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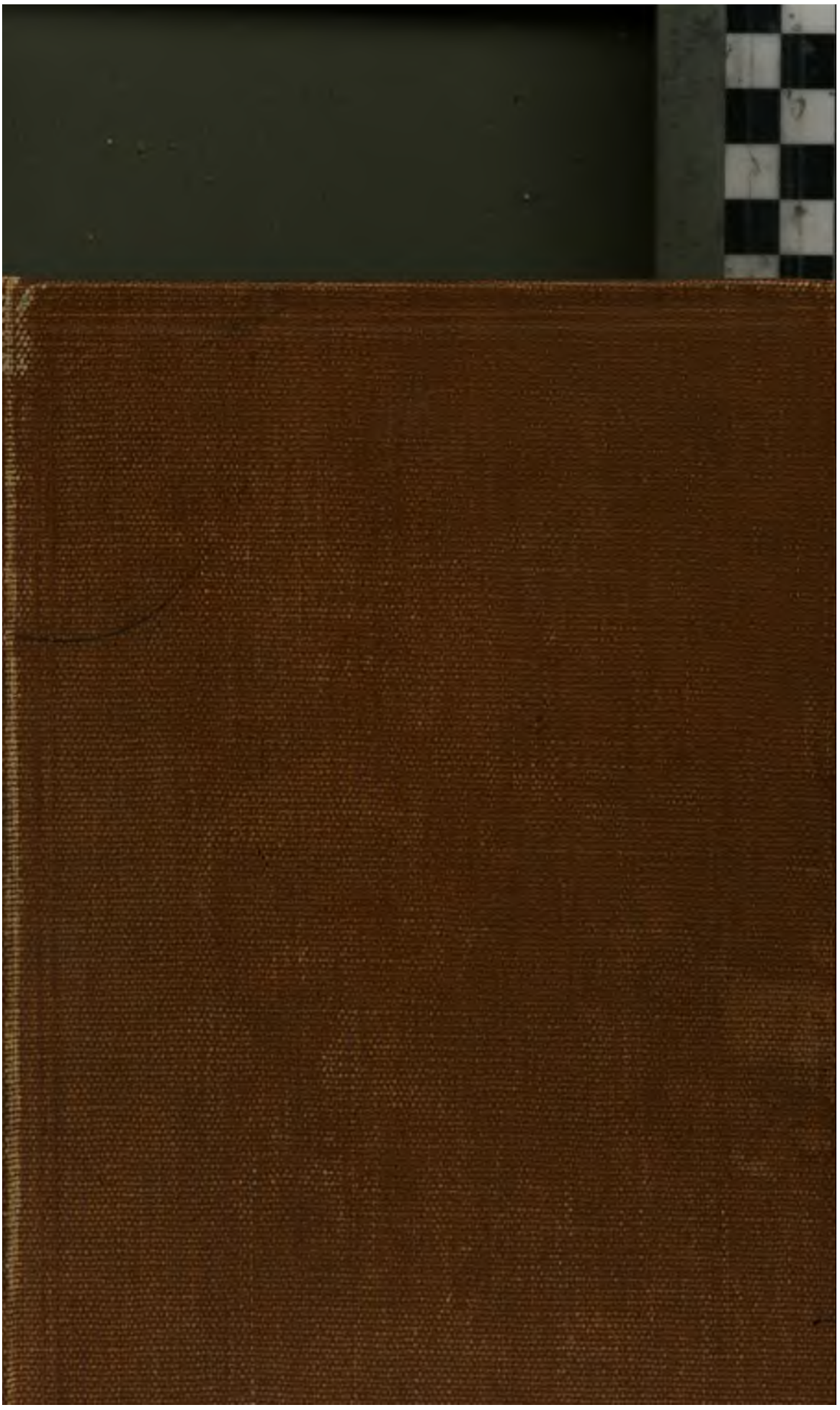

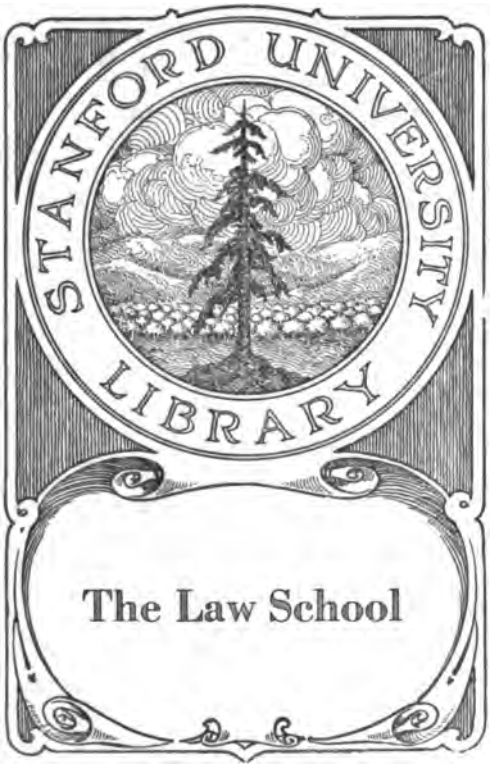
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WATER RIGHTS

IN THE

WESTERN STATES

THE LAW OF PRIOR APPROPRIATION OF WATER AS APPLIED ALONE IN SOME JURISDICTIONS, AND AS, IN OTHERS, CONFINED TO THE PUBLIC DOMAIN, WITH THE COMMON LAW OF RIPARIAN RIGHTS FOR WATERS UPON PRIVATE LANDS. FEDERAL, CALIFORNIA AND OREGON STATUTES IN FULL, WITH DIGEST OF STATUTES OF ALASKA, ARIZONA, COLORADO, HAWAII, IDAHO, KANSAS, MONTANA, NEBRASKA, NEVADA, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, OREGON, PHILIPPINE ISLANDS, SOUTH DAKOTA, TEXAS, UTAH, WASHINGTON AND WYOMING

FORMS

BY

SAMUEL C. WIEL

Of the San Francisco Bar

THIRD EDITION IN TWO VOLUMES

REVISED AND ENLARGED TO JUNE 1, 1911

VOLUME I

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PREFACE TO THIRD EDITION.

In the evolution of the Western water laws there resulted uncertainties; as, for example, in not distinguishing the California law and the Colorado law, nor the *corpus* of water and its *usufruct*. There are also various changes occurring in the law of prior appropriation as it is breaking away from its origin as a possessory right upon the public domain. Considerable latitude was consequently necessary in endeavoring a clear and full presentation, so that the analysis of the subject, the division and plan of the book, should picture the accumulation of Western water-law authorities as a whole, while being, at the same time, complete in detail.

In numbering the sections, some numbers were left blank between each chapter to allow, in revising the manuscript for the press, opportunity to shift the sections into a more suitable order, or to add new ones. Sections were renumbered, owing to new matter and rearrangement, so that numbers in previous editions do not correspond to those here. Every endeavor has been made by the author and by the publishers to insure accuracy. If any errors have still crept in, the author will be grateful to readers who will kindly point them out to him.

It need hardly be said that in dealing with matters involving regulation of public services, or with public lands, the aim has been to report the authorities, and not private beliefs of what the law "ought to be"; with no effort to make out a case for a side of any doctrine or controversy. In these things, as in other matters, there has been the object (than which there is none harder) simply to state truly and accurately, to the best of a very limited ability, the law as it is now found in the authorities. A small success in that—in the cause of truth—is all that this book pretends to, or desires.

Use has been made of articles contributed by the author to the Harvard Law Review, Yale Law Journal, American Law Review and Columbia Law Review, to whom acknowledgment is made in the passages where they occur. The author further expresses his thanks to the State Engineers and to the Department of Agriculture of the University of California, whose members extended many courtesies.

As a final word: This is the last edition of this book which will be prepared. The second edition having been exhausted within a year and some months after issuance, an opportunity was presented, in preparing this third one, to improve and enlarge in the light of further study, and of developments in the law within the last three years. The author now takes leave of the book permanently. If in later days he should return to it, it will not be until many years have passed; and probably it will not be at all.

August 1, 1911.

SAMUEL C. WIEL.

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WATER RIGHTS

IN THE

WESTERN STATES.

PART I.

FIRST PRINCIPLES.

CHAPTER 1.

RUNNING WATER.

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§ 2. The negative community.
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(3d ed.)

§ 1. **Classification of Waters.**—From the point of view of the law, occurrences of water consist of two great classes: Those definite in form and occurrence, and those diffused, indefinite in form and occurrence. The definite class includes running water (watercourses, surface or subterranean) and standing water (lakes and ponds). The indefinite class includes diffused surface water (rain water, swamps, etc., the sea), and diffused underground water (percolating water). It is with definite bodies of running water, that is, watercourses, that the law has most to do.

The law of watercourses is a law of streams as natural resources. The water running therein unrestrained is the property of no one, but a portion of it taken out of the stream and confined in the possession of an individual becomes the taker's private property,

belonging to him while under his possession and control; and the law of watercourses is a development of the rules under which one may thus take of the water and make it his own. There is a large body of law specifying *who* may avail themselves of this privilege and to what limitations they are subject, forming, in the common law, "the law of riparian rights," and in the West, "the law of prior appropriation." It is our object here, in this first part, to consider, in its elementary lines, this framework of the law of watercourses; leaving to later presentation the rules of "riparian rights" or "appropriation" that have been built around it.[1]

(3d ed.)

§ 2. **The Negative Community.**—In the Institutes of Justinian it is declared concerning things: "They are the property of someone or no one."[2] As further expressed in the Institutes, "By natural law these things are common to all, viz.: Air, *running water*, the sea and as a consequence the shores of the sea."[3] Commenting on this Vinnius says: "Things common are such because, while by nature being things everyone has use for, they have not, as yet, come into the ownership or control of anyone."[4] That is, they are the property of no one, within the first quotation from the Institutes.

This classification of running water with what has been called "the negative community," such as the air, runs through the civil-law authorities. Pothier's exposition of it is as follows:[5]

"The first of mankind had in common all those things which God had given to the human race. This community was not a positive community of interest, like that which exists between several persons who have the ownership of a thing in which each has his particular portion. It was a community which those who have written on this subject have called a negative com-

1 Acknowledgment is made to the Harvard Law Review, to which the writer contributed part of the following chapters. 22 Harvard Law Review, 190.

2 "Vel in nostro patrimonio vel extra nostrum patrimonium." As translated in Lux v. Haggin, 69 Cal. 315, 10 Pac. 674.

3 "Et quidem naturali jure, communia sunt omnium haec: aer et aqua profluens, et mare, et per hoc, littora maris." Institutes of Justinian, lib. 2, tit. 1, sec. 1. Mr. Ware (Ware's Roman Water Law) gives chiefly the *Pandects* or *Digest*, and does not give this passage in the Institutes.

4 "Communia sunt quae a natura ad omnium usum prodita, in nullius adhuc ditionem aut dominium pervenerunt." Quoted in Mason v. Hill, 5 Barn. & Adol. 1, 110 Eng. Reprint, 692.

5 Pothier, Traité du Droit de Propriété, No. 21.

munity, which resulted from the fact that those things which were common to all belonged no more to one than to the others. [Then, after saying that in the course of time men divided up among themselves almost all things, and most things have passed out of the negative community and become recognized as private property, proceeds:] Some things, however, did not enter into this division, and remain, therefore, to this day in the condition of the ancient and negative community. These things are those which the juris-consults called *res communes.* Marcien refers to several kinds—the air, *the water which runs in the rivers,* the sea and its shores. . . . . As regards wild animals ferae naturae, they have remained in the ancient state of the negative community.[6] All these things, which remained in the ancient state of the negative community, are called things common because subject to becoming the property of anyone who takes of them. They are also called *res nullius,* because no one owns them while in this state, and cannot own them but by getting them into his possession. These are the things which, belonging to no one to the extent that they have remained in the negative community, are susceptible of being held by right of possession."[7]

The law is laid down to the same effect by Puffendorff, Grotius, Vattel, Pardessus, and the other great civil-law commentators. A later chapter has been devoted to their presentation, as otherwise they would be inaccessible to most readers, and they throw light upon this fundamental matter. They will also be of use to practitioners in the Southwest, where the Mexican law sometimes crops up. There is no need, however, to encumber this part of the book by cumulative quotation here. The reader is referred for them to another place.[8]

This was found to be the civil law by the common-law cases which investigated it. In an early English case the civil-law authorities are stated as follows: "By the Roman law, *running*

6 Thus far, the translation is that given in Geer v. Connecticut, 161 U. S. 525, 16 Sup. Ct. Rep. 600, 40 L. Ed. 793. The remainder of the passage is the present writer's translation, to which the original is appended.

7 "Toutes ces choses, qui sont demurrées dans l'ancien état de communauté négative, sont appellées res communes, par rapport au droit que chacun a de s'en emparer. Elles sont aussi appellées res nullius, parce qu'aucun n'en a la propriété, tant qu'elles demeurent en cet état, et ne peut l'acquérir qu'en s'en emparant. Ce sont ces choses qui, n'appartiennent á personne, en tant qu'elles sont restées dans la communauté négative, qui sont susceptibles de l'acquisition qui se fait á titre d'occupation."

8 *Infra,* sec. 1025 et seq.

water, light and air were considered as some of those things which had the name of res communes, and which were defined 'things the property of which belongs to no person,'" etc.[9] In a leading English case where the civil-law authorities are set forth and examined, the same conclusion was reached concerning the Roman law.[10] It is also the civil law as in force to-day. A modern French work says: "The things which, suited alike to the use of all men are not susceptible of exclusive possession cannot, on this account, form the object of a right of property. These things, which the Roman law called res omnium communes, are the air, the deep sea, and *running water* as such; that is to say, in the sense that one sees it in its state of continual motion and ceaseless change."[11] Likewise the modern Spanish law, regarding which Eschriche says that waters of fountains and springs as they go out from thence "Become *running water* (aqua profluens), and pertain like common things (cosas comunes)," etc.[12]

The result of these authorities is that the *corpus* of naturally *running water*—the water in the natural resource—was classed in the Institutes and civil-law writers with the air, and those things which cannot be owned while in their natural state and condition, or as they have been called, the "negative community."[13]

(3d ed.)

§ 3. Development in the Common Law.—This civil-law principle that running water is in the "negative community" passed into the common law. It was taken up by the mediaeval English law-writers. As regards a related branch of the law of waters

9 Liggins v. Inge, 7 Bing. 692.

10 Mason v. Hill, 5 Barn. & Adol. 1, 110 Eng. Reprint, 692, quoted in the next section.

11 "Les choses qui, destinées a l'usage commun de tous les hommes, ne sont pas susceptibles de possession exclusive, ne peuvent, par cela même, former l'object du droit de propriété. Ces choses, que le droit Roman appellait res omnium communes, sont l'air, la haut mer, et *l'eau courante* comme elle; c'est-à-dire en tant qu'on l'envisage dans son etat de mobilité continue, et de renouvellement incéssant." (Droit Civile Francais, by Aubrey & Rau, 4th ed., vol. II, p. 34.)

12 "Las aguas de fuentes y manantiales son proprias de los dueños de los terrenos en que nacen ó de los campos inferiores que han adquirido derecho á su aprovechamiento, miéntras permanecen dentro de su reciato; pero así que salen de él se hacen aguas corrientes, *aqua profluens*, y pertenecen como cosas comunes al primero que las ocupa, en cuanto tiene necesidad de ellas. Los primeros que pueden ocuparlas son los dueños de las heredades que aquellas bañan ó atraviesan." Eschriche, "Aguas."

13 Pothier and Pardessus, *supra;* Ohio Oil Co. v. Indiana, 177 U. S. 190, 20 Sup. Ct. Rep. 576, 44 L. Ed. 729, 20 Morr. Min. Rep. 466.

(the law of accretion) it has been expressly said: "Our law may be traced back through Blackstone,[14] Hale,[15] Britton,[16] Fleta,[17] and Bracton,[18] to the Institutes of Justinian,[19] from which Bracton evidently took his exposition of the subject."[20] The passage in the Roman Institutes above quoted, classing running water, as a substance, with the air, is transcribed by Bracton as the law of England, saying:[21] "By natural law itself, these things are common to all—*running water*, air, and the sea, and the shores of the sea, as the sea's accessories." The passages in Fleta and Britton are somewhat similar.[1] In the rest of this chapter we shall follow this down the history of the law until we find it in the modern authorities.

The classification of running water with the air is taken up by another of the older writers, frequently referred to in the English reports.[2] He finds the civil-law rule in conflict with the maxim, "Cujus est solum, ejus est usque ad caelum." Callis says: "It may here, as I take it, be moved for an apt question, in whom the property of running waters was.[3] In my conceit, the civil law makes prettier and neater distinctions of those than our common law doth; for there it is said that *naturali ratione quaedam sunt communia, ut aer, aqua profluens, mare, et littora maris.* I concur in opinion with them, that the air is common to all; and I hold my former definitions touching the properties of the sea and the sea-shores. But that there should be a property fixed in running waters, I cannot be drawn to that opinion; for the civil law saith further, *quod aqua profluens non manet in certo loco, sed procul fuit extra ditionem ejus quod flumen est ut ad mare tandem perveniat;* for in my opinion, it should be strange the law of property should be fixed upon such uncertainties as to be altered into *meum, tuum, suum,* before these words can be spoken, and to be changed in every

14 Vol. II, c. 16, pp. 261, 262.

15 De Jure Maris, cc. 1, 6.

16 Bk. II, c. 2.

17 Bk. III, c. 2, sec. 6, etc.

18 Bk. II, c. 2.

19 Just. II, 1, 20.

20 Lindley, L. J., in Foster v. Wright, 4 C. P. D. 438, 49 L. J. C. P. 97.

21 "Naturali vero jure communia sunt omnium haec—*aqua profluens*, aer, et mare, et littora maris, quasi maris accessoria." Bracton, lib. 2, f. 7, sec. 5.

1 Quoted *infra*, sec. 5.

2 Callis on Sewers, p. 78, original edition (1622), quoted in Medway Co. v. Romney, 9 Com. B., N. S., 587, 7 Jur., N. S., 846, 30 L. J. C. P. 236. "Sewer" anciently signified small streams and brooks of fresh water.

3 Citing Natura Breva, fol. 123; and Pl. Com. 154; and 12 H. 7, fol. 4, as recognizing a plaintiff as having a property in the water as well as the soil.

twinkling of an eye, and to be more uncertain in the proprietor than a chameleon of his colours." This is the first express recognition the writer has discovered, of the conflict between this principle and the maxim "Cujus est solum."[4]

In one of the older cases holding that ejectment would not lie for a watercourse it is said that livery could not be made of it, "for non moratur, but is ever flowing," and comparing running water to the water in the sea.[5] This case is cited in the well-known case of Shury v. Piggot (1625), where (among many other things said) "aqua profluens" was compared to the air, which "aut invenit, aut facit viam," and also "The same [the watercourse] being a thing which arises out of the land, *but no interest at all by this claimed in the land,* but quod currere solebat in this way, and so to have continuance of this."[6] Lord Bacon spoke of "common property which, like the air and *water*, belongs to everybody."[7] The peculiar nature of running water was later referred to by Blackstone, who gives several emphatic statements of it as the settled law of England. He says: "But, after all, there are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common. . . . . Such (among others) are the elements of light, air and water," and he also speaks of "the very elements of fire or light, of air and of water. A man can have no absolute permanent property in these, as he may in the earth and land, since these are of a vague and fugitive nature"; and again, "For water is a mov-

[4] Lord Coke says: "Land in legal signification comprehendeth any ground, soil or earth whatsoever, as meadows, pastures, woods, moors, waters, marshes, furses and heath," discussing the meaning of "land," adding in the same note: "Also the waters that yield fish for the food and sustenance of man are not by that name demandable in a praecipe; but the land whereupon the water floweth or standeth is demandable, as, for example, viginti acras terrae aqua coöpertas. And lastly the earth hath in law a great extent upwards, not only of water, as hath been said, but of aer and all other things even up to heaven; for *cujus est solum ejus est usque ad caelum*, as is holden in 14 Hen. VIII, fol. 12; 22 Hen. VI, 59; 10 Edward IV, 14." Coke on Littleton, lib. cap. 1, secs. 1, 4a. See Blackstone's Commentaries, Bk. II, p 18. That the law, while applying this maxim to percolating water, does not follow it as to running water, see sec. 696, *infra*.

[5] Challenor v. Thomas, Yelv. 143, 80 Eng. Reprint, 96.

[6] Jones, J., in Shury v. Piggot, 3 Bulst. 340, 81 Eng. Reprint, 280. This case is closely connected with the maxim, "Aqua currit et debet currere ut currere solebat." *Infra*, sec. 667.

[7] Life of Bacon, English Men of Letters Series, p. 67.

able, wandering thing, and must of necessity continue common by the law of nature."[8]

The beginning of the last century saw a re-examination into the nature of rights in running water. In 1805, in Bealey v. Shaw,[9] Lord Ellenborough laid down the right, but without discussing the foundation of it.[10] In 1823, however, in Wright v. Howard,[11] it was said of a stream, "there is no property in the water." In 1824, in Williams v. Moreland,[12] appear the expressions, "Flowing water is originally *publici juris*," and "running water is not in its nature private property." In 1831, in Liggins v. Inge,[13] "Water flowing in a stream, it is well settled by the law of England, is *publici juris*." In Mason v. Hill,[14] decided in 1833, Lord Denman elaborately considered the attitude of the law toward running water, with the intention "to discuss, and, so far as we are able, to settle the principle upon which rights of this nature depend," and this case has been generally accepted as accomplishing this result, settling the common law of watercourses in its present form.[15] Lord Denman quotes at length from the civil law, and says concerning it: "No one had any property in the water itself except in that particular portion which he might have abstracted from the stream and of which he had the possession, and during the time of such possession only," and says that the expressions of Blackstone and the common-law cases just quoted calling running water "publici juris," simply adopted into the common law this principle that the water itself was not the subject of private ownership. This was followed very explicitly in the succeeding English cases. In one[16] it was said: "Flowing water, as well as light and air, are in one sense 'publici juris.' They are a boon from Providence to all and differ in their mode of enjoyment. Light and air are diffused in all directions, flowing water in some."

[8] Blackstone's Commentaries, Bk. II, pp. 14, 18, 395.

[9] 6 East, 208, 102 Eng. Reprint, 1266.

[10] In 12 East, 420, 104 Eng. Reprint, 167, he says the right rests on prescription.

[11] 1 Sim. & St. 190, 57 Eng. Reprint, 76.

[12] 2 Barn. & C. 910, 107 Eng. Reprint, 620.

[13] 7 Bing. 692, 5 M. & P. 712.

[14] 5 Barn. & Adol. 1, 110 Eng. Reprint, 692.

[15] See to this effect regarding Mason v. Hill, Cocker v. Cowper, 5 Tyrw. 103, 1 C. M. & R. 418; Embrey v. Owen, 6 Ex. 353; Stockport W. W. v. Potter, 3 Hurl. & C. 323; McGlone v. Smith, 22 L. R. Ir. 568; Lord Blackburn, in Orr Ewing v. Colquhoun, 2 App. Cas. 854; Pugh v. Wheeler, 2 Dev. & B. (N. C.) 50, Ruffin, C. J.; Angell on Watercourses, 7th ed., sec. 133; Salmond on Torts, p. 254; Gale on Easements, 8th (1908) ed., part 3, c. I, p. 258.

[16] Wood v. Waud, 3 Ex. 748.

In another:[17] "The water which they claim a right to take [from a spring] is not the produce of the plaintiff's close; it is not his property; it is not the subject of property. Blackstone, following other elementary writers, classes water with the elements of light and air." And in the classical case of Embrey v. Owen,[18] this finds what may be called its crystallized expression in the English reports. In this case Baron Parke (who had also taken part in the judgment in Mason v. Hill) said: "Flowing water is publici juris, not in the sense that it is a bonum vacans, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only: that all may reasonably use it who have a right of access to it; that *none can have any property in the water itself,* except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only."[19] As late as the 1906 Appeal Cases the Chancellor said that running water is "publici juris," and a claim to ownership of the *corpus* of the water of a stream was said by another of the lords to be "opposed to elementary ideas about the water of a river," and "repugnant to the general law of rivers."[20]

(3d ed.)

§ 4. **American Authorities.**—Of the authorities Chief Justice Gibson said:[21] "They establish that the use of water, flowing in its natural channel, like the use of heat, light or air, has been held by every civilized nation from the earliest times to be common by the law of nature, and not merely public, like the use of a river or a port, which is subject to municipal regulation by the law of the place. They establish, also, that the domestic uses of water are its natural and primary ones. Air is not more indispensable to the support of animal or vegetable life. Water is borne by the air, in the form of vapor, to the remotest regions of the earth, for the free use and common refreshment of mankind; and to interdict the use of the one within any given locality, would be as monstrous and subversive

[17] Race v. Ward, 4 El. & B. 702.

[18] 6 Ex. 355.

[19] "It is a right of the same character as the right to the pure flow of air, and is a right of such a nature that the person who enjoys it cannot at any time fix upon a particular portion of water to which he is entitled. He cannot say of any pint or globule of water that that pint or globule is his." Pollock, B., in Kensit v. Great Eastern Ry. (1883), 23 Ch. D. 566.

[20] White v. White, [1906] App. Cas. 83.

[21] Mayor v. Commissioners, 7 Pa. 363.

of the scheme of animal existence, as it would be to interdict the use of the other. It is only when it has been received on the surface of the earth, not while it is falling from the clouds, that it can be made to minister to the ordinary wants of life; and if it be common at first, it must continue to be so while it is returning, by its natural channels, to the ocean. No one, therefore, can have an exclusive right to the aggregate drops that compose the mass thus flowing, without contravening one of the most peremptory laws of nature. Water may be exclusively appropriated by being separated from the mass of the stream, and confined in tanks or trunks, but then it would have ceased to be *aqua profluens.*" And adds that a grant of water power "is not a grant of property in the *corpus* of the water as a chattel."

Another early case says: "It is too late to enter into the legal character and quality of water; the law having been settled, time out of mind, on this subject, and remained uniform and unquestioned. Water is neither land nor tenement, nor susceptible of absolute ownership. It is a movable, wandering thing; and must of necessity continue common by the law of nature. It admits only of a transient *usufructuary* property; and if it escapes for a moment, the right to it is gone forever; the qualified owner having no legal power of reclamation. . . . . Hence, as it is said in the authorities just cited, water is a distinct thing from the land. The truth of this observation will be recognized by every person who understands the natural properties of each. No action of trespass is sustainable for poisoning the water on a person's land.[22] But trespass on the case may be maintained for the injury done to a usufructuary right. The same observation is equally applicable to air and light; and on account of its fugitive nature water is classed by all jurists with these elements."[23] And as a very recent statement, "The plaintiff [as riparian owner] certainly has no property in the particles of water flowing in the stream, any more than it has in the air that floats over its land. Its rights in that respect are confined to their use and in preserving their purity while passing. So, the fish in the stream were not the property of the plaintiff at common law, any more than the birds that flew over its land."[24]

22 Citing 3 Blackstone's Commentaries, 217; Luttrel's Case, 4 Coke, 84, 76 Eng. Reprint, 1063.

23 Mitchell v. Warner, 5 Conn. 519.

24 Willow River Club v. Wade (1898), 100 Wis. 86, 76 N. W. 273, 42 L. R. A. 305.

In recent California cases the water is said to belong at common law to the riparian proprietors "by a sort of common right."[25] It appears throughout the California reports, as hereafter quoted.

This has passed into the present Western law of appropriation also. Authorities are fully cited later on.[26]

There is a very recent tendency to apply this also to the ownership of percolating water under the recent modification of the law with respect thereto. In the supreme court of the United States percolating water was said in some ways to be, like running water, in the negative community,[27] and recent California cases say that percolating water no longer belongs to the man in whose land it lies, as was the old rule which distinguished it from running water, but that, until possession is acquired, the ownership is in the public, or at least that portion of the public owning the surface soil, and it is common to a large portion of the community.[28]

(3d ed.)

§ 5. **Common or Public.**—There is some variation of this in both civil and common-law authorities. One variation is in changing the expression from "things common" to "things public." Domat[29] names as common things the heavens, stars, light, air, sea; as public things, the rivers, streams, their banks, highways. Fleta (an early English writer) says: "Some things are common, as the air, sea, and shores of the sea; others public, as the right of fishing and of using rivers and harbors."[1] And Lord Denman, in Mason v. Hill,[2] says: "It is worthy of remark that Fleta, enumerating the res communes, omits 'aqua profluens.'" The same may be said of Britton[3] (another early English writer), declaring, "Some things

[25] Anaheim W. Co. v. Fuller, 150 Cal. 327, 88 Pac. 978, 11 L. R. A., N. S., 1062; Turner v. James Canal Co., 155 Cal. 82, 132 Am. St. Rep. 59, 99 Pac. 520, 22 L. R. A., N. S., 401, 17 Ann. Cas. 823.

[26] *Infra*, secs. 18, 275–278.

[27] *Infra*, secs. 34, 1100, 1102.

[28] Ex parte Elam, 6 Cal. App. 233, 91 Pac. 811; Hudson v. Daily (1909), 156 Cal. 617, 105 Pac. 748. In Katz v. Walkinshaw, 141 Cal., at 140, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, Temple, J., said: "The members of the community have a common interest in the water." Cf. Redfield, C. J., in Ford v. Whitlock (1855), 27 Vt. 265, saying *streams* are of quasi-public concern, because they affect a large number of people.

[29] Liv. prelim., tit. 3, s. 1, p. 16.

[1] "Aliae communes sunt, ut aer, mare, et littora maris; aliae publicae, ut jus piscandi, et applicandi *fulmina* et portus." Fleta, 3 lib., cap. 1, s. 4.

[2] 5 Barn. & Adol. 1, 110 Eng. Reprint, 692.

[3] Bk. II, c. II, sec. 1; Nichols' Translation, p. 175.

are common, as the sea, the air, and the seashore, and as the right of fishing in tidal waters and in the sea and in common waters and rivers"; though in a later section [4] he includes wild animals among the things common, and he also classes rivers, like Fleta, among the things *public* instead of common. So, many common-law cases already quoted use the expression "*publici juris.*" In conjunction with this change of expression, a few writers substituted *rain* water for running water among the things common. One civil-law writer [5] commenting on the Institutes reads aqua pluvialis for profluens, as among res communes, and classes flumina with res publicae. In another civil-law work "cosas comunes" are defined as those "qui sirven a los hombres y demas vivientes como el aire, el *agua llovediza* [rain water] el mar y sus riberas." [6]

It is evident how this came about. In addition to the passage above, classing running water (aqua profluens) with the common things, there is a different passage in the Institutes saying, "But all rivers and harbors are public," [7] probably referring to *navigation.* This has induced some commentators to class running water as public, and then substitute rain water among the list of "things common." [8] But the Institutes, with regard to air, running water, and wild animals, make no distinction; calling running water common, even though also calling rivers public as regards navigation.[9]

(3d ed.)

§ 6. **State in Trust for the People.**—However, as an outgrowth of this variation of the idea of the "negative community"—the change from "common" to "public"—there is quite generally to-day a tendency to substitute the positive expression that running

[4] Sec. 3.

[5] Nicasius, lib. 2, tit. 1, 89b.

[6] Febrero Novisimo, T. 1, lib. 2, tit. 1; Lux v. Haggin, 69 Cal. 316, 10 Pac. 674. See other civil-law authorities *infra,* sec. 1025.

[7] "Flumina autem omnia et portus publica sunt."

[8] Professor Maitland says in his commentary upon Bracton in the publications of the Selden Society, that Bracton is substantially a copy of the work of an Italian commentator upon the Institutes of Justinian—a jurist of Bologna named Azo, of great reputation in Bracton's time. Azo questions (and Bracton so notes) whether there may not be a distinction between things common and things public, other than that made in the Institutes. Fleta and Britton appear to be influenced by this note of Bracton, and having put rivers into "public things" (as do the Institutes), feel a necessity then to depart from the Institutes and omit running water from the "common things."

[9] The complete classification in the Institutes of Justinian is quoted in full in the chapter devoted to the civil law. *Infra,* sec. 1025 et seq.

water belongs to the State in trust for the people or the public, in analogy to a similar change in the way of stating the law regarding wild game, and the law of the beds of navigable waters. Thus, while the shores of the sea and beds of navigable waters are, in the civil law, in the negative community and "common" as distinguished from "public,"[10] the modern common-law phrase is that they are owned by the State in trust for the people.[11] The same change is fairly well established regarding wild animals or game.[12]

In nearly all now of the Western States this change of expression is, by statute, introduced regarding running water.[13] All waters within the State are declared to be "the property of the public" (or to "belong to the public") in Arizona, California, Colorado, Montana, Nevada, New Mexico, Oklahoma, Oregon, North Dakota, South Dakota, Texas, Utah and Wyoming; while in Idaho, Nevada, North Dakota and Wyoming there are also declarations that waters are "the property of the State."[14] Some of the expressions in the cases construing these provisions consider them simply as an affirmance of the idea of the "negative community," as, for example, "The waters become perforce *publici juris*,"[15] or, "The waters of flowing streams are *publici juris*,—the gift of God to all His creatures,"[16] and the Idaho court held that a suit to determine the rights of all water users on a stream was not a suit concerning rights in State property.[17] But some of the decisions adopt, as a result of these statutes, the expression that running water "belongs to the State in trust for the people."[18]

10 *Infra*, sec. 898.

11 *Infra*, sec. 898.

12 Geer v. Connecticut, 161 U. S. 519, 16 Sup. Ct. Rep. 600, 40 L. Ed. 793. In this, the leading case, Field, J., dissented, however, because he believed wild animals belonged neither to the State, nor the public, nor individuals, but to no one, being in the negative community, and the difference in the mode of expression he believed material, and should be maintained.

Mr. Justice Angellotti, in a recent California case, says: "Nothing is better settled than the doctrine that the ownership of wild game, not reduced to actual possession by private parties, of which the fish in our waters constitute a part, is *in the people of the State* in their collective capacity. (Citing People v. Truckee etc. Co., 116 Cal. 397, 58 Am. St. Rep. 183, 48 Pac. 374, 39 L. R. A. 581.) Until actually reduced to possession, the fish *belong to all the people of the State* in common." Ex parte Bailey, 155 Cal. 472, 132 Am. St. Rep. 95, 101 Pac. 441.

13 See *infra*, sec. 170.

14 *Infra*, sec. 170. In California, by an act of 1911, the declaration is that they are the "property of the people of the State of California."

15 Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210.

16 Mohl v. Lamar Canal Co. (C. C. Colo.), 128 Fed. 776.

17 Bear Lake Co. v. Budge, 9 Idaho, 703, 108 Am. St. Rep. 179, 75 Pac. 614.

18 *Infra*, sec. 170 et seq.

This is the same modification of the original idea of the "negative community" as that just pointed out—the variation from "common" to "public." From saying that the running waters of a natural resource belong to no one at all, it is an easy transition to say that they belong to the State in trust for everyone. It had originally come about in the Desert States (the public land States) as opening a road to their departure from title in the United States to waters on the public domain within their limits.[19] In the pioneer California days the theory was that the *corpus* of running water on the public domain belongs to *no one* (neither United States, State, nor individuals), being a distinctly negative idea; but that the right to its flow and use, the *usufruct* in the natural resource, belongs to the United States on public lands.[20] But the Desert States to-day deny to the United States any right of property with regard thereto; and this change from the "negative community" to the positive one of "State in Trust for the People" facilitates, or is the result of, this denial.

(3d ed.)

§ 7. **Conclusion.**—For the present discussion, however, there is no substantial difference in the two forms of expression (that is, whether common or public; *res communes* or *publici juris;* the property of no one or the property of the State in trust for the people). So far as they concern the private rights of individuals, whether under the law of appropriation or the common law of riparian rights, both are founded on the ancient view taken by the law that running water unrestrained in its natural course belongs to the "negative community" and is nobody's property; its particles or aggregate drops, in specie or as a substance, being outside the domain of what can constitute property; just as no one can be said to own the air, the sea water, the rain or the clouds or the moon or stars, or the pearl at the bottom of the sea, the wild animals in the forest, or the fish swimming in the running stream itself. Like all these things, running water in its native condition is a substance wandering at large, obeying its own will and ever changing its form and position, uncontrolled by man, and with them, moves in "the negative community," whatever be the phrase adopted to express that idea.

[19] *Infra,* sec. 167 et seq.
[20] Kidd v. Laird, 15 Cal. 161, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571.

§§ *8–14. (Blank numbers.)*

CHAPTER 2.

THE USUFRUCT OF THE NATURAL RESOURCE.

§ 15. Rights of use.
§ 16. Same.
§ 17. American authorities.
§ 18. Western authorities.
§ 19. Conclusion.
§§ 20–29. (Blank numbers.)

(3d ed.)

§ 15. Rights of Use.—While the *corpus* of naturally running water is thus in the negative community and not the subject of private ownership (or "belongs to the public"), the law recognizes nevertheless a very substantial right in its flow and use,—the right to have the liquid flow and to use it, which the law calls the "usufructuary right," or the "water right." The law of watercourses consists of the rules governing this right of flow and use of the natural resource. We do not stop long over this, merely giving authorities to show the distinction between the usufruct and the water itself.

There is in the civil law a large body of law known as the law of "usufruct."[1] One civil-law writer says, continuing a passage quoted above:[2] "Though not susceptible of being property, things of this nature [the negative community] do not the less fall within the province of the law for the regulation of their *use*, which is not absolutely abandoned to the caprice of all."[3] Puffendorff, speaking of the air, one member of the negative community, says: "So, though no one will pretend to fix a property in the wind, yet we may appoint a service or duty of not intercepting the wind to the prejudice of our mills."[4] Another civil-law authority,[5] speaking of a riparian proprietor owning both banks of a stream, says

1 Inst. Just., lib. I, tit. IV, V, Pandects, lib. VII. See Noodt's "De Usufructu," opp. tom. 1, pp. 387–478.

2 *Supra*, sec. 2, note 11.

3 "Quoique non susceptibles de propriété, les choses de cette nature n'en tombent pas moins sous l'empire du Droit pour le règlement de leur usage, qui n'est pas, d'une manière absolue, abandonné à la discrétion de tous." Droit Civile Francais, par Aubry & Rau, 4th ed., vol. II, p. 35, citing Code Napoleon, sec. 714. This article 714 reads as follows: "There are things which belong to no one, and the use whereof is common to all. The laws of police regulate the manner of enjoying such things."

4 Puffendorff, lib. IV, c. V, sec. II.

5 Hall's Mexican Law, sec. 1392.

of the water: "It is not his own as to property, but only as to the use which he can make of it in its passage." When it is said that running water is common, it is meant that the stream is a common source of supply, which many individuals have the right to enjoy.

In the old case of Shury v. Piggot, we recall the passages already quoted where it is said that *aqua profluens* is in a class with the air, and a man's right therein includes no interest in the land but only a right to continuance of *flow*. Blackstone says: "For water is a movable, wandering thing, and must of necessity continue common by the law of nature, so that I can only have a temporary, transient *usufructuary* property therein."[6] And again speaking of "qualified property" as opposed to an absolute right of property, Blackstone says: "Many other things may also be the objects of qualified property. It may subsist in the very elements of fire or light, of air, and of water. A man can have no absolute permanent property in these, as he may in the earth and land, since these are of a vague and fugitive nature, and therefore can admit only of a precarious and qualified ownership, which lasts so long as they are in actual use and occupation, but no longer. If a man disturbs another, and deprives him of the lawful enjoyment of these; if one obstructs another's ancient windows, corrupts the air of his house or gardens, fouls his water, or unopens and lets it out, or if he diverts an ancient watercourse that used to run to the other's mill or meadow; the law will animadvert hereon as an injury, and protect the party injured in his possession. But the property in them ceases the instant they are out of possession; for, when no man is engaged in their actual occupation, they become again common, and every man has equal right to appropriate them to his own use."[7] One well-known English case says: "The property in the water itself was not in the proprietor of the land through which it passes, but only the *use* of it, as it passes along, for the enjoyment of his property, and as incidental to it."[8] The classical English expression is in Embrey v. Owen,[9] saying, as elsewhere quoted,[10] that flowing water is *publici juris*, in which, itself, none can have any property, but may have a right to reasonably use it. "Each proprietor of the adjacent land has the right to the

6 2 Blackstone's Commentaries, 18.

7 Blackstone's Commentaries, Bk. II, c. 25, p. 395.

8 Wood v. Waud, 3 Ex. 775, citing Story and Kent.

9 6 Ex. 353.

10 *Infra*, sec. 694.

usufruct of the stream which flows through it," the right to the benefit and advantage of the water as it flows past.[11]

(3d ed.)

§ 16. **Same.**—There is an interesting early Scotch case in which this phase of the law is analyzed. It is worth the attention of those who are interested in the history of the law.[12] Lord Kames reports it as follows: The lakes of Fanyside are distant about a mile or two from the River Aven. Between the lakes and the river is a mill taking water from the lakes. The waste water from the mill descends to the river, and is the only water that reaches the river unless when the lakes in great speats overflow their banks. The lakes, the mill and the whole surrounding lands belong to Mr. Elphinstone of Cumbernauld, and he projected an artificial canal to direct the water of the lakes into a different river. The proprietors of many mills upon the River Aven took the alarm, and commenced a declarator against Mr. Elphinstone.

"At advising this cause, much darkness was occasioned by a notion that some of the judges unwarily adopted, as if a *river* could be appropriated like a field or a horse. A river, which is in perpetual motion, is not naturally susceptible of appropriation; and were it susceptible, it would be greatly against the public interest that it should be suffered to be brought under private property. In general, by the laws of all polished nations, appropriation is authorized with respect to every subject that is best enjoyed separately; but barred with respect to every subject that is best enjoyed in common. Water is scattered over the face of the earth in rivers, lakes, etc., for the use of animals and vegetables. Water drawn from a river into vessels or into ponds becomes private property; but to admit of such property with respect to the river itself, considered as a complex body, would be inconsistent with the public interest by putting it into the power of one man to lay waste a whole country. . . . . A man who builds a mill is entitled to make an aqueduct, provided, after using the water for his mill, he restore it to the river from whence it was taken. This right he has from

11 Another English case says: "All that a riparian proprietor is entitled to is flumen aquae; but no atom of the water belongs exclusively to him." Earle, C. J., in Medway Co. v. Romney, 9 Com. B., N. S., 586.

12 Magistrates of Linlithgow, etc., contra Elphinstone of Cumbernauld, 3 Kames, 331 (Scotch), Jan. 14, 1768 (italics ours).

the law of nature without the aid of prescription. But to carry the water another way without restoring it will require forty years' possession to defend him by negative prescription against a challenge by inferior heritors.

"Laying, then, aside arguments from property or servitude, the principles that govern this case are as follows: A river may be considered as the common property of the whole nation, but the law declares against separate property of the whole or part. 'Et quidem naturali jure communia sunt haec: Aer, aqua profluens, et mare.' [13] A river is one subject composed of a trunk and branches. *No individual can appropriate a river or any branch of it; but every individual of the nation, those especially who have land adjoining, are entitled to the use of the water for their private purposes.* Hence it follows, that no man is entitled to divert the course of a river or of any of its branches; which would be depriving others *of their right, viz., the use of the water.*" [14]

(3d ed.)

§ 17. **American Authorities.**—In American cases the same doctrine is laid down. Justice Story says: [15] "But, strictly speaking, he has no property in the water itself, but a simple use of it while it passes along." And Kent: [16] "He has no property in the water itself, but a simple usufruct while it passes along." In a New York case: [17] "Another maxim . . . . is, that the owner of the bed of the stream does not own the water, but he only has a mere right to its use; he has a mere usufruct." In a Massachusetts case: "In relation to the stream itself, it is now a well-settled principle that no one, neither the riparian proprietor nor the owner of a mill, acquires or has any property in the water flowing in it, except as to that portion which he actually withdraws and holds in his own possession; but, instead of this, that he has a simple usufruct of it while it passes along." [18] In a very recent New

13 1 Instit. de rerum divisione.

14 The case then proceeds to distinguish the underground "feeders" (percolating tributaries) as not governed by the above. Judgment in the case was for defendant on the ground that the flow from the lakes to the river was not a constant run of water, but only occasional flood water in wet season; that is, it was mainly an *artificial* flow. See *infra*, sec. 53, etc.

15 Tyler v. Wilkinson, 4 Mason, 397, Fed. Cas. No. 14,312.

16 3 Com. Marg. 439.

17 Pixley v. Clark (1866), 35 N. Y. 520, 91 Am. Dec. 72.

18 Pratt v. Lamson, 2 Allen (Mass.), 287.

York case[19] it is said: "The water which flows over the lands of a person is not his property, and at most he has a mere usufructuary right therein, and must so use it as to not unnecessarily and unreasonably impair its usefulness by other riparian owners. While the Deposit Electric Company may own the land on which the dam is built, and also a large portion of the lands covered by the pond, yet as was said in Sweet v. Syracuse:[20] 'It is a principle recognized in the jurisprudence of every civilized people from the earliest times that no absolute property can be acquired in flowing water. Like light, air, or heat of the sun, it has none of the attributes commonly ascribed to property, and is not the subject of exclusive dominion and control, ... While the right to use it as it flows along in a body may become a property right, yet the water itself, the *corpus* of the stream, never becomes, or in the nature of things can become, the subject of fixed appropriation or exclusive dominion, in the sense that property in the water itself can be acquired, or become the subject of transmission from one to another. *Neither sovereign nor subject* can acquire anything more than a mere usufructuary right therein. . . . . These propositions have been often stated by jurists and in judicial decisions in different forms, but it is believed that they all concur in the same general result.' "

(3d ed.)

§ 18. **Western Authorities.**—The California court has laid this down in many cases. In the earliest case upon the subject it said: "It is laid down by our law-writers that the right of property in water is *usufructuary*, and consists not so much of the fluid itself as the advantage of its use."[21] In another early case the court was very emphatic, saying: "This court has never departed from the doctrine that running water, so long as it continues to flow in its natural course, is not, and cannot be made, the subject of private ownership. A right may be acquired to its use which will be regarded and protected as property, but it has been distinctly declared in several cases that this right carries with it no specific property in the water itself. . . . . In regard to the water of the stream, his rights [an appropriator's], like those of a riparian owner, are strictly *usufructuary*, and the rules of law by

[19] In re Delaware River (1909), 131 App. Div. 403, 115 N. Y. Supp. 750.

[20] 129 N. Y. 335, 27 N. E. 1081, 29 N. E. 289.

[21] Eddy v. Simpson, 3 Cal. 249, 58 Am. Dec. 408.

which they are governed are perfectly well settled."[22] In another: "The property is not in the *corpus* of the water, but only in its use."[23] Again: "It is not necessary in this case to define in detail the precise extent of the riparian right as existing in this country; it is enough to say that under settled principles, both of the civil and common law, the riparian proprietor has a *usufruct* in the stream as it passes over his land."[24] In Lux v. Haggin,[25] the California court elaborately reviewed the entire law of waters, and this is there laid down: "As to the nature of the right of the riparian owner in the water, by all the modern as well as ancient authorities the right in the water is usufructuary and consists not so much in the fluid itself as in its uses." In another case in that court Mr. Justice Henshaw said: "The right of a riparian proprietor in or to the waters of a stream flowing through or along his land is not a right of ownership in or to those waters, but is a usufructuary right—a right, among others, to make a reasonable use of a reasonable quantity for irrigation, returning the surplus to the natural channel, that it may flow on in its accustomed mode to the land below";[26] and again in another it was said: "The rights of the riparian owner . . . . do not include a proprietorship in the *corpus* of the water. His right to the water is limited to its use," etc.[27] Many other California cases, hereafter cited, lay this down, and so do the other Western courts, such as, for example, the Nebraska court, saying: "The law does not recognize a riparian property right in the *corpus* of the water. The riparian proprietor does not own the water. He has the right only to enjoy the advantage of a reasonable use of the stream as it flows by his land, subject to a like right belonging to all other riparian proprietors."[28] "The water of a stream is not the subject of ownership in the ordinary sense, but the right of property is in the right to use its flow, and not in the specific water."[1]

The right of an appropriator under the Western law of prior appropriation is governed by the same principle. Nothing is more

22 Kidd v. Laird, 15 Cal. 162, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571.

23 Nevada etc. Co. v. Kidd, 37 Cal. 282.

24 Pope v. Kinnan, 54 Cal. 3.

25 69 Cal. 255, 10 Pac. 674.

26 Hargrave v. Cook, 108 Cal. 72, 41 Pac. 18, 30 L. R. A. 390.

27 Gould v. Eaton, 117 Cal. 542, 49 Pac. 577, 38 L. R. A. 181.

28 Crawford etc. Co. v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647, 93 N. W. 781, 60 L. R. A. 889.

1 29 Cyc. 334.

firmly settled in the West than the rule that an appropriator can have no ownership in the water, as such, in the natural stream above the head of his canal or ditch, and that his right is solely one to have the stream water flow to his ditch so that it may be used.[2]

This principle of a private right in the use of the natural resource as distinguished from the substance itself is taken from the law of "usufruct" in the Institutes,[3] and is well recognized to-day. This usufructuary right, or "water-right," is the substantial right with regard to flowing waters; is the right which is almost in-

[2] Eddy v. Simpson, 3 Cal. 249, 58 Am. Dec. 408, 15 Morr. Min. Rep. 175; Hill v. Newman, 5 Cal. 445, 63 Am. Dec. 140, 4 Morr. Min. Rep. 513; Conger v. Weaver, 6 Cal. 548, 65 Am. Dec. 528, 1 Morr. Min. Rep. 594; Crandall v. Woods, 8 Cal. 136, 1 Morr. Min. Rep. 604; Hill v. King, 8 Cal. 336, 4 Morr. Min. Rep. 533; Kidd v. Laird, 15 Cal. 161, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571; Heyneman v. Blake, 19 Cal. 579; McDonald v. Askew, 29 Cal. 200, 1 Morr. Min. Rep. 660; Nevada etc. Co. v. Kidd, 37 Cal. 282; Hanson v. McCue, 42 Cal. 308, 10 Am. Rep. 299; Los Angeles v. Baldwin, 53 Cal. 469; Pope v. Kinman, 54 Cal. 3; Parks Canal Co. v. Hoyt, 57 Cal. 44; Lux v. Haggin, 69 Cal. 255, at p. 390, 10 Pac. 674; Swift v. Goodrich, 70 Cal. 103, 11 Pac. 561; Green v. Carotta, 72 Cal. 267, 13 Pac. 865; Riverside Co. v. Gage, 89 Cal. 410, 26 Pac. 889; Ball v. Kehl, 95 Cal. 613, 30 Pac. 780; Vernon Irr. Co. v. Los Angeles, 106 Cal. 237, 39 Pac. 762; McGuire v. Brown, 106 Cal. 660, 39 Pac. 1060, 30 L. R. A. 384; Hargrave v. Cook, 108 Cal. 72, 41 Pac. 18, 30 L. R. A. 390; Smith v. Green, 109 Cal. 229, 41 Pac. 1022; People v. Truckee etc. Co., 116 Cal. 397, 58 Am. St. Rep. 183, 48 Pac. 374, 39 L. R. A. 581; Gould v. Eaton, 117 Cal. 542, 49 Pac. 577, 38 L. R. A. 181; Katz v. Walkinshaw, 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236 (Shaw, J.); Calkins v. Sorosis Co., 150 Cal. 431, 88 Pac. 1094; Duckworth v. Watsonville Co., 150 Cal. 520, 89 Pac. 338; Hesperia etc. Co. v. Gardiner, 4 Cal. App. 357, 88 Pac. 286; Saint v. Guerrerio, 17 Colo. 448, 31 Am. St. Rep. 320, 30 Pac. 335; Boise etc. Co. v. Stewart, 10 Idaho, 38, 77 Pac. 25, 321; Crawford Co. v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647, 93 N. W. 781, 60 L. R. A. 889; Salt Lake City v. Salt Lake etc. Co., 24 Utah, 249, 67 Pac. 672, 61 L. R. A. 648; Salt Lake City v. Salt Lake etc. Co., 25 Utah, 456, 71 Pac. 1069; Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210; Pomeroy on Riparian Rights, sec. 55; Kinney on Irrigation, p. 398, *supra*. See, also, *infra*, sec. 276.

"There is no absolute property in the waters of a natural watercourse or natural lake. No right can be acquired to such waters except a usufructuary right—the right to use it, or to dispose of its use for a beneficial purpose." Nev. Stats. 1907, p. 30, sec. 3.

Unfortunately, the distinction has not always been appreciated. For example, in an overruled Colorado case it was said: "The distinction attempted to be drawn between the right to use water and the title to it is purely mythical and imaginary, and the sooner it is dropped, and the two treated as identical, the better, and less confusion will exist." Wyatt v. Larimer etc. Co. (1892), 1 Colo. App. 480, 29 Pac. 913. The case was overruled in 18 Colo. 298, 36 Am. St. Rep. 280, 33 Pac. 144. See, likewise, Fresno Irr. Co. v. Park, 129 Cal. 437, at 448, 62 Pac. 87, speaking of the distinction "sometimes made" between the ownership of the use of the water and the ownership of its *corpus*. See, also, Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. 858, 15 L. R. A., N. S., 359.

[3] *Supra*, sec. 1 et seq.

variably the subject matter over which irrigation or water power or similar contracts are made and litigation arises; and is real property. It is as fundamental under the law of riparian rights as under the law of appropriation. Under the latter the right of use lasts only while in actual application. Under the former the *right* of use is perpetual whether actually exercised or not; it is perpetually annexed as a privilege to the riparian freehold, to be put into actual exercise whenever its owner will, or not at all, but none the less a mere right of use, present or future, including no ownership of any drop of the water while it continues flowing naturally.

(3d ed.)

§ 19. **Conclusion.**—The law of watercourses under whatever system (whether appropriation or riparian rights), borrowing from the civil law, is but a development of the exercise of the usufructuary right, and of the severance in pursuance of it, of a portion of the water from the natural stream. The water in the stream—in the natural resource—itself is nobody's property, or "belongs to the public." The right may exist, in one having a right of access to it, to take of it or otherwise use it (called usufructuary) and to have it flow to him for his use. Any part taken in the fulfillment of this usufructuary right is the private property of the taker while in his possession, and it is to this last proposition that we now proceed.

§§ *20–29. (Blank numbers.)*

CHAPTER 3.

WATER SEVERED FROM THE NATURAL RESOURCE AND REDUCED TO POSSESSION.

§ 30. Introductory.
§ 31. Severed water.
§ 32. What acts reduce the water to possession.
§ 33. Analogy to wild animals—a "mineral *ferae naturae*."
§ 34. Distinguished from percolating water—Ohio Oil Co. v. Indiana.
§ 35. Becoming personal property.
§ 36. Same.
§ 37. Escaped or abandoned water.
§ 38. Recapture where abandonment not intended.
§ 38a. Same.
§ 39. Same.
§ 40. Statutory regulation of recapture.
§§ 41–50. (Blank numbers.)

(3d ed.)

§ 30. The development of the law of running water carries the foregoing to its conclusion whereby the stream water which, while in the stream, is not, as a substance, the subject of property (or "belongs to the public"), finally passes into private ownership. This occurs when some portion of it is taken out of the natural resource, severed from the stream, and reduced to possession. The specific portion of water taken ceases to be in the negative community or to "belong to the public" so long (but no longer) as it is subjected to the actual possession, control and dominion of a private individual. A water-right is a usufruct in the stream, the natural resource, consisting in the right to have the water flow so that some portion of it (which portion the law limits in various ways under the system of prior appropriation or the system of riparian rights) may be reduced to possession and made the private property of an individual.

(3d ed.)

§ 31. Severed Water.—In the civil law it is said: "Upon these principles, running waters are held by the Roman *juris-consulti* to be common to all men. But it also follows that this decision does not apply to waters, the appropriation of which (to the exclusion of the common enjoyment) is necessary for a certain pur-

pose, as water included in a pipe or other vessel for certain uses."[1] Vinnius says, in commenting on the passage in the Institutes above quoted regarding air, running water, and the sea: "First of all, these things are in their nature suited to the common use of all; and next, in case any of these things is such that in its nature it can be taken into possession, it belongs to the possessor so far as he does not injure the general use by such occupation."[2] And commenting upon the same passage in the Institutes a Scotch case says: "*Water drawn from a river into vessels or into ponds becomes private property.*"[3] No one owns the air, but the inventor who liquefies it owns so much as is liquid in his laboratory; it is his private property while in his possession.[4]

Pothier illustrates it as follows: "One may put the case, for example, where I go to dip water from a river. I acquire the ownership of the water which I have taken, and with which I have filled my pitcher, by title of occupancy; for this water, being a thing which belonged to no person, to which no person had any exclusive right whatever, I have been able, on taking it into my possession, to acquire the ownership of it by right of capture. This is why, in case, on returning from the river, I have, for some purpose, left my pitcher standing on the road, with the intention of returning later to fetch it where I left it,—if, in the meantime, a passer-by, having found my pitcher, proceeds (to save himself the trouble of going to the river) to pour into his pitcher the water that was in mine, he has committed against me an actual theft of that water, which water was a thing of which I was actually the proprietor, and of which I retained the possession through the intention I had of returning for it at the place where I left it.

[1] Bowyer's Commentaries on Civil Law, p. 61.

[2] "Primum communis omnium est harum rerum usus, ad quam natura comparatae sunt; tum siquid earum rerum per naturam occupari potest, id eatenus occupantis fit, quatenus ea occupatione usus ille promiscuus non laeditur." Quoted in Mason v. Hill, 5 Barn. & Adol. 1, 110 Eng. Reprint, 692. Cf. California Civil Code, sec. 655.

[3] Adding, "but to admit of such property with respect to the river itself, considered as a complex body, would be inconsistent with the public interest, by putting it in the power of one man to lay waste a whole country." Magistrates v. Elphinstone, 3 Kames Dec. (Scotch) 331.

[4] Says another civil-law authority: "Individual portions of this running water become undoubtedly the private property of the taker by occupancy, and he can do with that what he will." ("Allein einzelne portionen von diesem Fluszwasser werden durch die occupation unstrietig ein eigenthum des Schöpfenden, und dieser kann damit machen was er will." Glück, commenting on Dig., lib. 1, tit. 8.)

Note that the flow of the stream must not be confounded with the running water itself, which is designated *aqua profluens.*" [5]

The common law is stated in identical terms. "None can have any property in the water itself, *except in the particular portion which he may choose to abstract from the stream,* and take into his possession, and that during the time of his possession only." [6] In a well-known case in the House of Lords,[7] it is said that no one can have any property in the running water of the stream "which can only be *appropriated by severance,* and which may be lawfully so appropriated by everyone having a right of access to it" (the riparian proprietors). Lord Campbell declared[8] that water in a cistern is private property, and in a very recent case in House of Lords the Chancellor said that water in an artificial pond is "water with somewhat of a proprietary right." [9] In a New York case it is laid down: "Water, when reduced to possession, is property, and it may be bought and sold and have a market value, but it must be in actual possession, subject to control and management. Running water in natural streams is not property, and never was." [10] The California court very clearly expressed the theory of the law when, in words similar to those of the House of Lords above quoted,[11] it said: "He does not own the *corpus* of the water, but incident to his riparian is the right to appropriate a certain portion of it. It is only, I think, by some species of appropriation that one can ever be said to have title to the *corpus* of the water. The right of the riparian owner is to the continuous flow with a *usufructuary* right to the water, provided he returns it to the stream above his lower boundary, and the right, as I have said, to make a complete appropriation of some of it." [12]

The nature of the right of ownership existing in naturally running water is that of having it flow, of using it, and of taking it

5 Pothier, opp. tom. 8, p. 149.

6 Embrey v. Owen, 6 Ex. 353; Mason v. Hill, 5 Barn. & Adol. 1, 110 Eng. Reprint, 692.

7 Lyon v. Fishmongers Co., L. R. 1 App. Cas. 673.

8 Race v. Ward, 4 El. & B. 710.

9 Lord Halsbury, in White v. White, [1906] App. Cas. 84.

10 City of Syracuse v. Stacey, 169 N. Y. 231, 62 N. E. 354.

11 Lyon v. Fishmongers Co., *supra.*

12 Vernon Irr. Co. v. Los Angeles, 106 Cal. 237, 39 Pac. 762. One general authority says: "Ownership of water in canal—the water in a canal is the sole property of the canal owners." 5 Am. & Eng. Ency. of Law, 113. The right to take water out of another's pond is a profit a prendre. Angell on Watercourses, 7th ed., p. 245; Hill v. Lord, 48 Me. 83, *dictum;* but not so of the right to take water from his spring. Race v. Ward, 4 El. & B. 710. Water in a pipe is a commodity, and if conveyed in a pipe, the pipe may belong to one person and the water to another. New Jersey Co. v. Town of Harrison, 72 N. J. L. 194, 62 Atl. 767.

into possession by diverting it into artificial structures, ditches, reservoirs, cisterns, barrels, canals, pipes, and the like, thereby making private property of a part of it, during the time it is held in possession and control. Being naturally a member of the "negative community," the law recognizes only a right to use or take of it, and to have it flow to the taker so that it may be used or taken (a usufructuary right); but when severed from the natural resource, so much of the substance as is actually taken is severed from the negative community and, passing under private possession and control, becomes private property during the period of possession and control. The *corpus* of the water severed from the stream in a reservoir or other artificial structure that confines it in control is private property as a commodity; it ceases to "belong to the public" or to be without ownership, but is "water with somewhat of a proprietary right."

(3d ed.)

§ 32. What Acts Reduce the Water to Possession.—The test being whether the water is reduced to actual possession, what specific act may produce that effect is a question of fact in which there is latitude for difference under different circumstances. The artificial means employed are usually dams, ditches, reservoirs and other waterworks of magnitude, on the one hand, and household utensils, bottles, barrels, hogsheads and similar small and movable receptacles on the other.

That the water is reduced to possession in the latter class is obvious. Thus Pothier[13] uses a jug to illustrate the principle, and another authority instances all "portable receptacles."[14]

When the other class is considered it is not always so obvious, and depends much upon the circumstances. Judge Field[15] thought that water in a reservoir could *always* be regarded as reduced to possession and as private property. Another authority said it was just as obviously so with water in a pond as with water in vessels.[16] At the same time, it has been said that building a dam across a river so as to form a reservoir is not necessarily reducing it to

[13] *Supra.*

[14] Stanislaus W. Co. v. Bachman, 152 Cal. 719, 93 Pac. 858, 15 L. R. A., N. S., 359.

[15] Spring Valley W. Co. v. Schottler, 110 U. S. 347, 4 Sup. Ct. Rep. 48, 28 L. Ed. 173; dissenting opinion; People ex rel. Heyneman v. Blake, 19 Cal. 579.

[16] Magistrates v. Elphinstone, quoted *supra*, sec. 31.

possession,[17] and regarding the effect of a dam in a river, it is held likewise,[18] that it does not always alter the character of the water from that of "publici juris." In one case [19] it was said that building a dam in a stream *is* reducing the water to possession. The test seems to be, as to a dam, whether the flow of the stream continues through the water thus spread out, or whether the flowing character of the water in its natural channel is destroyed. It would seem a question of fact in each case whether the effect of the dam was simply to swell the stream, leaving it still a stream, or was to destroy the stream, and make it a private impound.[20]

Likewise the effect of diverting water into a *ditch* might and might not be reducing it to possession, according to the size and character of the ditch and of the stream it taps. Small ditches, such as mining ditches or lateral irrigation ditches, may possibly be said fully to hold control, whereas large canals like the Erie Canal, for example, might be open to question. However, it seems the consensus of opinion that, as a general rule, water in a ditch is to be regarded as reduced to possession.[21]

These are questions of fact, however, and in any event subordinate to the clear rule of law; that is, the test is whether the artificial structure reduces the water to possession.

(3d ed.)

§ 33. Analogy to Wild Animals—A "Mineral Ferae Naturae."—In the negative community there is a still more familiar member, namely, animals *ferae naturae;* with which, also, running water has been compared (even so far as to name it accordingly a "mineral ferae naturae"), and which likewise become private property by capture.

In the first place, wild animals are, by settled law, members of the negative community; they are nobody's property while wandering at large; and in the next place, running water is compared

17 City of Syracuse v. Stacey, 169 N. Y. 231, 62 N. E. 354, 355.

18 White v. White, [1906] App. Cas. 83.

19 Conger v. Weaver, 6 Cal. 548, 65 Am. Dec. 528, 1 Morr. Min. Rep. 594.

20 In one case (County of Sierra v. County of Nevada [1908], 155 Cal. 1, 99 Pac. 371) it is said: "The creation of the reservoir was effected by blocking the channel at a point where the stream would otherwise naturally flow beyond it. But it was none the less the natural channel of the South Fork, because by artificial means waters were accumulated and spread out and covered the original channel."

21 *Infra,* sec. 35.

"The water had been segregated by plaintiff from the general supply, was impounded in his ditch, and was intended to be appropriated to his own use. It was under his control and had become his property." Shaw v. Proffitt (Or.), 109 Pac. 584 (*dictum*).

to animals *ferae naturae* since the days of the Roman law. In the Institutes the law of wild animals follows under the same title as that above quoted concerning aqua profluens, saying: "*Likewise* wild animals, birds and fishes, since before capture belonging to no one, after capture belong to him who captures them."[22] Vattel, elsewhere quoted,[23] gives together as the things of which no one claims the property, "the air, the *running water*, the sea, *the fish and wild beasts.*" Vinnius, in commenting on the Institutes,[24] says fish are among the things common while in the ocean, but cease to be such the moment they are caught; and it is also said: "The fish in the sea, rivers, lakes, etc., being in their natural freedom, are things belonging to no one; fishing is a species of occupation whereby the fisherman acquires the property in the fish he catches, and thus takes into his possession."[25]

Says Blackstone: "A qualified property may also subsist with relation to animals ferae naturae, ratione impotentiae, on account of their inability [mentioning also (as well as wild birds) young birds not yet able to fly], for these cannot, through weakness, any more than the others through restraint, use their natural liberty and forsake him. . . . . The qualified property which we have hitherto considered extends only to animals ferae naturae, when either reclaimed, impotent, or privileged. Many other things may also be the objects of qualified property; it may subsist in the very elements of fire and light, of air and of water."[1]

Following the particles of the liquid from the stream into a reservoir or other structure in which they have been confined, there

[22] Inst. Just., lib. II, tit. 1, sec. 12. "Ferae igitur bestiae et volucres et pisces, id est omnia animalia, quae in terra, mari, caelo nascuntur, simulatque ab aliquo capta fuerint, iure gentium statim illius esse incipiunt; *quod enim ante nullius est, id naturali ratione occupantis conceditur.* Nec interest, feras bestias et volucres utrum in suo fundo quisque capiat, an in alieno; plane qui in alienum fundum ingreditur venandi aut aucupandi gratia, potest a domino, si is providerit, prohiberi ne ingrediatur. Quiquid autem eorum ceperis, eo usque tuum esse intelligitur, donec tua custodia coercetur; cum vero evaserit custodiam tuam et in naturalem libertatem se receperit, tuum esse desinit et rursus occupantis fit."

[23] *Infra*, sec. 1025.

[24] 2 Inst., tit. 1, sec. 1.

[25] Pothier, Traité du Droit de Propriété. Opera, tom. 8, p. 137. The passage continues to say that fishing in non-navigable rivers is not really larceny, though treated as such, but "Regarding fish in a reservoir, these are *sub manu*, and in the possession of him who is guarding them, who may permit their capture as he sees fit; and there can be no doubt whatever that one who fishes there without his consent commits an actual larceny against the man to whom these fish belong." See The Case of Swans, 7 Coke Rep. 15b, 77 Eng. Reprint, 435.

[1] II Blackstone's Commentaries, 395.

then has come a change in the "wandering" of the liquid that has been so taken. It is like the change regarding wild birds caught in a snare, wild animals caged, fish caught in nets. Before capture, none of these is regarded as property, real or personal; being wandering, ownerless things; while wandering at large they are nobody's property; but after capture, they become the private property of the taker. While swimming in the stream the fish in the water are no more the subject of private ownership than the water they swim in, and (though one may own the usufructuary right of fishing) nobody owns the fish themselves;[2] but the fisherman owns them when caught in a net.[3] So the particles of water that have passed into private control in a reservoir, ditch, or other waterworks or artificial structure that holds the water confined have been taken from their natural haunts, so to speak, and captured. This comparison was made in the following words by Judge Field with regard to the water in the reservoirs of the Spring Valley Water Company, which supplies San Francisco. After saying that water collected by individual agency in hogsheads, barrels or reservoirs "is as much private property as anything else that is reduced to possession, which otherwise would be lost to the uses of man," he proceeds: "Indeed, it is a general principle of law, both natural and positive, that where a subject, *animate or inanimate,* which otherwise could not be brought under the control or use of man, is reduced to such control or use by individual labor, a right of property in it is acquired by such labor. The wild bird in the air belongs to no one, but when the fowler brings it to the earth and takes it into his possession, it is his property. He has reduced it to his control by his own labor, and the law of nature and the law of society recognize his exclusive right to it. The pearl at the bottom of the sea belongs to no one, but the diver who enters the water and brings it to light has property in the gem. He has, by his own labor, reduced it to possession, and in all communities and by all law his right to it is recognized. So the trapper on the plains and the hunter in the north have a property in the furs they have gathered, though the animals from which they were taken roamed at large and belonged

2 People v. Truckee etc. Co., 116 Cal. 397, 58 Am. St. Rep. 183, 48 Pac. 374, 39 L. R. A. 581; Ex parte Maier, 103 Cal. 476, 42 Am. St. Rep. 129, 37 Pac. 402.

3 Young v. Hichens, 6 Q. B. 606, 51 Eng. Com. L. 606.

to no one. They have added by their labor to the uses of man an article promoting his comfort which, without that labor, would have been lost to him. They have a right, therefore, to the furs, and every court in Christendom would maintain it. So when the fisherman drags by his net fish from the sea, he has a property in them, of which no one is permitted to despoil him." And he applies this to the water brought to a city by a water company.[4] Chancellor Kent says: "The elements of air, light, and water are the subjects of qualified property by occupancy," and then, in the same paragraph, proceeds to the law of wild animals, as based on the same principle.[5]

The leading authority in the common law for this comparison is Blackstone, who says: "But, after all, there are some few things, which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common; being such wherein nothing but an *usufructuary* property is capable of being had; and, therefore, they belong to the first occupant, during the time he holds possession of them, and no longer. Such (among others) are the elements of light, air and water; which a man may occupy by means of his windows, his gardens, his mills, and other conveniences; such also, are the generality of those animals which are said to be *ferae naturae*, or of a wild untamable disposition, which any man may seize upon and keep for his own use or pleasure. All these things, so long as they remain in possession, every man has a right to enjoy without disturbance; but if once they escape from his custody, or he voluntarily abandons the use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them afterward."[6]

To avoid misunderstanding, it must be well noted that this passage distinguishes the *corpus* of water from the usufructuary in the stream, and that when Blackstone here says that every man

[4] Spring Valley W. W. v. Schottler, 110 U. S. 347, 4 Sup. Ct. Rep. 48, 28 L. Ed., at p. 183. Field, J., arguendo in a dissenting opinion.

Cf. the opinion of Sanderson, J., also dissenting, in Nevada County etc. Co. v. Kidd, 37 Cal. 326, saying: "By his diversion . . . . he converts it into a species of merchandise which he garners in his ditches and reservoirs—which he conveys to market, and measures out, and sells for a price."

In a recent California case Mr. Justice Angellotti describes the rights of a water company as "rights necessary to secure the absolute ownership of the water caught and impounded." Contra Costa Water Co. v. Oakland (Cal. Sup.), Jan. 19, 1911, 113 Pac. 668.

[5] Kent's Commentaries, part 5, c. 35, p. 347.

[6] Blackstone's Commentaries, Bk. II, p. 14. See, also, pp. 18, 395.

has an equal right to seize and enjoy, he is referring to the particles or drops, which no man can trace or identify as having been formerly in his possession, and which consequently he can lay no claim to because of such former possession. Instead, anyone to whom the escaped or abandoned particles come may seize and use them in the same manner as any other particles, and under the same considerations as govern his right to such other. The escaped or abandoned particles pass under any usufruct that may exist in the stream they have mixed with, be the owners of that usufruct who they may, and without, for the present purpose, specifying who the owners of the usufruct may be. The statement applies only to the *corpus* of the water (the ownership of the usufruct has been evolved into the law of riparian rights, or in the West, into the law of appropriation), and shows how the *corpus* is not the subject of property while flowing naturally, is private property during capture, and again ceases to be property when possession ceases (property in the corpus being lost by escape of the water or its abandonment, whereupon the particles again cease to be his property, and are again nobody's property, completing the cycle).[7]

(3d ed.)

§ 34. **Distinguished from Percolating Water—Ohio Oil Co. v. Indiana.**—This analogy of *running water* to animals ferae naturae does not, of course, exist, to the same extent, to percolating water, because in Acton v. Blundell[8] a distinction was made between the two. A different rule of ownership (the *cujus est solum* doctrine) was applied to percolating water, whereby, even in its natural state, it is the private property (real property) of the landowner in whose land it exists. This is the great difference in the attitude of the law toward percolating water and the running water of streams. "There is only one case in law in which water in its natural state is the subject of ownership, and that is the case of percolating water. A man is regarded as owning the percolating water while it is in the land. But other water in its natural state is subject only to the use of the man through whose land it flows. He has a right to its use but is not regarded as having the title."[9] There is to-day, however, a tendency to give up the rule of Acton

[7] See Pardessus, Traité des Servitudes, vol. I, p. 174.

[8] 12 Mees. & W. 324, 13 L. J. Ex. 289.

[9] Goodwin on Real Property, p. 2.

v. Blundell, and to abandon the difference,[10] and thus to class all water, percolating as well as running, as a "mineral ferae naturae." Some authorities thus merging the different kinds of water are stated and reviewed by the supreme court of the United States in Ohio Oil Co. v. Indiana.[11] This is, of course, a fundamental departure as regards percolating water, and the court did not go the whole length of putting it absolutely, like running water, into the "negative community." The *cujus est solum* doctrine withheld the court somewhat, and it said the analogy as to percolating water is not complete. In reading this opinion, it must be borne in mind that the court's hesitation has reference solely to percolating water, concerning which the analogy is a very recent departure or "new rule," and involves the rejection of Acton v. Blundell.

The case dealt with natural gas, to which the court also tentatively applied the principle, speaking of percolating water only as an analogy, classing natural gas, oil and percolating water together as "minerals ferae naturae"; but with some hesitation induced by the cujus est solum doctrine which has hitherto applied to them, in contrast to *running water*. Mr. Justice White, delivering the opinion, said these have no fixed situs, but on the contrary, have the power, as it were, of self-transmission and are of a peculiar character. He recognizes that the *cujus est solum* doctrine makes them the landowner's property, and yet says that cannot absolutely be, but that property can be based in them only when subject to control in a well, for example. When they escape or come under another's control, the title of the former is gone. He quotes with approval a Pennsylvania case[12] wherein it is said that while these things are minerals, they are minerals with peculiar attributes. "Water, also, is a mineral, but the decisions in ordinary cases of mining rights, etc., have never been held as unqualified precedents in regard to flowing or even percolating water.[13] Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as *minerals*

10 For the recent cases, see *infra*, sec. 1066.

11 177 U. S. 190, 20 Sup. Ct. Rep. 576, 44 L. Ed. 729, 20 Morr. Min. Rep. 466. See, also, Geer v. Connecticut, 161 U. S. 519, 16 Sup. Ct. Rep. 600, 40 L. Ed. 793; Bacon v. Walker (1906), 204 U. S. 316, 27 Sup. Ct. Rep. 289, 51 L. Ed. 499.

12 Westmoreland Co. v. De Witt, 130 Pa. 235, 18 Atl. 724, 5 L. R. A. 731.

13 The distinction between the two kinds of water is thus noted, but not followed up.

ferae naturae. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. Their fugitive and wandering existence within the limits of a particular tract is uncertain," etc. Other cases are cited in which the phrase "minerals ferae naturae" is used. Only when reduced to actual possession do they become the subject of ownership, but then are, like any other property, the subject of ordinary commerce.[14] Mr. Justice White says the landowner has the right on his land to bore wells and otherwise seek to acquire these things, but that "until these substances are actually reduced by him to possession, he has no title whatever to them as owner," and uses the expression that "things which are ferae naturae belong to the 'negative community.'" Proceeding to a conclusion, however, regarding natural gas, with which the case dealt, he cannot consider the analogy complete. This is because of the conflict with the *cujus est solum* doctrine, which he was not ready to reject entirely, and, because, if the analogy to the negative community were absolute, he saw no way to exclude the public from taking them as well as the landowners.

It is not our object here to enter this discussion as to natural gas, oil, or even percolating water, as we consider the last separately in another place.[15] We have shown the settled view of the law toward running water (*aqua profluens*). We would also mention with regard to Mr. Justice White's two grounds of hesitation, that as to the first, the *cujus est solum* doctrine not only never has any bearing as to running water, but is being in contemporary cases rejected also as to percolating water;[16] while as to the second, the general public is excluded (at common law) from the use of running water for the reason that, while its *corpus* is owned by no one, the taking thereof is confined to riparian proprietors because they, as the owners of the inclosing lands, alone have access to it (the lack of access excluding all nonriparian owners); following which all riparian proprietors, having equally the right of access, must exercise the resulting usufruct reasonably, with due regard to the rights of their neighbors on the stream.[17] Since the above was published,

[14] Citing State ex rel. Corwin v. Indiana etc. Co., 120 Ind. 575, 22 N. E. 778, 6 L. R. A. 579; People's Gas Co. v. Tyner, 131 Ind. 277, 31 Am. St. Rep. 433, 31 N. E. 59, 16 L. R. A. 443, 17 Morr. Min. Rep. 481.

[15] *Infra*, sec. 1100 et seq.

[16] See recent cases collected *infra*, sec. 1066.

[17] *Infra*, sec. 692 et seq.

the California court has adopted this as the basis of its new law of percolating water also.[18]

From Ohio Oil Co. v. Indiana, the term "mineral ferae naturae" is passing into the text-books. For example, "Water, oil, and still more strongly gas, may be classed by themselves, and have been not inaptly termed *minerals ferae naturae.*" [19]

(3d ed.)

§ 35. **Becoming Personal Property.**—The analogy to animals *ferae naturae* is finally shown by the authorities establishing that water reduced to possession is personal property. Just as wild animals, by capture becoming private property, are personalty, so likewise running water, severed from its natural wandering, and confined under private control in a reservoir, or other works of man that reduce it to possession, is also personal property.

The individual particles of water so impressed by diversion into an artificial structure or waterworks that confine it, and become *private* property, possess none of the characteristics of immovability that go with ideas of real estate; they are still always moving though privately possessed, having, as particles, the characteristics of personal property. The analogy to caged animals, snared birds, or fish in a net shows well the point of view; and the particles in the reservoir or other artificial structure that reduces it to possession, now private property, are personalty. This is the law as laid down by Justice Stephen Field.[20] "Water, when collected in reservoirs or pipes, and thus separated from the original source of supply, is personal property, and is as much the subject of sale—an article of commerce—as ordinary goods and merchandise." This was said of the water in the same Spring Valley reservoirs as those involved in the Schottler case. It was necessary to decide whether the Spring Valley Company, supplying San Francisco with water, was within a statute authorizing the formation of a corporation for trade or commerce, and it was held

18 Hudson v. Daily, 156 Cal. 617, 105 Pac. 748, quoted *infra*, sec. 1055.

19 21 Am. & Eng. Ency. of Law, 417. See, also, 27 Cyc. 534; Kerr on Real Property, sec. 111. See, also, Charon v. Clark, 50 Wash. 191, 126 Am. St. Rep. 896, 96 Pac. 1040, 17 L. R. A., N. S., 647; Ex parte Elam, 6 Cal. App. 233, 91 Pac. 811; Huber v. Merkel, 117 Wis. 355, 98 Am. St. Rep. 933, 94 N. W. 354, 62 L. R. A. 589.

20 People ex rel. Heyneman v. Blake, 19 Cal. 579, cited by him with approval in the Schottler opinion, quoted, sec. 33, note 4, *supra*.

that it was. In another California case [21] it was in effect held that where the *corpus* of water in a pipe is involved as distinguished from a "water-right" or usufruct in a stream, a justice of the peace has jurisdiction, saying: "It has several times been held that water diverted from a natural stream into ditches and reservoirs is, when so contained in said reservoirs, the personal property and not the real estate of the owners thereof." In a Utah case holding the water in a ditch or pipe taxable as personal property, it is said: "Water in the pipes of a distributing system is personal property. The ownership is in the water itself." [22] A late New Mexico case, holding water confined in a reservoir to be personal property, says: "Water once reduced to possession and control may be the subject of purchase and sale, or of larceny; and it makes no difference in that respect whether the captured fluid is held in a skin or cask by an itinerant water vender, or in the pipes of a modern aqueduct company." [23] The water so taken into an artificial appliance is the subject of larceny at common law, as personal property.[24]

There is some latitude for discussion as to what acts reduce the water to possession as a fact.[25] But when severed from the stream and actually reduced to possession, the specific portion so held at any given moment is personal property, and this is stated in numerous other authorities, some of which are given in the note.[26]

21 Hesperia etc. Co. v. Gardiner, 4 Cal. App. 357, 88 Pac. 286. The supreme court denied a rehearing.

22 Bear Lake Co. v. Ogden, 8 Utah, 494, 33 Pac. 135.

23 Mr. Justice Abbott in Hagerman etc. Co. v. McMurray (N. M.), 113 Pac. 823, referring to the second edition of this book. See, also, Turley v. Furman (N. M.), 114 Pac. 278.

24 Ferens v. O'Brien, 11 Q. B. D. 21. This is enacted in California Penal Code, section 499.

Wild animals are not property in a natural state, and not the subject of larceny; but when brought into possession by being caught in a trap, they are then the subject of larceny as chattels. 25 Cyc. 17, article "Larceny," by Professor J. H. Beale. See 1 Hale's Pleas of Crown, 511.

25 *Supra*, sec. 32.

26 In addition to the foregoing, we add the following cases where the principle was enunciated *obiter:*

"It is urged that an appropriator of water does not become the owner of the very body of water as his personal property, until he has acquired the control of it in conduits or reservoirs of his own. The proposition as stated is undoubtedly correct," etc. Beatty, C. J., in Riverside Co. v. Gage, 89 Cal. 418, 26 Pac. 889.

In one case it is said that there is a plain and substantial difference between water in a ditch or reservoir and water in a natural stream, and says, regarding the former, that, "being in defendant's possession and under his control, had become his personal property." Ball v. Kehl, 95 Cal. 613, 30 Pac. 780.

"For the purpose of this decision, it may be admitted that water acquired by appropriation (to be sold to miners and others) by means of a ditch leading from a natural stream, becomes, after it passes into the ditch, the personal property of the appro-

(3d ed.)

§ 36. **Same.**—The origin of this rule (deduced from the fundamental civil-law principle of the "negative community" that the *corpus* of the water in a natural stream is *not* property, real or personal, in any sense of the word), excludes the common-law maxim, "*Cujus est solum ejus est usque ad caelum,*" from any application to the water of running streams. In dealing with the question of when water becomes personalty, a common argument is to overlook this starting point, and, failing to distinguish between the water and the water-right, to regard the stream water as itself real property under the *cujus est solum* doctrine. An argument is then started from a proposition that the particles are realty, and the transition is regarded as one from the particles as realty to personalty by severance from the freehold, like fixtures or emblements; when in truth it is the transition from *not* property (neither real nor personal) to *private property,* by severance from the natural stream; between particles wandering "wild" and particles "captured" by diversion and under private possession and control. The "*cujus est solum*" argument, among other things, would apply to running streams the ideas upon which the law of percolating water rests, for the *corpus* of naturally percolating water is property—real property—as part of the soil under the maxim, "*Cujus est solum ejus est usque ad caelum.*" Not so, however, the flowing water in a natural stream as a natural resource, the *corpus* of which is never property, real or personal, while in the stream. The foundation of the law of watercourses, on the one hand, and of the law of percolating water on the other, is entirely different, owing to the very fact that the "*cujus est solum*" maxim does not apply to the water of a natural water-

priator. Nevertheless, although such appropriator may be entitled to the flow of all the stream undiminished, the water in the stream above his ditch is not his personal property. . . . . The appropriator certainly does not become the owner of the very body of the water until he has acquired control of it in conduits or reservoirs created by art or applied to the purpose of leading or storing water by artificial means." Parks Canal Co. v. Hoyt, 57 Cal. 44.

. . . . "After it has been diverted from its original channel and conveyed elsewhere in pipes for distribution and sale, it loses its original character and becomes personal property." Dunsmuir v. Port Angeles Co., 24 Wash. 114, 63 Pac. 1095.

"When water has been separated from the stream and stored where it can be controlled by the owner, it becomes personal property." Farnham on Waters, 462.

See, also, Helena W. W. v. Settles, 37 Mont. 237, 95 Pac. 838.

course.[27] The *cujus est solum* doctrine has no bearing upon the point.[1]

Aside from this importance of the matter in illustrating the theory of the law of streams, however, it would be unfortunate if much stress were laid upon it in practice. It is the continuance of the natural supply, the flow and use of the natural resource, which alone is entitled to much attention. The true force of the foregoing lies in showing that to decide cases upon the basis of private property rights in running water as a substance must usually be improper; controversies must, as a rule, be decided with reference to the *usufruct* of the natural resource and not the *corpus* of the water itself.[2]

(3d ed.)

§ 37. Escaped or Abandoned Water.—The water taken into an artificial structure and reduced to possession is private property *during the period of possession.* When possession of the actual water or *corpus* has been relinquished or lost, by overflow or discharge after use, property in it ceases; the water becomes again nobody's property and re-enters the negative community, or "belongs to the public," just as it was before being taken into the ditch.[3] It has no earmarks to enable its former possessor to follow

[27] Acton v. Blundell, 12 Mees. & W. 324, 13 L. J. Ex. 289, in establishing the law of percolating water, said that percolating water "is not to be governed by the law which applies to rivers and flowing streams, but that it rather falls within that principle which gives to the owner of the soil all that lies beneath his surface."

[1] An example where the "cujus est solum" reasoning is inadvertently made use of, appears in a recent case (Stanislaus W. Co. v. Bachman, 152 Cal. 717, 93 Pac. 858, 15 L. R. A., N. S., 359). Expressions are used that the water of running streams is on the same footing as percolating water; that running water is not different from other material substances composing a part of the earth; that the particles of water of a natural stream are real property; and the opinion concludes that water does not become personalty on severance from the natural resource and reduction to possession, but only when lifted off the ground and delivered to some consumer in a *portable receptacle,* reasoning upon the *cujus est solum* ground. The point was not actually involved in the case, however; and since then the case has been doubted in Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. 404 (see *infra,* secs. 1324, 1325), and seems clearly no longer to retain the approval, so far as concerns the present matter, of the distinguished jurist who wrote the opinion.

[2] Kidd v. Laird, 15 Cal. 161, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571.

Discussing the distinction between the right of use and the water itself, Mr. Justice Ailshie, in Idaho, in a concurring opinion, says: "Indeed, it can be of no consequence to the State as to where the property right in the waters is vested, so long as the people have reserved to themselves the right to regulate the use." Hard v. Boise etc. Co., 9 Idaho, 589, 76 Pac. 331, at 334, 65 L. R. A. 407. See Part VII of this book regarding regulation of distribution of water to public uses.

[3] *Supra,* sec. 2.

it and say it is his. The specific water so discharged or escaped is abandoned; not an abandonment of a water-right, but an abandonment of specific portions of water, viz., the very particles that are discharged or have escaped from control.

There is an abandonment of whatever runs waste after use. When the owner has made all the use of the water he wants, and lets the waste run off from ditches without intent to recapture, the waste is abandoned, and the owner of the water-right no longer has any claim upon it.[4] If it finds its way by natural channels into another creek, he cannot go there and reclaim it as against other appropriators there who make use of it.[5] If a miner digs a ditch to drain away the water from a stream so that the bed can be mined, the water is abandoned.[6] In one case it is said:[7] "The water from the tunnel finds its way to the stream and has become a part thereof. It inures to the benefit of all taking water therefrom. In this particular water the claimants have no interest or right which will permit them to segregate a volume of water equal to that flowing from the tunnel, even if it be an actual increase, and assert an exclusive right thereto as against others diverting water from the stream."[8]

(3d ed.)

§ 38. Recapture Where Abandonment not Intended.—But there is an exception to this. If the discharge or escape from the ditch or tunnel or reservoir or other structure is made not because it is waste, but for convenience in handling it, intending at the time to recapture it at some lower point, it is not abandoned, for abandonment is always a question of intention. In such case, if the water enters a stream, where such intention to retain ownership of the artificial increment exists, the water may be reclaimed from the stream by its producer. The usufructuary right of the stream claimants below extends only to the natural flow of the stream, the specific waters of which are nobody's property; while

[4] Dougherty v. Creary, 30 Cal. 290, 89 Am. Dec. 116, 1 Morr. Min. Rep. 35; Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Colorado etc. Co. v. Rocky Ford etc. Co., 3 Colo. App. 545, 34 Pac. 580; Farmers' etc. Co. v. Rio Grande etc. Co., 37 Colo. 512, 86 Pac. 1042.

[5] Eddy v. Simpson, 3 Cal. 249, 58 Am. Dec. 408, 15 Morr. Min. Rep. 175; Schulz v. Sweeney, 19 Nev. 359, 3 Am. St. Rep. 888, 11 Pac. 253.

[6] McKinney v. Smith, 21 Cal. 374, 1 Morr. Min. Rep. 650.

[7] Farmers' etc. Co. v. Rio Grande etc. Co., 37 Colo. 512, 86 Pac. 1042.

[8] Citing La Jara Creamery & Livestock Assn. v. Hanson, 35 Colo. 105, 83 Pac. 644.

the property right in the water itself extends, free of such usufruct in others, to whatever liquid or artificial increment has, without intent to abandon, been artificially added, produced or introduced into the channel by the labor of man. Such increment belongs to the man whose labor produced it or brought it there when naturally it would not have existed there; having become his property by artificial development and brought under his possession and control or "captured," it may, in such a case, be "recaptured," to use an expression of Judge Field's. Water can be discharged into a stream as a link in a ditch line and taken out again, though there are prior appropriators or existing riparian owners on the same stream. A stream may be used to carry stored water. It is not abandoned where there is an intent to recapture it.[9]

[9] *California.*—Hoffman v. Stone, 7 Cal. 46, 4 Morr. Min. Rep. 520; Butte etc. Co. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769, 4 Morr. Min. Rep. 552; Burnett v. Whiteside, 15 Cal. 35; Weaver v. Eureka L. Co., 15 Cal. 274, 1 Morr. Min. Rep. 642; Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Richardson v. Kier, 37 Cal. 263; Wilcox v. Hausch, 64 Cal. 461, 3 Pac. 108; Creighton v. Kaweah Co., 67 Cal. 222, 7 Pac. 658; Paige v. Rocky Ford Co., 83 Cal. 84, 21 Pac. 1102, 23 Pac. 875; Wiggins v. Muscupiabe Co., 113 Cal. 182, 54 Am. St. Rep. 337, 45 Pac. 160, 32 L. R. A. 667; Mayberry v. Alhambra etc. Co., 125 Cal. 444, 54 Pac. 530, 58 Pac. 68; Churchill v. Rose, 136 Cal. 576, 69 Pac. 416; Lower Tule etc. Co. v. Angiola etc. Co., 149 Cal. 496, 86 Pac. 1081; Wutchumna W. Co. v. Pogue, 151 Cal. 105, 90 Pac. 362; Pomona W. Co. v. San Antonio W. Co., 152 Cal. 618, 93 Pac. 881. See Evans D. Co. v. Lakeside D. Co., 13 Cal. App. 119, 108 Pac. 1027; Civ. Code, sec. 1413.

Colorado.—Platte etc. Co. v. Buckers etc. Co., 25 Colo. 77, 53 Pac. 334; Oppenlander v. Left Hand Ditch Co., 18 Colo. 142, 31 Pac. 854; Buckers etc. Co. v. Farmers' etc. Co., 31 Colo. 62, 72 Pac. 49; Ripley v. Park etc. Co., 40 Colo. 129, 90 Pac. 75. See Hackett v. Larimer etc. Co. (Colo.), 109 Pac. 965. See statutes *infra*, sec. 40.

Idaho.—Parke v. Boulware, 7 Idaho, 490, 63 Pac. 1045; Malad etc. Co. v. Campbell, 2 Idaho, 411, 18 Pac. 52. See statutes, *infra*, sec. 40.

Montana.—Beaverhead etc. Co. v. Dillon etc. Co., 34 Mont. 135, 85 Pac. 880; Smith v. Duff, 39 Mont. 382, 133 Am. St. Rep. 587, 102 Pac. 984; Kelly v. Hynes (Mont.), 108 Pac. 785. See Civ. Code, sec. 1883.

Nebraska.—See statutes cited *infra*, sec. 40. In Cobbey's Ann. Stats. (sec. 6752, Laws 1889, c. 68, p. 504, sec. 6, and Laws 1895, c. 40, p. 378, sec. 3) it is, however, prohibited on streams less than one hundred feet in width.

Nevada.—Schulz v. Sweeney, 19 Nev. 359, 3 Am. St. Rep. 888, 11 Pac. 253.

New Mexico.—Laws 1907, p. 71, sec. 60.

Oklahoma.—Stats. 1905, p. 274, sec. 1.

Oregon.—Simmons v. Winters, 21 Or. 35, 28 Am. St. Rep. 727, 27 Pac. 9; McCall v. Porter, 42 Or. 56, 70 Pac. 822, 71 Pac. 976; Hough v. Porter (1908), 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728. See statutes, *infra*, sec. 40.

South Dakota.—Stats. 1905, p. 201, sec. 4; Stats. 1907, c. 180, sec. 4.

Utah.—Fuller v. Sharp, 33 Utah, 431, 94 Pac. 817; Herriman etc. Co. v. Keel, 25 Utah, 96, 69 Pac. 719; Herriman etc. Co. v. Butterfield Min. etc. Co., 19 Utah, 453, 57 Pac. 537, 51 L. R. A. 930. Enacted in Stats. 1911, c. 43, p. 60, amending Comp. Laws, 1907, sec. 1288x25.

Washington.—Miller v. Wheeler (1909), 54 Wash. 429, 103 Pac. 641,

In a very early California case Mr. Justice Stephen Field, delivering the opinion of the court, said: "In the case at bar the channel of the south fork of Jackson Creek is used as a connecting link between the Amador County canal and the ditch of the defendants. The water from the canal is emptied into the fork with no intention of abandoning its use, but for the sole purpose of supplying the ditch. . . . There may be some difficulty in cases like the present, in determining with exactness the quantity of water which parties are entitled to divert. Similar difficulty exists in the case of a mixture of wheat and corn—the quantity to be taken by each owner must be a matter of evidence. The courts do not, however, refuse the consideration of such subjects, because of the complicated and embarrassing character of the questions to which they give rise. If exact justice cannot be obtained, an approximation to it must be sought, care being taken that no injury is done to the innocent party.[10] The burden of proof rests with the party causing the mixture.[11] He must show clearly to what portion he is entitled. He can claim only such portion as is established by decisive proof. The enforcement of his right must leave the opposite party in the use of the full quantity to which he was originally entitled."[12] The party recapturing the water must make and deduct from the amount to be recaptured due allowance for seepage and evaporation,[13] and must take due care not to abstract or impair any *natural* tributaries,[14] even if those tributaries consist only of percolating water.[15]

23 L. R. A., N. S., 1065; Laws 1907, c. 222, p. 285.

Miscellaneous.—See Elliot v. Fitchburg Ry., 10 Cush. (Mass.) 193, 57 Am. Dec. 85; Whittier v. Cocheco Co., 9 N. H. 454, 32 Am. Dec. 382; Society etc. v. Morris Canal Co., Saxt. (1 N. J. Eq. 830) 157, 21 Am. Dec. 41.

10 Accord, Burnett v. Whitesides, 15 Cal. 35.

11 Accord, Burnett v. Whitesides, 15 Cal. 35; Wilcox v. Hausch, 64 Cal. 461, 3 Pac. 108; Herriman etc. Co. v. Keel, 25 Utah, 96, 69 Pac. 719; Herriman etc. Co. v. Butterfield Min. etc. Co., 19 Utah, 453, 57 Pac. 537, 51 L. R. A. 930, the latter holding that seepage and evaporation must be deducted. See, also, Buckers etc. Co. v. Farmers' etc. Co., 31 Colo. 62, 72 Pac. 49; Smith v. Duff (1909), 39 Mont. 382, 133 Am. St. Rep. 587, 102 Pac. 984.

But see Miller v. Wheeler (1909), 54 Wash. 429, 103 Pac. 641, 23 L. R. A., N. S., 1065, *semble contra*, as to burden of proof.

12 Butte C. & D. Co. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769, 4 Morr. Min. Rep. 552.

13 Herriman etc. Co. v. Butterfield Min. Co., 19 Utah, 453, 57 Pac. 537, 51 L. R. A. 930; Miller v. Wheeler (1909), 54 Wash. 429, 103 Pac. 641, 23 L. R. A., N. S., 1065.

14 Miller v. Wheeler, *supra*.

15 Smith v. Duff (1909), 39 Mont. 382, 133 Am. St. Rep. 587, 102 Pac. 984.

The intention not to abandon the water turns the stream channel into a mere means of conveyance.[16] In one case the increment to the stream consisted of waste water seeping into it from irrigation. The court found (a matter possibly questionable on the facts recited) that this water it had always been the intention of the irrigator, from whose land it seeped, to recapture from the stream and put to his own use; and held that he consequently could sell to another the same right to withdraw from the stream the flow equivalent to the seepage, which sale would prevail against existing claimants on the stream.[17] Water may be "developed" by a tunnel distant from and unconnected with the stream and allowed to flow from the tunnel into the stream, and where the facts show this to be new and foreign water which would not naturally have formed part of the stream, the tunnel owner, if he so intends at the time he caused this increment, may reclaim it from the stream.[18] Water may be drained from a mine and emptied into a stream with the intent to recapture it at some other point, and a decree settling rights upon the stream rendered

[16] Simmons v. Winters, 21 Or. 35, 28 Am. St. Rep. 727, 27 Pac. 9.

[17] The court said (Miller v. Wheeler (1909), 54 Wash. 429, 103 Pac. 641, 23 L. R. A., N. S., 1065): "Having decided that there was some flow, that this was increased by the energy and expenditure of appellants, and that the increase was not abandoned, the case will be remanded to the lower court to find the amount of the original flow from the springs on Wheeler Hill, the amount this flow has been increased by artificial means, and the amount of depreciation from natural waste and evaporation of the added flow in passing from Wheeler Hill to the Miller headgate; and that it then decree that the amount so found be allowed to pass the headgate for use on the lands of Wheeler and his grantees in the valley below." But an increment due to more economical structures is not an artificial increase such as to take it out of a contract to supply from the natural flow. Evans v. Prosser etc. Co. (Wash.), 113 Pac. 271.

[18] Mayberry v. Alhambra etc. Co., 125 Cal. 444, 54 Pac. 530, 58 Pac. 68, saying: "The right to the artificial increment is quite distinct from the title to the natural flow, and the owner thereof may reclaim it from the channel." Accord, Buckers etc. Co. v. Farmers' etc. Co., 31 Colo. 62, 72 Pac. 49. See Farmers' Union etc. Co. v. Rio Grande etc. Co., 37 Colo. 512, 86 Pac. 1042. In one case it is said: "The court found, in effect, that the subterranean water diverted and carried down the canyon in said pipeline and by that means mingled with the natural surface flow and turned into the defendants' ditch at the Crafton dam, did not constitute any part of the subterranean waters which would naturally flow to and feed the plaintiff's source of supply, and that the interference with natural conditions did not operate to diminish plaintiff's supply. If this is true, the diversion by means of the pipeline would cause no damage to plaintiff." Mentone Co. v. Redlands Co., 155 Cal. 323, 100 Pac. 1082, 22 L. R. A., N. S., 382, 17 Ann. Cas. 1222.

previously does not prevent the recapture of the mine water for irrigation.[19]

The matter is frequently covered by statute.[20]

(3d ed.)

§ 38a. **Same.**—While the new water in the cases heretofore considered was usually transported to the stream from a distant source, such as from another stream in another watershed, yet the same principle applies where the increment is not so transported, but is caused to exist solely by salvage works in the stream itself, provided those works are done with the express intention of availing oneself of the increased flow. Thus, it was applied in one case,[21] where the increment was introduced by merely clearing out a choked channel; or by other artificial means;[22] or by enlarging flow of springs;[23] or by providing an artificial channel to save seepage and evaporation.[24]

A recent case furnished an excellent illustration. In Pomona W. Co. v. San Antonio W. Co.,[25] the stream for two and one-half miles was a losing stream, diminishing nineteen per cent by seepage and evaporation before reaching plaintiff. Defendant saved this loss by providing a pipe-line to carry the stream over those two and one-half miles, and also, in the bed of the creek thus left dry, placed another pipe-line in which 25–50 inches of water accumulated.[1] The court says that the defendant thus delivers to plaintiff below all the water which plaintiff would get and be entitled to if the stream continued to flow naturally; and the water in the pipes in excess of the natural flow is new, rescued, developed, or salvage water. The court lays stress upon the fact that the presence of the new water is due entirely to the agency of the defendants, and holds that the amount thereof must be de-

19 Ripley v. Park etc. Co., 40 Colo. 129, 90 Pac. 75.

20 *Infra*, sec. 40. The California Civil Code enacts, section 1413: "The water appropriated may be turned into the channel of another stream and mingled with its water, and then reclaimed; but in reclaiming it the water already appropriated by another must not be diminished." This is merely declaratory of the early decisions already cited.

21 Paige v. Rocky Ford etc. Co., 83 Cal. 84, 21 Pac. 1102, 23 Pac. 875.

22 Beaverhead etc. Co. v. Dillon etc. Co., 34 Mont. 135, 85 Pac. 880; Kelly v. Hynes (Mont.), 108 Pac. 785.

23 Churchill v. Rose, 136 Cal. 576, 69 Pac. 416.

24 Pomona W. Co. v. San Antonio W. Co., 152 Cal. 618, 93 Pac. 881; Wiggins v. Muscupiabe Co., 113 Cal. 182, 54 Am. St. Rep. 337, 45 Pac. 160, 32 L. R. A. 667.

25 152 Cal. 618, 93 Pac. 881.

1 No contention upon the use of riparian proprietors was made; and the parties all claimed to use the water on nonriparian lands or under claims of appropriation.

termined "with the nicest exactness possible," and the right thereto then belongs to defendant who rescued it. Mr. Justice Henshaw said: "This principle has been enunciated by this court as early as Butte Company v. Vaughn,[2] and has been reaffirmed, however varying the forms may have been, whenever it has been presented. The principle in brief is this: that where one is entitled to the use of a given amount of water at a given point, he may not complain of any prior use made of the water which does not impair the quality or quantity to which he is entitled, and, upon the other hand, he may not lay claim to any excess of water over the amount to which he is entitled, however it may be produced. In the Vaughn case, *supra,* the question turned upon the prior use. In Creighton v. Kaweah Irrigating Company[3] it is said: 'At best, the plaintiffs would be entitled only to have the defendant enjoined from obstructing the flow of that which would have naturally flowed unaided by artificial means, with which the plaintiff is not connected.' In Wiggins v. Muscupiabe L. & W. Co.,[4] this whole question is elaborately considered, and full recognition is accorded of the right to water of one who saves as well as to the one who develops it. It there appeared that one hundred inches of water were naturally lost by absorption and evaporation in passing through the natural channel from the dam and ditch of an upper riparian owner to the land of a lower owner. It was held that a court of equity in dividing the flow of the stream might allow the upper owner to provide artificial means for carrying all the waters of the stream in excess of the one hundred inches to the land of the lower owner, and permit the upper owner to use so much of the one hundred inches as he could save by such artificial means, and, quoting from the opinion, it is said: 'The plaintiff could, under no circumstances, be entitled to the use of more water than would reach his land by the natural flow of the stream, and, if he receives this flow upon the land, it is immaterial to him whether it is received by means of the natural course of the stream or by artificial means. On the other hand, if the defendant is enabled by artificial means to give to the plaintiff all of the water he is entitled to receive, no reason can be assigned why it should not be permitted to divert from the stream where it

[2] 11 Cal. 143, 70 Am. Dec. 769, 4 Morr. Min. Rep. 552.

[3] 67 Cal. 222, 7 Pac. 658.

[4] 113 Cal. 195, 54 Am. St. Rep. 337, 45 Pac. 160, 32 L. R. A. 667.

enters its land and preserve and utilize the one hundred inches which would otherwise be lost by absorption.' This same doctrine is recognized by all the courts which have been called upon to consider it."[5]

(3d ed.)

§ 39. **Same.**—The point which distinguishes these cases is the intent existing at the time the artificial increment to the stream is produced, not to abandon it, but, on the contrary, always intending to reclaim it, and the carrying out of that intent within a reasonable time. The intent to recapture the water must be present at the time it is discharged from control, and must be very clearly shown;[6] otherwise an injunction will lie to prevent its recapture.[7] The intent to recapture is essential, and without it, the water is abandoned; and, as previously set forth, cannot be reclaimed against claimants on the stream, existing at the time the recapture is attempted.

The rule permitting recapture of artificial increments added to the stream without intent to abandon applies under the law of riparian rights as much as under the law of appropriation.[8]

(3d ed.)

§ 40. **Statutory Regulation of Recapture.**—In this matter supervision by public officials seems specially desirable when the owners along the stream are numerous. The owner of a water-right in the stream may well say: "Our waters would be so mixed that, independently of the injury you could cause me in retaking from the stream more water than you had turned in, you oblige me to keep a constant surveillance over you while doing so, and you compel me to keep up a perfect understanding with you in regard to the maintaining, clearing, and stoppage, or continuance of flow, on terms

[5] Citing Platte Irr. Co. v. Imperial Co., 25 Colo. 77, 53 Pac. 335; Herriman Irr. Co. v. Butterfield Min. Co., 19 Utah, 453, 57 Pac. 541, 51 L. R. A. 930; Farnham on Waters, sec. 672. Note that the Wiggins case was decided with regard to riparian proprietors at common law. See, also, *infra*, sec. 279.

[6] Schulz v. Sweeney, 19 Nev. 359, 3 Am. St. Rep. 888, 11 Pac. 253.

[7] Wilcox v. Hausch, 64 Cal. 461, 3 Pac. 108.

[8] Wiggins v. Muscupiabe Co., 113 Cal. 182, 54 Am. St. Rep. 337, 45 Pac. 160, 32 L. R. A. 667; Brymbo Co. v. Lesters Co., 8 Rep. (Eng.) 329; Elliot v. Fitchburg Ry., 10 Cush. (Mass.) 191, 57 Am. Dec. 85; Muskoka Co. v. Queen, 28 Grant Ch. (U. C.) 563; Fox etc. Co. v. Kelley, 70 Wis. 287, 35 N. W. 744; Society v. Morris Co., 1 N. J. Eq. 157, 21 Am. Dec. 41; Dyer v. Cranston Co., 22 R. I. 506, 48 Pac. 791.

upon which we probably could not agree; in a word, you impose on me a perpetual community of interest which I have not sought, but opposed." To meet this, the recent State Water Codes usually allow the State Engineer to oversee the commingling and recapture.[9] In Washington the statute provides for court commissioners for that purpose.[10] And such commissioners may be appointed by courts in specific cases without statute.[11]

[9] *Colorado.*—Rev. Stats. 1908, secs. 3203, 3222–3225; Gen. Stats. 1725; Laws 1879, p. 107, sec. 39; Laws 1907, p. 176.

Idaho.—Laws 1909, p. 150, c. 197; Laws 1911, c. 149.

Nebraska.—Cobbey's Ann. Stats., secs. 6752, 6799; Stats. 1897, c. 85, p. 359, sec. 1; Laws 1903, c. 119, p. 612.

New Mexico.—Stats. 1907, p. 71, sec. 60.

Oregon.—Stats. 1909, c. 216, sec. 59.

South Dakota.—Stats. 1907, c. 180, sec. 4.

And probably the other States having water codes. See statutes, in Part VIII below.

[10] Stats. 1907, c. 222, p. 285.

In the code of Lombardy it is provided: "Article 16. Whoever desires to introduce water into a public canal with the view of taking it out again at a lower point shall submit his claim to the director-general. It will be decided so as to cause no injury to the rights of other parties. Objections to such arrangement will be disposed of by the public administration."

[11] *Infra*, sec. 640.

§§ *41–50. (Blank numbers.)*

CHAPTER 4.

THE LAW CONFINED TO NATURAL RESOURCES.

§ 51. The natural usufruct alone of practical importance.
§ 52. Natural and artificial watercourses distinguished.
§ 53. The law of natural watercourses does not apply to water in an artificial watercourse.
§ 54. Importance of the right of access to the natural stream.
§ 55. Artificial flow claimants may have priorities between themselves.
§ 56. But artificial flow claimants have no original rights against the creator of the flow, the owner of the natural resource.
§ 57. Same.
§ 58. Same.
§ 59. Some qualifications.
§ 60. Qualification by grant, condemnation, or dedication.
§ 61. Qualification by drainage from a foreign source into a natural stream.
§ 62. Qualification by relation back to a natural stream.
§ 63. "First principles" deduced.
§§ 64–65. (Blank numbers.)

(3d ed.)

§ 51. The Natural Usufruct Alone of Practical Importance.—The value of the foregoing lies in showing that the *corpus* of water in the stream itself, as a substance, is not the subject of property (is in the "negative community" or "belongs to the public"), and that one may have only the strictly usufructuary right to the flow and use of the stream. Were the principles to be, to any great extent, so applied as to regard cases as based upon property rights in running water as a substance, it would be a misapplication, for their true force lies in showing the opposite—that controversies must, as a rule, be decided with regard to the flow and use of the natural water supply, and not its *corpus;* for the usufruct of the natural resource (and not the water itself) is alone of practical importance.

This is having much influence in the West under the law of appropriation, which forcefully denies that a water user has any ownership in the water *of the stream* from which he diverts (that "belongs to the public"), but only a right to continuance of supply from the natural resource during the beneficial use. Under the common law of riparian rights the principle is as true—a riparian owner also has no ownership of the water of the stream to which

his land is riparian. He also has only a right of continuance of supply, though this right of a riparian owner differs from the law of appropriation, in that it is not confined to periods of use, but is perpetually reserved to his land,—a perpetual right to have the supply from the natural resource continued for future possible use whether now used or not.

(3d ed.)

§ 52. Natural and Artificial Watercourses Distinguished.—The law of natural watercourses or of natural bodies of water as natural resources does not apply to water in an artificial watercourse, or other occurrence or situation not of natural creation. An artificial flow, depending for its continuance upon the act of man, differs in its essentials from a flow created by nature; the one is voluntary, and the other is an element of geological structure, a natural part of the earth;[1] the one requires duties to be placed upon the upper owner if he must continue it, the other requires no act of man to continue it. Moreover, in the natural resource whose flow is due to nature, the water is *"publici juris"* (or "belongs to the public," or is in the "negative community") and open to acquisition of original private rights of continual flow and use, or "water-rights." But the water in a ditch, reservoir, pipe, or other artificial impound or structure that reduces it to possession is not *publici juris;* it has already somewhat of a private right attached to its *corpus* which withholds it from natural servitude of flow and use of others than its actual possessor,—the natural order of the water as a thing wandering at large has ceased.[2]

Creswell, J., in Sampson v. Hodinott,[3] referring to the distinction between an artificial drain and a natural stream, says that "all authority, from the Digest downward, shows that there is distinction."[4] That as a general proposition rights are the same in natural and artificial watercourses "cannot possibly be sus-

[1] "A watercourse is a thing natural." Shury v. Piggott, 3 Bulst. 339; Poph. 169, 81 Eng. Reprint, 280.

[2] As said in one case, Charnock v. Higuerra, 111 Cal. 473, 481, 52 Am. St. Rep. 195, 44 Pac. 171, 32 L. R. A. 190, "Every diversion of water from a stream is artificial—a disturbance of the natural order of things. A dam or a ditch is as much an artificial mechanism as a pump; it may, indeed, be much more so; and the one alters the natural conditions in the same sense that the other does."

[3] 1 Com. B., N. S., 590.

[4] See, also, 14 Ency. of Laws of England, 604; 5 Am. & Eng. Ency. of Law, 112.

tained."[5] As is said by another authority: "The rights and liabilities of parties in respect of artificial streams and watercourses are entirely distinct from the rights and liabilities of riparian proprietors [or appropriators] in respect of natural streams and watercourses. The water in an artificial stream is the property of the party by whom it is created or caused to flow."[6]

(3d ed.)

§ 53. The Law of Natural Watercourses Does not Apply to Water in an Artificial Watercourse.—In the natural resource (the flow and use of a natural stream) a real property right, an incorporeal hereditament, is acquired by original ownership. In an artificial flow, ownership can, as a general principle, be acquired only by grant, condemnation or prescription from the owner of the natural resource supplying the artificial flow; it is a derivative right and not an original one. Nature has created a resource in the flow and supply of the natural stream; but away from streams water carried to other localities can be subject only to such rights of continuance as are derived through the man who carries it and causes it to flow there.

It is simply the result of natural conditions. Only owners of rights in the natural streams have "natural rights" or rights in a natural water body; all others derive a right only through some stream-owner, a derivative and not a natural right. This gives great value to the owners of natural water resources, and is a disadvantage to water users owning no rights in the stream itself and building up improvements at a distance from streams in reliance upon water coming from works or land of stream appropriators or riparian owners; but that is simply an inevitable disadvantage inherent in natural situation away from streams, or where streams have been all taken up by prior rights where the law permits their appropriation.[7]

[5] Wood v. Waud, 3 Ex. 748. Accord, Goddard on Easements, 7th ed., 1910, p. 87.

[6] Kerr on Injunctions, 4th ed., p. 190.

"Artificial channels are in a different legal position from natural watercourses." Ferguson on Water in Scotland, p. 277.

[7] Note that the common law forbids the carrying away of stream water permanently from its channel, and requires it to be returned to the stream so that natural rights may exist therein in favor of others. (*Infra*, sec. 709, "Natural Right.") The law of prior appropriation, however, does not require such return in favor of any party subsequent to a permanent diversion; it holds the natural resource open to exclusive ownership.

(3d ed.)

§ 54. Importance of the Right of Access to the Natural Stream. Since only the natural resource is, thus, the subject of original natural usufructuary rights (as distinguished from contract or derivative rights), a right of access to the natural resource (the natural stream) is indispensable to the acquisition of rights or usufructs therein. It is the result of natural conditions which surround streams entirely by land vested in ownership. Since such inclosing lands alone have or can give a right of access to the stream, their ownership must be a factor which will inevitably shape any system of water law.

The controlling force of the ownership of the inclosing lands controlling access to the natural resource is the accepted basis of the common law of riparian rights and of the new law of percolating water. Thus, declaring emphatically that the water itself is not the subject of ownership (or is "publici juris"), the law of riparian rights arises directly from the exclusion of non-riparian owners because they have no access to the natural resource (the natural stream) without trespassing upon the riparian lands; it then gives equal rights (as opposed to special rights by priority of use) to that class of the public owning the lands having such access, that is, the riparian or inclosing lands.[8] Likewise the new law of percolating water declares that the ground-water is not itself the subject of private ownership, just as of the water of streams, and declares that it gives equal rights to that class of the public owning the lands having access to the natural underground resource—that is, all adjacent or overlying lands.[9]

And no less noteworthy is the way the right of access has affected the law of prior appropriation. The early policy of the United States of free rights in the public lands (approved by the act of 1866) afforded free access to the streams to all, and the law of prior appropriation flourished; to-day, with the vast areas of reserved or withdrawn lands, the United States has largely withdrawn the right of access to the streams, with the avowed purpose of preventing their appropriation.[10] So, likewise, the rapid pace of settlement, under which bordering lands are passing into private hands, restricts the right of access in the same way, and impedes appropriation of the water. It was, indeed, the passing of riparian

[8] *Infra*, secs. 692 et seq., 765 et seq.

[9] *Infra*, sec. 1102 et seq.

[10] *Infra*, sec. 204 et seq.

lands into private hands which directly brought back the laws of riparian rights in California (confining appropriation to the public lands); and which, in Colorado, to avoid that result, caused the early ruling for free access and rights of way over private lands, since found necessary on constitutional grounds to discard.[11] So the situation is rapidly arriving where, even though the State law recognizes no water law but prior appropriation, yet appropriators cannot get at the water either because private land incloses the stream and must not be trespassed upon, or because the inclosing land is public land and the United States refuses the right to build ditches or reservoirs (that is, the right of access) except under the newly developing system of Federal Right of Way legislation.

The general body of the law of watercourses, under whatever system, is applicable only to natural streams in their natural situation; and a right of access to this natural resource through the bordering lands is essential to the exercise of rights therein, a determinative factor in any system of water law.

(3d ed.)

§ 55. Artificial Flow Claimants may have Priorities Between Themselves.—Between two parties, both without right in any natural stream (such as rival claimants to waste water coming from a ditch of a stream-owner to whom both are strangers), priority of possession governs by the rule of the common law that possession is sufficient title against a later mere possession; between two parties equally without right the one first in possession has the better standing.[12] It is frequently so provided by statute.[13]

It should be noticed, however, that the Colorado statute, which has been the model for the others, recognizes a paramount right in the owner of the natural resource from which the waste or seepage

11 *Infra*, secs. 224, 225.

12 See Wood v. Waud, 3 Ex. 748.

For example, water from a tunnel belongs to the appropriators receiving it as against all who are not privy to those who drove the tunnel. Farmers' Union etc. Co. v. Rio Grande etc. Co., 37 Colo. 512, 86 Pac. 1042.

See, also, cases in the following note.

13 *Colorado.*—"All ditches now constructed or hereafter to be constructed for the purpose of utilizing the waste, seepage or spring waters of the State, shall be governed by the same laws relating to priority of right as those ditches constructed for the purpose of utilizing the water of running streams; *Provided, that the person upon whose land the seepage or spring waters first arise, shall have the prior right to such waters if capable of being used upon his lands.*" Colo. Rev. Stats. 1908, sec. 3177; M. A. S. 2269; Laws 1889, p. 215, 1. See Rev. Stats. 1908, sec. 4231, as to waste water hoisted from a mine. (See La Jara etc. Co. v. Hansen, 35 Colo. 105, 83

comes. The rival waste claimants merely have priorities between themselves. Claims of this kind between rivals both subject to a paramount title in a third person frequently occur in the law of waters;[14] but they are not freehold rights, being at the mercy of the paramount owner,—in this case, the owner of the natural supply.

(3d ed.)

§ 56. But Artificial Flow Claimants have No Original Rights Against the Creator of the Flow, the Owner of the Natural Resource.—While artificial flow claimants may thus have priorities between themselves, they can have no right *of continuance* against the owner of the natural supply (the appropriator on the natural stream, or in California, the riparian owner), except by grant, condemnation or dedication (or by the rule of compulsory service where the water is distributed to public use).[14a]

The chief instance of artificial flows in practice is where some stream-owner has carried water to a distance and, after use, discharges it below his land or works. Where this discharge is into a stream, the matter is more particularly considered in a later section; but the simplest case is where there is no stream at the point of discharge, and the waste simply makes its way off over a dry gulch or other theretofore waterless configuration of the land. Seeing the water come down, other parties arrive, build

Pac. 644. See, also, Ripley v. Park etc. Co., 40 Colo. 129, 90 Pac. 75.)

Idaho.—Section 3246, Rev. Codes, is copied from the Colorado statute, *supra*. The act embodying this section was passed in 1899. See Laws 1899, p. 380, sec. 23. See concurring opinion of Sullivan, C. J., in Gerber v. Nampa Irr. Dist., 16 Idaho, 1, 100 Pac. 80; Saunders v. Robison, 14 Idaho, 770, 95 Pac. 1057.

Nebraska.—(Substantially a copy of the Colorado act.) Comp. Stats. 1903, sec. 6452; Cobbey's Ann. Stats. 6798; Laws 1895, c. 69, p. 260, sec. 44.

New Mexico.—Laws 1907, p. 71, sec. 53. See Vanderwork v. Hewes (N. M.), 110 Pac. 567.

North Dakota.—Stats. 1905, c. 34, sec. 49; Rev. Codes (1905), sec. 7604 et seq.

Oklahoma.—Laws 1905, p. 224, sec. 45.

Oregon.—See Brosnan v. Harris, 39 Or. 148, 87 Am. St. Rep. 649, 65 Pac. 867, 54 L. R. A. 628; Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

South Dakota.—Laws 1905, p. 201, sec. 56. See Laws 1907, c. 180, sec. 57, requiring payment to the owner of works from which seepage comes, before right thereto is acquired.

Washington.—Sec. 5829, Pierce's Code of 1905. See Dickey v. Maddux, 48 Wash. 411, 93 Pac. 1090; Nielson v. Sponer, 46 Wash. 14, 123 Am. St. Rep. 910, 89 Pac. 155. This is copied from the Colorado statute, *supra*.

Some of these, such as the New Mexico and South Dakota statutes, recognize, between seepage claimants, priority in him who first obtains permit from the State Engineer.

[14] *Infra*, secs. 246, 627.

[14a] *Infra*, sec. 1248 et seq.

ditches below, receive the water and put it to use. Yet unless they have a contract with the stream-owner, they must generally rely upon continued receipt from him of such water at their peril. In such case the creator of this artificial flow may cease to allow it to escape. So long as he permits it to go down, the lower takers have a right to all that comes; so much he has abandoned, and cannot recapture; with its use he has no concern.[15] But it is only the specific water run waste that is abandoned, not any of the incoming water; the owner's water-right in the flow and use of the natural stream remains unaffected and unlimited by anything that happens to the waste away from any stream. Whenever he will he may begin to retain it and prevent its escaping in the future, or may change his use so that it escapes in another place (the law limiting changes, elsewhere considered, applies only to natural streams); [16] and generally may exercise dominion over its continuance even though it be to the detriment of those to whom it has come while allowed to escape.[17]

Some simple illustrations will show that this must obviously be so. May not the original appropriator from the stream, the owner on the natural resource, abandon his ditch when it gets old, the abandonment resulting in that it no longer carries waste to the waste claimants—or, if it breaks, must he keep it in repair for the benefit of the waste users? Would the flow of water from the eaves of a house give a right to the neighbors to insist that the house should not be pulled down or altered, so as to diminish the quantity of water flowing from the roof? Would the fact that my pump has for years dripped water onto a neighbor's ground give him a right to say that my pump must go on leaking?

(3d ed.)

§ 57. **Same.**—As the water in a ditch is private property, the landowner through whose land the ditch runs, or into which a ditch discharges, can claim no riparian rights therein against the ditch-owner, for riparian rights exist only in natural streams, whose waters are *publici juris*.[18] A nonriparian owner receiving the

15 *Supra*, sec. 37.

16 *Infra*, secs. 496, 500.

17 The mere discharge of water by an upper proprietor upon the land of a lower may easily establish a right on the part of the upper proprietor to go on discharging, because so long as the discharge continues there is submission on the part of the lower proprietor to proceedings which indicate a claim of right on the part of the proprietor above, but it is difficult for the lower proprietor to establish a right to have the flow continued.

18 Davis v. Martin (1910), 157 Cal. 657, 108 Pac. 867; Creighton v.

waste from the ditch of a riparian owner does not thereby acquire any right in the stream from which the water originally comes, nor any right (aside from grant) to have the riparian owner continue the supply.[19] Nor is it subject to the acquisition (against the creator of the flow) of a continuous right of flow and use by appropriation under the law of prior appropriation, for the law of appropriation, properly speaking, as a law of freehold rights, applies likewise only to the flow of a natural stream.[20]

In the absence of contract, the natural water-right owner may cease the abandonment of waste from a ditch, and so use the water that none of it thereafter runs waste, or so that it runs off in a new place where people below no longer can get it.[21] Long receipt by them of the water of itself gives no permanent right to have the discharge continued, whether by appropriation, prescription or estoppel, even though the lower claimants built expensive ditches or flumes to catch the waste.[22] The claim

Kaweah Co., 67 Cal. 221, 7 Pac. 658; Green v. Carotta, 72 Cal. 267, 13 Pac. 685; Arkwright v. Gell, 5 Mees. & W. 225, 2 H. & H. 17; Ranney v. St. Louis Co., 137 Mo. App. 537, 119 S. W. 484. Compare the French law as given in "Droit Civile Francais," by Aubrey & Rau, 4th ed., vol. III, p. 48. "Proprietors nonriparian to the natural flow of the water are not allowed, as riparian to an artificial canal leading from the stream, to demand that the canal owner transmit to them the water thus derived." ("Les propriétaires non-riverains d'un cours d'eau naturel ne sont pas admis, comme riverains d'un canal artificiel dérivé de ce cours d'eau, à demander que le propriétaire du canal leur transmette les eaux ainsi derivées.")

[19] Davis v. Martin, 157 Cal. 657, 108 Pac. 866. In this case the court said, per Mr. Justice Shaw: "The Martin ranch abutted upon the stream and the riparian rights attaching to said lands by reason of this contiguity were paramount to the rights of any appropriator. Being the owners of the land bordering its banks, they could control its flow and prevent others from diverting it at any point on their lands. There was no evidence or finding that the plaintiffs ever obtained by purchase or grant from the owners of the Martin ranch any right whatever either to maintain the ditch over that ranch, or to use the water of the stream. . . . . The only part thereof which the plaintiffs succeeded in obtaining for use on their land was such waste waters as the owners of the Martin ranch allowed to pass through the ditch beyond their boundaries."

[20] Cases just cited. Helm, C. J., in Farmers' etc. Co. v. Southworth, 13 Colo. 111, 21 Pac. 1029, 4 L. R. A. 767, says: "The constitution recognizes priorities only among those taking water from natural streams." (See, also, Dickey v. Maddux, 48 Wash. 411, 93 Pac. 1090.) Other authorities are hereinafter cited in dealing with specific examples in the following sections.

[21] Davis v. Martin, 157 Cal. 657, 108 Pac. 866; Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299 (commented on in Katz v. Walkinshaw, 141 Cal. 116, at 129, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236); Correa v. Frietas, 42 Cal. 339, at 343; 2 Morr. Min. Rep. 336.

[22] The following are cited only as examples (see, also, cases cited *infra*, sec. 593, "estoppel"):

Dougherty v. Creary, 30 Cal. 290, 89 Am. Dec. 116, 1 Morr. Min. Rep. 35; Stone v. Bumpus, 40 Cal. 428, 4 Morr. Min. Rep. 271; Hanson v.

to a continuance of such lower use by estoppel is frequently made, on the ground that the ditch-owner allowing the discharge down the gulch knew of the expectation of the person receiving the discharge, and of the expense incurred in putting it to use. But in a leading case[23] the court says on this point: "We have been cited to no authority, and know of none, that holds that the bare fact that the ditch was constructed with the knowledge of the plaintiffs and their grantors, and without objection on their part, though at heavy cost, is sufficient to operate an estoppel. There must be some degree of turpitude in the conduct of a party before a court of equity will estop him from the assertion of his title—the effect of the estoppel being to forfeit his property, and transfer its enjoyment to another."[24] Estoppels may arise from proper facts, but not from merely receiving water that another discharges.[25]

Lower user based purely upon discharged waste from a ditch or tunnel, etc., gives no permanent rights, and to this effect some quotations are here given, including cases where the waste found its way to the lower claimants by percolation.

"The plaintiffs could acquire no other than a mere privilege or right to the use of the waste water, or, at most, but a secondary and subordinate right to that of the first appropriators, and only such as was liable to be determined by their action at any time, unless the water had been turned back into the original channel. . . . ."[1]

McCue, 42 Cal. 303, 10 Am. Rep. 299; Correa v. Frietas, 42 Cal. 339, 2 Morr. Min. Rep. 336; Stockman v. Riverside etc. Co., 64 Cal. 57, at 59, 28 Pac. 116; Anaheim etc. Co. v. Semi-Tropic etc. Co., 64 Cal. 185, 30 Pac. 623; Lux v. Haggin, 69 Cal. 255, at 266, 10 Pac. 674 (disapproving Parke v. Kilham, 8 Cal. 77, 68 Am. Dec. 310, 4 Morr. Min. Rep. 522, on this point); Lakeside Ditch Co. v. Crane, 80 Cal. 181, 22 Pac. 76; Hargrave v. Cook, 108 Cal. 72, 41 Pac. 18, 30 L. R. A. 390; Davis v. Martin, 157 Cal. 657, 108 Pac. 866; Fairplay etc. Co. v. Weston, 29 Colo. 125, 67 Pac. 160, 21 Morr. Min. Rep. 725; Burkhart v. Meiburg, 37 Colo. 187, 119 Am. St. Rep. 279, 86 Pac. 99, 6 L. R. A., N. S., 1104; Smith etc. Co. v. Colorado etc. Co., 34 Colo. 485, 82 Pac. 940, 3 L. R. A., N. S., 1148; Cardelli v. Comstock Co., 26 Nev. 284, 66 Pac. 950, 21 Morr. Min. Rep. 699; Wimer v. Simmons, 27 Or. 1, 50 Am. St. Rep. 685, 39 Pac. 6; Crescent etc. Co. v. Silver King etc. Co., 17 Utah, 444, 70 Am. St. Rep. 810, 54 Pac. 244. See Yale on Mining Claims and Water Rights, 201; Arkwright v. Gell, 5 Mees. & W. 226, 2 H. & H. 17; Mason v. Shrewsbury etc. Ry. Co. [1871], L. R. 6 Q. B. 578; Greatrex v. Hayward [1853], 8 Ex. 291, 22 N. J. Ex. 137.

[23] Stockman v. Riverside etc. Co., 64 Cal. 57, at 59, 28 Pac. 116.

[24] Citing Boggs v. Merced Min. Co., 14 Cal. 368, 10 Morr. Min. Rep. 334. This is in accord with the leading English case of Arkwright v. Gell, 5 Mees. & W. 226, 2 H. & H. 17.

[25] *Infra*, secs. 556, 593, 594.

[1] Woolman v. Garringer, 1 Mont. 544, 1 Morr. Min. Rep. 675.

In Hanson v. McCue:[2] "This ditch, in its course over Hanson's land, leaked water in such quantities that it collected into a stream, which Hanson used for irrigation. This was the only foundation for the right which Hanson had or claimed to the water. The court properly held that he had no right to the waste water, and that McCue was not bound to continue to maintain the artificial stream for Hanson's benefit, but could, by any means he chose, change the use of the spring and the course of the ditch." In a recent California case it was ruled that use for many years of waste coming from a ditch does not of itself give any right of action against the ditch-owner when he thereafter, for his own use, cuts off the waste.[3]

Waste water soaking from the land of another after irrigation need not be continued, and may be intercepted and taken by such original irrigator, and conducted elsewhere, though parties theretofore using the waste are deprived thereof. In one case[4] plaintiff had dug a ditch along the boundary of her land, thereby collecting the seepage from the irrigation of her neighbor above. The latter dug a parallel ditch on his own land, collecting the seepage for himself and using it elsewhere. The court says: "The plaintiff certainly has acquired no vested right to compel the defendants to apply the waters, the right to the use of which they own, in such a way as that some of it will not soak into their own ground, but escape and pass from the surface onto her lands. The defendants have the right to change the place and manner of use, or reduce the quantity applied to their lands, so that no water whatever will escape and reach the lands of plaintiff. . . . . The plaintiff does not assert the right to the use of this water by virtue of an appropriation made from the same stream, or any of its tributaries, which are the source of defendants' supply. She cannot, therefore, like a prior or junior appropriator of water from the same stream, insist on the economical use of the defendants of their appropriation. . . . . By mere acquiescence on their part to plaintiff's use after waste water has passed from their lands they have not estopped themselves thereafter to intercept and make beneficial use of it before it escapes from their control."[5]

[2] As commented on by Shaw, J., in Katz v. Walkinshaw, 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236.

[3] Davis v. Martin, 157 Cal. 657, 108 Pac. 866.

[4] Burkhart v. Meiberg, 37 Colo. 187, 119 Am. St. Rep. 279, 86 Pac. 98, 6 L. R. A., N. S., 1104.

[5] Where a canal company furnishes an applicant with waste water from a drain ditch, supplied wholly with

No action, therefore, will lie for an injury by the diversion of an artificial watercourse, where from the nature of the case it is obvious that the enjoyment of it depends upon temporary circumstances and is not of a permanent character.[6] This, if sanctioned, would present a case of the servient owner being allowed to compel the dominant one to continue a discharge of water and to prevent him from altering its course, and thus to invert their relative positions. No such right exists in the servient proprietor.[7]

The point of view is that the water issuing from the discharge must be considered as a *corpus,* so that no question of a continuous

water wasting from other lands, the user thereof cannot compel the canal company to maintain such waste water, even though a rental is charged therefor when used; for the rights of the user depend wholly upon the water wasted into the drain ditch. Gerber v. Nampa Irr. Dist., 16 Idaho, 1, 100 Pac. 80.

[6] Wood v. Waud, 3 Ex. 747; Gale on Easements, 181; Arkwright v. Gell, *supra;* Duncan v. Bancroft, 110 Mass. 267; Waffle v. New York Cent. R. R. Co., 53 N. Y. 11, 13 Am. Rep. 467; 58 Barb. 413; 2 Washburn on Real Property, 72.

[7] A recent writer (Mr. Mills, of Denver, Colorado, in Mills' Irrigation Manual, p. 53) says: "An appropriator of waste water acquires a right only to whatever water flows from the ditch or canal through which the first use is made, after the wants and necessities of the appropriators under such ditch or canal have been supplied, and such appropriation does not carry a right to any specific quantity of water, nor the right to interfere with the water flowing in such ditch or canal, and the appropriators under such ditch or canal are under no obligation to permit any specific quantity of water to be discharged as waste for his benefit."

An English case says: "If the stream flows at its source by the operation of nature—that is, if it is a natural stream—the rights and liabilities of the party owning the land at its source are the same as those of the proprietors in the course below. If the stream flows at its source by the operation of man—that is, if it is an artificial stream—the owner of the land at its source or the commencement of the flow is not subject to any rights or liabilities toward any other person, in respect of the water of that stream. The owner of such land may make himself liable to duties in respect of such water by grant or contract; but the party claiming a right to compel performance of those duties must give evidence of such right beyond the mere suffering by him of the servitude of receiving such water." Gaved v. Martyn, 19 Com. B., N. S., 759, 760.

"If such a stream be of a temporary and precarious character, owing its existence solely to operations carried on for the beneficial use of the alleged servient tenement, it will be difficult, if not impossible, for an inferior heritor to qualify a right to its continuance." Ferguson on Water in Scotland, pp. 277, 278. A civil-law writer finds the rule to be the same under that system, saying: "I have been able to allow it to run out of my property, because it was useless to me. . . . . I have been able to permit that you should make on your field works to collect it, because I had no right to prevent them, since each one can do on his property that which appears most convenient to him, but not on that account have you acquired the right to the water which has not yet flowed out of my field, but only to that which may be already outside of my possession; and thus it is, that I can retain it, convert it to new uses, and even dry up the spring, which, perhaps, may be prejudicial to me." Eschriche, "Aguas," sec. 4, translated from the Spanish. See, also, the French writer quoted at the beginning of this section.

usufructuary right in a natural resource can be involved. So much of the *corpus* as is discharged is "returned to the public," and may be taken by the man to whom it comes, but receiving it gives him no right in any of the substance that has not yet come to him. He deals with the *corpus* of water and not with its natural flow. The law of appropriation as a system of permanent freehold rights, and the law limiting change[8] properly can apply only to rights in a natural watercourse. As was said in Colorado by Mr. Justice Helm: "The constitution recognizes priorities only among those taking water from a natural stream."[9]

Waste claimants at a distance from streams have no rights of continuance against the owner on the natural resource, or the creator of the waste flow. Should the statutes above mentioned[10] be thought to attempt to bind a stream-owner against his will to waste claimants disconnected with any stream, they would be taking from owners on the natural resource the control of their property, and would seem unconstitutional as depriving them of an essential element of their property right without due process of law.[11]

(3d ed.)

§ 58. **Same.**—While the foregoing was addressed more directly to water discharged as waste from a ditch or flume or similar structure, yet the authorities given also involve water escaping by seepage, and the principle is entirely the same. No question of a continuous water-right is involved (aside from prescription or contract, etc.) except where rights can be asserted directly or indirectly in a natural stream.

The discharge of drainage water through a tunnel stands on the same footing, with the additional strength that, while the discharge considered in the last section was not of water artificially collected (but, instead, originally existing in a natural body and diverted therefrom)—here the water is itself artificially collected, as well as artificially confined. The question arises in cases of water pumped from a mine and run off in a ditch. The leading case in which this situation is considered is the English case of Arkwright v. Gell,[12] in which the opinion was by Baron Parke, to whose opin-

8 *Infra*, sec. 496 et seq.

9 Farmers' etc. Co. v. Southworth, 13 Colo. 120, 21 Pac. 1028, 4 L. R. A. 767.

10 *Supra*, sec. 55.

11 See Dickey v. Maddox, 48 Wash. 411, 93 Pac. 1090; Nielson v. Sponer, 46 Wash. 14, 123 Am. St. Rep. 910, 89 Pac. 155.

12 5 Mees. & W. 226, 2 H. & H. 17.

ions the law owes much to the clear presentation of the distinction between the *corpus* of water and a usufructuary right. He says the stream coming from the mine is not governed by the law of natural watercourses, and proceeds:

"This was an artificial watercourse, and the sole object for which it was made was to get rid of a nuisance to the mines, and to enable their proprietors to get the ores which lay within the mineral field drained by it; and the flow of water through that channel was, from the very nature of the case, of a temporary character, having its continuance only whilst the convenience of the mine-owners required it, and in ordinary course it would most probably cease when the mineral ore above its level should have been exhausted." As to the lower claimant who received and put to use this water, "He would only have a right to use it, for any purpose to which it was applicable, so long as it continued there." Time would raise no presumption of a grant nor found any claim to a continuance of the discharge; for "the mine-owner could not bring any action against the person using the water," so as to make him stop using it; and consequently such use did not in any way concern or bind the mine-owner. "We therefore think that the plaintiffs never acquired any right to have the stream of water continued in its former channel."[12]

A modern illustration, entirely to the same effect, arose out of the waters flowing from the Sutro tunnel, below Virginia City, Nevada. Plaintiffs used waste water that was being pumped from the Comstock mines, and discharged in large volume through the Sutro tunnel, which had been built to drain those mines. This discharge, the court held, was an artificial stream, and not subject to appropriation by plaintiff so as to give any right against the tunnel company. The court put this case: "One further illustration: A, by artificial means, fills a tank or reservoir on his own land today, and permits the waters to flow down to B's land and irrigate B's land. Probably A's conduct gives to B the right to that water —that individual tank or reservoir full. But suppose A fills the same tank or reservoir to-morrow, but chooses to use this water—this tank or reservoir full—to irrigate his own land; what right has B to this last water? We think none, and it makes no material difference if such a state of things were kept up for a long num-

[12] Accord, Wood v. Waud, 3 Ex. 775. See, also, Ferguson on Law of Water in Scotland, p. 277 et seq.

ber of years. In such case, time would raise no presumption of grant, and A could at any time stop the production of such artificial and temporary stream; and he could also, at any time, if he continued the production of such stream, put the waters thereof to his own use."[14] In this case, counsel argued "That such waters are just as absolutely the property of the corporation defendant as if such water were manufactured each day from oxygen and hydrogen by the corporation defendant."

A distinction may, perhaps, be made between such tunnel water and an artesian well. The water from an artesian well, though artificially started, thereafter flows naturally. It has been held, that where an artesian well was drilled on an oil claim on public land, and both the well and claim were then abandoned, the flow from the well was a stream to which the law of appropriation applied thereafter.[15] Another case also distinguished between artesian wells flowing naturally and wells requiring pumping.[16]

(3d ed.)

§ 59. **Some Qualifications.**—It is possible that the owner of the natural supply may be prevented from *capriciously* cutting off an artificial supply of water which another has long enjoyed, when that is done without any fair object of his own to promote, or is done merely to injure the other; but that would be an innovation upon the general rule that the motive with which an act is done is immaterial. Such innovation has been made in natural percolating water cases, denying a right to cut off another's natural percolating supply except for the reasonable use of one's own land;[17] but it has not, as yet, entered into the authorities here.

But there is one clear qualification; and there are two others upon which the law is not, however, settled. The clear exception is where rights are acquired against the creator of the flow by grant, condemnation or dedication. The two others are possibly the cases where an artificial flow of water from a foreign source is allowed to enter and enrich a *natural* stream, and the cases in the

[14] Cardelli v. Comstock T. Co., 26 Nev. 284, 66 Pac. 950, 21 Morr. Min. Rep. 699. Accord as to mine tunnel waters, Crescent etc. Co. v. Silver King etc. Co., 17 Utah, 444, 70 Am. St. Rep. 810, 54 Pac. 244; Fairplay etc. Co. v. Weston, 29 Colo. 125, 67 Pac. 160, 21 Morr. Min. Rep. 725.

[15] De Wolfskill v. Smith, 5 Cal. App. 175, 89 Pac. 1001.

[16] Ex parte Elam, 6 Cal. App. 233, 91 Pac. 811.

[17] *Infra*, sec. 1119 et seq.

West where consumers from a distributing canal are held to be owners of the natural stream through the intermediate agency of the distributing system. These are considered in the following sections in the order named.

(Before doing so, mention may be made of an apparent qualification under the rule of compulsory service where water is received from a canal devoting it to public use.[17a] That, however, is a matter only collateral to the law of watercourses.)

(3d ed.)

§ 60. Qualification by Grant, Condemnation, or Dedication. That rights may be obtained, against the owner of the natural supply, by grant or condemnation, needs no exposition.

There is further an established principle that by lapse of time an artificial watercourse may come to be regarded as equivalent to a natural one. These cases do not depend exactly upon prescription, for, as above shown, prescription, properly speaking, cannot run in favor of lower parties upon a flow as against parties high up.[18] They rest rather upon what some of the cases call an ordinary dedication to a class of public which, in the course of time, has established itself upon the basis of the artificial condition. Where the creator of the artificial condition intended it to be *permanent,* and a community of landowners or water users has been allowed to adjust itself to the presence and existence of the artificial watercourse or other artificial condition, acting upon the supposition of its continuance, and this has proceeded for a long time beyond the prescriptive period, the new condition will be regarded as though it were a natural one, its artificial origin being then disregarded by the law as it has been by the community. The creator of the artificial watercourse will be held to have dedicated it to the use of the community that has by long time become adjusted to it.[19]

17a *Infra,* sec. 1280.

18 *Supra,* sec. 56 et seq.

19 Paige v. Rocky Ford etc. Co., 83 Cal. 84, at 93, 21 Pac. 1102, 23 Pac. 875; Matheson v. Ward, 24 Wash. 407, 85 Am. St. Rep. 955, 64 Pac. 520; Hollett v. Davis, 54 Wash. 326, 103 Pac. 423; Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728; Stimson v. Inhabitants of Brookline, 197 Mass. 568, 125 Am. St. Rep. 382, 83 N. E. 893, 16 L. R. A., N. S., 280, 14 Ann. Cas. 907; Shepardson v. Perkins, 58 N. H. 354; City of Reading v. Althouse, 93 Pa. 405; Woodbury v. Short, 17 Vt. 386, 44 Am. Dec. 344; Foetl v. Whitlock, 27 Vt. 265; Beeston v. Waite (1856), 5 El. & B. 986; Bailey v. Clark (1902), 1 Ch. 649; Nuttall v. Bracewell, L. R. 2 Ex. 1; Ivimey v. Stocker, L. R., 1 Ch. App. 396; Whitmore v.

Where the owner of the land has artificially changed the course of the stream so as to affect other riparian proprietors favorably, and acquiesced therein for a sufficient length of time, he cannot claim the right to change the flow of the water to the detriment of such other riparian owners; for such acquiescence on his part is binding like a public dedication.[20] After high-water channels are artificially opened, and after they, together with the cuts dug connecting them with the main stream, have been used by the parties opening them and by their successors in interest, and such use is acquiesced in and recognized as branches of the main creek by others on the main stream and its tributaries and branches for the period prescribed by the statute of limitations, they become as natural channels and owners of lands adjacent thereto are in law entitled to the same consideration and to the same rights as are those on the main and unquestioned channel.[21]

This rule rests upon a *quasi* dedication of the artificial condition *to the public,* and the essence of it is the growth of a *community* dependent upon the artificial condition. Where no such community-interest has been created, and the question is solely between a single individual and the original creator of the artificial watercourse or condition, the rules purely of prescription, as above considered, apply. The rule of dedication *to the public* just set forth is inapplicable.

(3d ed.)

§ 61. Qualification in Cases of Drainage from a Foreign Source into a Natural Stream.—The foregoing dealt with artificial discharges of water, such as waste water, that did not enter any natural stream. Where the discharge of waste from a ditch or other works is *into a stream* perhaps another question enters.

Where the discharge into a stream consists only of water originally taken *from that stream,* there can be no question but that the lower stream claimants have a right to its continuance, being simply a

Stanford (1909), 1 Ch. 427; Wood v. Waud, 3 Ex. 775; Gould on Waters, sec. 159; 14 Ency. of Laws of England, 404.

But see Ranney v. St. Louis etc. Co., 137 Mo. App. 537, 119 S. W. 484; Greatrex v. Hayward (1853), 8 Ex. 291, 22 L. J. Ex. 137.

[20] Paige v. Rocky Ford etc. Co., 83 Cal. 84, 93, 21 Pac. 1102, 23 Pac. 875 (citing Gould on Waters, sec. 159); Woodbury v. Short, 17 Vt. 386, 44 Am. Dec. 344; Shepardson v. Perkins, 58 N. H. 354; Ford v. Whitlock, 27 Vt. 265; Matheson v. Ward, 24 Wash. 407, 85 Am. St. Rep. 955, 64 Pac. 520; Hollett v. Davis (1909), 54 Wash. 326, 103 Pac. 423.

[21] Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

surplus of the natural flow, governed by the ordinary rules of riparian rights (under the common law) or of successive appropriators of natural streams under the law of appropriation.[22] Indeed, under the common law of riparian rights, such return to the stream is obligatory.[23]

But there is much difficulty where an artificial flow is discharged into a stream *from a foreign source*, such as the waste from a ditch heading in a different stream, or from a seepage tunnel, or from neighboring irrigation, which would not have formed part of the stream otherwise; a difficulty arising chiefly under the law of appropriation of streams, which system does not in all cases require the water to be returned to the same stream from which taken, and it is frequently discharged into an entirely different drainage. The man bringing it there without intent to recapture has abandoned all he allows to enter, and cannot reclaim it *from* the stream;[24] but have claimants on the receiving stream any permanent right to a continuance of the discharge into the stream? Is it a part of their natural source of supply giving vested rights in a supply from a foreign source, so as to limit the dominion of the ditch-owner over it, and so as to constitute a permanent right to have the discharge into the stream from the foreign source *kept up*? For example, if mine water has long drained into a stream and augmented it, must the mine-owner forever continue draining his mine that way, when it is clear, as above, that he would not have to continue it if he had not discharged it directly into the stream?[25]

There are holdings that the lower stream claimants have a right to the continuance of the artificial discharge into the stream from a foreign source, as a part of their usufructuary right in the stream itself.[1]

Nevertheless, it is said: "Water artificially added to a natural stream becomes a part of it, and can be afterward appropriated only to the same extent as the stream itself. [Referring to aban-

[22] *Infra*, sec. 302 et seq., successive appropriators.

[23] *Infra*, sec. 755.

[24] *Supra*, sec. 37.

[25] He certainly cannot *pollute* it. Humphreys T. Co. v. Frank, 46 Colo. 524, 105 Pac. 1093.

[1] Eddy v. Simpson, 3 Cal. 249, 58 Am. Dec. 408, 15 Morr. Min. Rep. 175; Wood v. Waud, 3 Ex. 779; Druley v. Adam (1882), 102 Ill. 177; Tourtellot v. Philps, 4 Gray (Mass.). 370, Shaw, C. J.; Washburn on Easements, star p. 274, sec. 33; Angell on Watercourses, 7th ed., secs. 93, 95, p. 99.

It should be recalled that the duty to continue the artificial discharge into the stream is established where lapse of time has made it amount in effect to a dedication of the artificial flow to the public (*supra*, sec. 60).

a. The running water of natural streams is, as a *corpus,* the property of no one (variously expressed as being in the "negative community," "common," "*publici juris,*" "the property of the public," or "the property of the State in trust for the people"), and is a wandering, changing thing without an owner, like the fish swimming in it or like wild animals, the air in the atmosphere, and the "negative community" in general.

b. The substantial property right recognized by the law is the usufruct of the stream—the right to the flow and use of the natural resource, or "water-right" in the natural supply, and this is real property, however obtained. A right of access to the natural resource is essential to the enjoyment of this usufruct.

c. Any specific portion of the water severed from the stream and reduced to possession (as in a barrel, tank, ditch, reservoir, or artificial waterworks or structures generally) is private property as a *corpus* while so held in possession; but the *usufruct* in the natural resource, and not the *corpus* of a specific portion of water, is of most importance; and when the portion that has been reduced to possession escapes or is abandoned, it re-enters the "negative community," and its former owner may not recapture it unless he discharged it from his possession with that intent.

And the following corollary:

Upon artificial resources or flows, or waste water, priority governs between rival claimants among themselves, but they are all, as respects continuance of supply, subordinate to the owner of the natural supply, with the following exceptions: (1) The owner of the natural resource may become bound to the waste claimants or artificial flow claimants by dedication (where a community has become dependent thereon), or by the rule of compulsory service where the supply is devoted to public use, or by grant or condemnation (but not by prescription or estoppel, without special facts and circumstances beyond receipt by the latter of the benefit of the waste or artificial flow); (2) Under the usual Western law of distribution of water for irrigation, consumers from ditches, canals, and similar works are (in addition to the public right to share in a public use or service) accorded rights of part ownership in the natural resources involved, by relation back to the natural stream through the intermediate agency of the distributing canal.

§§ *64–65. (Blank numbers.)*

PART II.

CALIFORNIA AND COLORADO DOCTRINES.

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§§ 100–107. (Blank numbers.)

A. ORIGIN OF THE DOCTRINE OF PRIOR APPROPRIATION IN THE CUSTOMS OF THE PIONEER MINERS.

(3d ed.)

§ 66. Acquisition of the Western Public Domain.—The law of prior appropriation of water originated among the miners of California in the earliest days of that State, whence it has been copied in all the Western States and Territories, viz.: Alaska, Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.

By 1846 the title of the United States was established to the country covering Oregon, Washington, Idaho, and portions of Montana and Wyoming.[1] On July 4, 1848, the Treaty of Guadalupe Hidalgo[2] with Mexico was proclaimed, ceding to the United States the region now covered by California, Nevada, Utah, and part of Arizona and New Mexico. In 1853 the Gadsden Purchase embraced part of Arizona and New Mexico.[3] Consequently, at the time this history opens, practically all the region west of the

1 "There has been some discussion as to the origin of our title to what was known as the Oregon country, comprising the States of Oregon, Washington and Idaho, and the portions of Montana and Wyoming west of the Rocky Mountains. The question was whether our title was derived from the Louisiana Purchase or directly by discovery and prior possession. As the result of a discussion by the General Land Office in 1898, the map of the United States now issued by that office states that the title was established in 1846. The exact basis of our claim has apparently never been authoritatively decided." Morris Bien, in 192 North American Review, 388, for September, 1910.

The General Land Office became a part of the Department of Interior March 3, 1849. *Ibid.*

2 9 Stats. at Large, 928.

3 Lindley on Mines, sec. 40.

Mississippi Valley was a vast, uninhabited, newly acquired Federal property.

(3d ed.)

§ 67. California Before the Arrival of Pioneers.—California had been, at the beginning of the century, a Spanish missionary territory. That part to which the pioneers came was known to the Mexicans as Alta or Upper California, and was regarded as only a set of colonies extending northward from the original settlements in Baja or Lower California, the desert peninsula, which is still Mexican territory.[4] The colonies consisted of here and there small settlements about the missions of Franciscan monks who had wandered northward from the original Jesuit and Dominican Missions of Baja California.

Under the Spanish rule that preceded the Mexican Revolution, these colonies were on the outskirts of civilization, needing but few laws, and little regard being paid to the strict letter of even those. With the revolution which severed Mexico from the Spanish Crown came disorder and disorganization. The Missions were broken up, the presidios neglected, and no new system was adopted and enforced in place of the one which had fallen into disuse. Land had never been, previously to the acquisition of the country by the Americans, of much value. The wealth of the colonists consisted principally in their cattle and horses, which were sold for a trifling sum. During the disorders which characterized the Mexican régime, land can be said to have had scarcely any value—at all events, not a value worth the trouble and expense of procuring a perfect title under the colonization laws of Mexico and Spain. No mail facilities were enjoyed—long journeys had to be made to the capital of the province, in the midst of civil disorders and revolution, in order to procure a perfect title. Men could not always, perhaps but seldom, be found, who were capable of making the necessary surveys. This condition of things led, in some cases without taking any steps to obtain a title, in others after having taken only the incipient proceedings, to the practice of taking possession, or at least of claiming large tracts of land which had not been surveyed, and the boundaries of which were undefined and even unknown. This system continued until the conquest of the

[4] See the volume in the American Commonwealth Series, upon "California," by Josiah Royce.

country—until the discovery of gold—until the Americans thronged into Northern California, a portion of the country which could be said previously to have contained scarcely any population except Indians.[5]

(3d ed.)

§ 68. **Mexican Law.**—The region before the conquest, was unsettled and a part of the Mexican public domain, just as, after the cession, it became part of the public domain of the United States. The foundation of the Mexican civil law was, as at common law, the law of riparian rights; but upon the public domain, where there were no riparian proprietors, the Mexican Government held, as it to this day holds, a large power of making grants and concessions. Little had been done under this power, however—the writer knows of no California water-rights traced back to any special private grant or concession of waters from the Mexican Government. There had been, in fact, no law in force to interfere with the California miners helping themselves to the waters they needed; for the region, as a whole, was uninhabited.

A minor feature of the public land system of Mexico has, however, in the case of the city of Los Angeles, come down to the present day. Under the Mexican law, agricultural settlements or "pueblos" located on public land had *ipso facto* a concession of the waters on the surrounding public lands, so far as necessary for the general supply of the settlement. This right in the pueblo was superior to that of any riparian proprietors; because any riparian proprietors, perforce, acquired private title to public riparian land subsequent to the establishment of the pueblo, since the pueblos

[5] Preface by Judge Bennett to the first volume of California Reports.

"Previous to the occupation of the part of the country known as the Gold Region, by the Americans, no attempts were made to settle there, as it was infested by wild Indians." Yale on Mining Claims and Water Rights, p. 23.

Concerning the ancient Mexican colonization in Baja California, the writer of this book, on a trip across the middle of the peninsula a few years ago, learned of evidences of irrigation on a very small scale in the vicinity of the Missions, but at the present day the peninsula is overrun with a heavy growth of cactus, and probably always has been. The stories of the old Mexican and Spanish irrigation here are much exaggerated.

Speaking of California at the time, it was said: "The country was very sparsely populated indeed, except by a few families at the various Missions." Memoirs of General W. T. Sherman, p. 28. Speaking of Baja California: "There were few or no people in Lower California, which is a miserable, wretched, dried-up peninsula." *Ibid*, p. 38.

colonized uninhabited regions.[6] The pueblo right prevailed because it was acquired on public land before there were any riparian proprietors. The city of Los Angeles has, after much litigation, been held to succeed to the rights of the pueblo, from which it grew, to a public water supply from the Los Angeles River which runs through it. The extent of the city's right of use under this claim is now settled to include the entire flow of the river, which may be used in parts of the city either within or outside the original pueblo limits.[7]

This, however, was distinctly public land law; for the basic Mexican law was the law of riparian rights as at common law.

[6] Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Vernon Irr. Co. v. Los Angeles, 106 Cal. 237, 39 Pac. 762; Los Angeles v. Los Angeles etc. Co., 152 Cal. 645, 93 Pac. 869, 1135. Affirmed in 217 U. S. 217, 30 Sup. Ct. 452, 54 L. Ed. 736.

[7] City of Los Angeles v. Hunter; Same v. Buffington (1909), 156 Cal. 603, 105 Pac. 755.

This pueblo right is set forth in Lux v. Haggin: "By analogy, and in conformity with the principles of that decision [Hart v. Burnett, 15 Cal. 530], we hold the pueblos had a species of property in the flowing waters within their limits, or a certain right or title in their use, in trust, to be distributed to the common lands, and the lands originally set apart to the settlers, or subsequently granted by the municipal authorities. . . . . Each pueblo was quasi a public corporation. By the scheme of the Mexican law it was treated as an entity or person, having a right as such, and, by reason of its title to the four leagues of land, to the use of the waters of the river on which it was situated, while, as a political body, it was vested with power, by ordinance, to provide for a distribution of the waters to those for whose benefit the right and power were conferred. . . . . From the foregoing it appears that the riparian proprietor could not appropriate water in such manner as should interfere with the common use or destiny which a pueblo on the stream should have given to the waters; and, *semble*, that the pueblos had a preference or prior right to consume the waters, even as against an upper riparian proprietor." Lux v. Haggin, 69 Cal. 255, 10 Pac. 674.

By the act of 1850, page 155, it was provided that the city of Los Angeles succeeded "to all the rights, claims and powers of the Pueblo de Los Angeles in regard to property."

The pueblo right of Los Angeles was considered in another case, Vernon Irr. Co. v. Los Angeles, 106 Cal. 237, 39 Pac. 762, where it was said that the Mexican law regarded the waters as public property and held for the benefit of the inhabitants and by the pueblo (where there was one) to induce settlement; also in Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585, to the same effect, and further holding that the pueblo right of Los Angeles grows with the growth of the city. Los Angeles v. Pomeroy went to supreme court of the United States under the name of Hooker v. Los Angeles, 188 U. S. 314, 23 Sup. Ct. Rep. 395, 63 L. R. A. 471, 47 L. Ed. 487, where the pueblo right was upheld against riparian proprietors, even those claiming land under Mexican grants. This was affirmed in Devine v. Los Angeles, 202 U. S. 313, 26 Sup. Ct. Rep. 652, 50 L. Ed. 1046, on the ground that the controversy involved no federal question. Likewise in Los Angeles etc. Co. v. Los Angeles, 217 U. S. 217, 30 Sup. Ct. Rep. 452, 54 L. Ed. 736 (1910), affirming S. C., 152 Cal. 645, 93 Pac. 869, holding further that the rights of pueblos against riparian owners is solely a question of local law. In Los Angeles v. Hunter, Same v.

We have considered this at length in later chapters.[8] We refer to it here as showing that, because substantially the whole region was public domain of Mexico, there was no occasion even under Mexican law to apply the law of riparian rights, there being no riparian proprietors; and, there being no private riparian lands to which to restrict the use of water, no such restriction prevailed. What law had been enforced at the time the pioneers settled in California centered chiefly about the pueblos, of which none existed in the mining regions; and hence if continued in force, would have put little impediment in the way of the miners helping themselves to the waters they needed. Whatever questions could have arisen under Mexican law were public land questions, just as they became when, in the following years, they arose under American sovereignty.[9]

(3d ed.)

§ 69. Discovery of Gold in California in January, 1848.—There have been gold excitements since, but none as great nor as permanent in importance as that following the discovery of gold in California. Only very old-timers, schoolboys then, are left to remember it. A military expedition had landed at Monterey, California, not many months before and was holding possession

Buffington (1909), 156 Cal. 603, 105 Pac. 755, the matter was said to be fully at rest, that the city's right extended to the whole flow of the Los Angeles River, for use either within or without the original pueblo limits, and included the underground waters of the San Fernando Valley, in which the river has its source as in a quasi subterranean lake.

The following is a list of the cases involving the Los Angeles pueblo right: Feliz v. Los Angeles, 58 Cal. 73; Elms v. Los Angeles, 58 Cal. 80; Lux v. Haggin, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674; Vernon Irr. Co. v. Los Angeles, 106 Cal. 237, 39 Pac. 762; Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585; Los Angeles v. Los Angeles etc. Co., 152 Cal. 645, 93 Pac. 869, affirmed in 217 U. S. 217, 30 Sup. Ct. Rep. 452, 54 L. Ed. 736; Hooker v. Los Angeles, 188 U. S. 314, 23 Sup. Ct. Rep. 395, 47 L. Ed. 487, 63 L. R. A. 471; Devine v. Los Angeles, 202 U. S. 313, 26 Sup. Ct. Rep. 652, 50 L. Ed. 1046; Los Angeles v. Hunter, Same v. Buffington (1909), 156 Cal. 603, 105 Pac. 755. See Shaw, J., concurring in Miller v. Bay Cities W. Co., 157 Cal. 256, 107 Pac. 115. See, also, Anaheim W. Co. v. Fuller, 150 Cal. 327, 88 Pac. 978, 11 L. R. A., N. S., 1062; Fellows v. Los Angeles, 151 Cal. 52, 90 Pac. 137.

[8] *Infra*, secs. 685 et seq., 1026.

[9] Regarding Mexican law, see Lux v. Haggin, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674; Boquillas etc. Co. v. Curtis, 11 Ariz. 128, 89 Pac. 504, S. C., 213 U. S. 339, 29 Sup. Ct. Rep. 493, 53 L. Ed. 822; Gutierres v. Albuquerque etc. Co., 188 U. S. 545, 23 Sup. Ct. Rep. 338, 47 L. Ed. 588; De Boca v. Pueblo, 10 N. M. 38, 60 Pac. 73. The quotations from these cases given in the preceding editions of this book are here omitted because of the fuller presentation of the civil law hereafter given. *Infra*, secs. 685 and 1025 et seq.

for the United States. An American, John A. Sutter, made his way inland and was building a sawmill on the American River where it joins the Sacramento, when his partner, James W. Marshall, found gold in the scourings of the mill-race. Sutter sent specimens to Monterey to get a pre-emption title to the land from the United States military commander, as the only representative of the American government in the new region. Title was denied from lack of authority. The specimens were shown to the commander's adjutant, W. T. Sherman, then a lieutenant, who confirmed the character of the mineral. The discovery was made in January, 1848, and almost contemporaneously the Mexican War came to a close and the region was ceded by Mexico to the United States by the treaty of Guadalupe Hidalgo, proclaimed July 4, 1848.[10]

(3d ed.)

§ 70. **Immigration upon the Discovery of Gold.**—General Sherman says in his writings that he thought little of it at the time, but when many years had passed he wrote, "That gold was the first discovered in the Sierra Nevadas, which soon revolutionized the whole country and actually moved the whole civilized world."

As the spring and summer of 1848 advanced, reports came faster and faster from Sutter's sawmill of fabulous discoveries, and spread throughout the land. Everybody was talking of gold, until it assumed the character of a fever. Soldiers began to desert; citizens were fitting out trains of wagons and pack-mules to go to the mines where men earned fifty, five hundred, and thousands of dollars per day; and for a time it seemed as though somebody would reach solid gold. Some of this gold began to come to Yerba Buena in trade, and to disturb the value of merchandise, particularly of mules, horses, tin pans, and articles used in mining. Before another year had passed, the stream of gold-seekers attracted by the discovery filled the mountains with a hundred thousand people, and still increased. Crowded steamers began to round the Horn,[11] and later brought people who crossed the Isthmus of Panama. Emigrant trains of families who could not pay steamer passage crossed the plains in wagons, braving starva-

[10] 9 Stats. at Large, 922.

[11] The first arrived February 28, 1849.

tion, Indians, and the elements. The rush to Cripple Creek, Klondike, Tonopah and Goldfield all together did not approach it.

There were, during the first year, no government, no law, nor any private landowners. The region was a vacant wilderness. The American military officers on February 12, 1848, declared the Mexican law abrogated; but otherwise the small military force was inadequate and inactive. Colonel Mason, in command, had simply said, in general conversation, "This is public land and the gold is the property of the United States; all of you here are trespassers, but as the Government is benefited by your getting out the gold, I do not intend to interfere."

(3d ed.)

§ 71. **The Customs of the Pioneer Miners.**—The miners accordingly, from lack of other means of keeping order, held mass meetings in each locality and adopted district organizations by which they agreed to be governed. The regulations were numerous, as each mining district had its own laws, but frequently one set of laws was adopted for the whole county.[12] The essentials of these regulations were everywhere similar. Mass meetings were held, officers appointed, including sheriffs and recorders, and names adopted, "sensible, poetical, and ridiculous, the last predominating." Localities had such names as Henry's Diggings, Slag Gulch, Indian Diggings, Fiddle Town and Whisky Hill, the last supposed to be at or near the place pictured by Bret Harte in "The Luck of Roaring Camp"; yet as a whole, the population was of young men of good character, just entering the world to seek fortune.

The rules covered a wide field of law, but were devoted specially to property rights. Their fundamental principle held the natural resources free to all, the first possessor being protected; the rule "first come first served" was applied by common acceptance. The right to mine, first of all in importance, was protected in the first possessor of the mining ground, and that has grown into the system of mining law which we have to-day. All

12 There were about five hundred districts in California about 1860, two hundred in Nevada, one hundred each in Arizona, Idaho and Oregon, following in the steps of California.

rights were declared upon the basis of priority of discovery, location and appropriation.[13]

These customs, it should be repeated, grew up among the miners upon the public domain, and were not rules that the lawyers originated among themselves. Lawyers in large numbers, where the camps would admit them, came, as they still come, to new mining camps, and some of the most prominent names in the history of the State are of lawyers who started practice in the pioneer mining camps. But the rough-and-ready spirit of mining camps carries them along with it. The lack of facilities for reference and study forces them to depend on their own argument adapted to their surroundings more than upon precedent.

(3d ed.)

§ 72. The Customs Approved by the Legislature.—Free mining, free soil and free water, under self-government, thus sprang up over night, in which Congress had no part, although the region was now American soil, and Federal property. "I apprehended, if these territories were left without a government for another year, and especially California, they might be lost to the Union," said President Polk in December, 1848. He added that "in the course of the next year a large population would be attracted to California by its mineral wealth and other advantages; that among the emigrants would be men of enterprise and adventure, men of talents and capital; and that finding themselves without a government or the protection of law, they would probably organize an independent government, calling it California or Pacific Republic, and might endeavor to induce Oregon to join them."[14]

The situation was met by the hurried admission of the State into the Union. Under the lead of the military officers, a loyal State organization was effected and California was admitted in September, 1850, without having had preliminary status or governmental organization as a territory. The Act of Admission contained the usual clause that the State shall never interfere with the primary disposal of the public domain, but the new State lost no time in giving its full approval to this universal occupa-

[13] Concerning the customs of miners and origin of the law of appropriation of water, see an interesting article in 1 Michigan Law Review, 91. See, also, Yale on Mining and Water Rights, cc. VII, VIII; Lindley on Mines, sec. 40 et seq.

[14] Diary of James K. Polk, published by A. C. McClurg & Co., Chicago.

tion of the public lands. In 1851, at the instance of Stephen Field, then a young member from Yuba County (and later Chief Justice of California and Justice of the United States supreme court), the first California legislature passed the following statute:[15] "In actions respecting mining claims, proof shall be admitted of the customs, usages or regulations established and in force at the bar, or diggings embracing such claim; and such customs, usages or regulations, when not in conflict with the constitution and laws of this State, shall govern the decision of the action."[16] In this way, by customs established by themselves, and with the sanction of the State legislature when organized, the pioneers appropriated to themselves the mines and forests and waters and other things of the region.

(3d ed.)

§ 73. **Water Customs as Part of the Mining Customs.**—For, as the use of large quantities of water became (after the advent, in the second or third year, of "sluicing" and similar methods) essential to mining operations, it became one of the mining customs or regulations that the right to a definite quantity of water, and to divert it from streams or lakes, could be acquired by prior appropriation. Historically, the law of appropriation of water is merely a branch of mining law. It was only an extension of the same rule as that by which possession of mining claims was recognized.[17]

[15] Civil Practice Act of April 29, 1851, sec. 621, now sec. 748 of the Code of Civil Procedure (with slight verbal changes).

[16] This statute was early copied in almost all the other Western States; e. g., *Idaho:* Riborado v. Quang Pang etc. Co., 2 Idaho, 136 (144), 6 Pac. 125; *Nevada:* Stats. 1861, p. 21, sec. 77; Mallett v. Uncle Sam Min. Co., 1 Nev. 188, 90 Am. Dec. 484, 1 Morr. Min. Rep. 17. *Utah:* Rev. Stats. 1898, sec. 3521.

[17] See statement by reporter in Titcomb v. Kirk, 51 Cal. 289, 5 Morr. Min. Rep. 10.

The following is from an old diary of one of the pioneer miners recently published. Under date of October 19, 1850, this diary says: "We got the ditch repaired and the water turned on the flat by Thursday and have been running off the top dirt. It's amazing the amount we move and it astonishes our neighbors. A lot of them are looking out for sidehill diggings below us and will try the same process. Anderson says it will be a good idea to extend our ditch and sell water to the miners who might want to use it, but I don't see what right we have got to it more than anybody else. Anyway he has put a notice at the head of the ditch claiming all the water it will hold, *and as there is no law in the case he says he will make a law out of the precedent.*" Diary of a Forty-Niner, edited by Chauncey L. Canfield, who says in a note, "The first claim to water-rights on record in Nevada County." This passage is interesting, though possibly not authentic. The county records were destroyed by fire in 1856.

The fact probably is that, since water customs did not arise until the second or third year (the first year being the stage of pan and shovel, rocker and "long tom," not requiring diversion), the statute below quoted adopting the general common law was already in existence.[18] No special importance attaches to these relative dates, however; no point has ever been made of them, for reasons hereafter appearing.

B. DEVELOPMENT OF THE CUSTOMS INTO LOCAL LAW.

(3d ed.)

§ 74. The Questions Presented to the Courts.—When the State courts were organized and received the questions growing out of these conditions (the first case did not reach the supreme court until 1853), the necessity was thrown upon the court of giving legitimacy in some way to these things that had transpired among the miners and were so firmly established throughout the population then existing in the State.

There was an immediate conflict of contentions. This conflict existed along two distinct grounds in the water cases. One was of the relation of these new rules to the common law, which had been adopted by the statute of April 13, 1850, as follows: "The common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of this State, is the rule of decision in all the courts of this State."[19] The other was of the relation of the

[18] That statute was passed in April, 1850, ratified on the admission of the State in September, 1850, while the first water ditch was probably not built until the end of that year. In the first ten volumes of the California Reports, the following are the dates of the early ditches involved in the cases:

Fall of 1850: Kidd v. Laird, 15 Cal. 163, 70 Am. Dec. 472, 4 Morr. Min. Rep. 571; Nevada W. Co. v. Powell, 34 Cal. 109, 91 Am. Dec. 685, 4 Morr. Min. Rep. 253. See the date of the ditch given in the diary just above quoted.

1851: McDonald v. Bear R. Co., 13 Cal. 226, 1 Morr. Min. Rep. 626; Maeris v. Bicknell, 7 Cal. 261, 68 Am. Dec. 257, 1 Morr. Min. Rep. 601; White v. Todd's Valley Co., 8 Cal. 443; Ortman v. Dixon, 13 Cal. 37.

1852: Kelley v. Natoma W. Co., 6 Cal. 105, 1 Morr. Min. Rep. 592; Crandall v. Woods, 8 Cal. 137, 1 Morr. Min. Rep. 604; Parke v. Kilham, 8 Cal. 78, 68 Am. Dec. 310, 4 Morr. Min. Rep. 522; Humphreys v. McCall, 9 Cal. 59, 70 Am. Dec. 621; Mokelumne Hill Co. v. Woodbury, 10 Cal. 185.

1853: 3 cases.

The first attempt at quartz mining was not until 1852 (Whitney's Geology of California, p. 224). The first hydraulic mining was not tried until 1853 (Browne's Mineral Resources of California, p. 116).

[19] Stats. 1850, p. 219; now Political Code, sec. 4468.

This adoption of the common law was by the constitutional convention

appropriators to the United States government, the landowner of the region which the pioneers were appropriating to themselves without Federal authorization; for the act admitting California into the Union had contained the usual clause that the State shall never interfere with the primary disposal of the public domain within its limits. The first was a question of local law; the second, a question of Federal public land law.

Side by side these questions have ever since run through the history of the law of waters in the West, at different periods the one and then the other assuming the more importance. In the beginning, of which we are now writing, it was the second, the relation to the United States, which loomed largest. The other question, of the relation to the common law, was never serious then, being soon disposed of by merging it into the second question, as we shall quickly see.

(3d ed.)

§ 75. **The Customs and the Common Law.**—The water customs, based upon exclusive rights by priority of appropriation, were opposed to the common-law system of riparian rights.[20] They did not follow the rules of riparian rights because, in the first place, the miners, left so largely to themselves, did not know those rules. The miners were of all nationalities, from places where many different systems of law prevailed, and went into a wilderness where the law was not represented. Important also was the necessity of carrying the water far from streams, and muddying it with mining debris. But the main reason was that the law of riparian rights is a system for settled regions of private landowners, while there was here a new and uninhabited region in which no private landowners existed. Instead of finding the streams inclosed by private land preventing access to them, all was public land, as free and open as the air.

(3d ed.)

§ 76. **The Customs and the Court.**—As early as the third volume of the California Reports the matter was before the supreme court, but the court was not yet ready to declare this

before the State's admission into the Union, which did not occur until September of the same year. The schedule of the constitution continued all existing statutes in force.

[20] *Infra*, sec. 666 et seq.

custom concerning the use of waters lawful.[21] The trial judge did adopt it as the basis of his charge. But the supreme court said: "The rule laid down by the court below, while it is a departure from all the rules governing this description of property, would be impracticable in its application, and we think it much safer to adhere to known principles and well-settled law, so far as they can be made applicable to the novel questions growing out of the peculiar enterprises in which many of the people of this State are embarked." This case of Eddy v. Simpson is interesting as nevertheless foreshadowing the doctrine which afterward became the rule of the court, that prior possession of water *on public land* gives the exclusive right to its use; and as showing the difficulties the court met in adjusting itself to the new conditions arising out of the occupation by the pioneers of the great, open, public domain.[22]

(3d ed.)

§ 77. Irwin v. Phillips.—The next case before the California court succeeded in having the principle of exclusive right by prior appropriation of water on the public lands fully recognized and accepted. This case, Irwin v. Phillips, 5 Cal. 140,[23] decided in 1855, is always cited as the original precedent establishing the rule of appropriation. The case was between a canal owner who had diverted water from the public land, and a miner who had later located on public land from which the stream had been diverted. The opinion is of sufficient importance to be given in full.[24] The court said (per Heydenfeldt, J.):[25]

"The several assignments of error will not be separately considered, because the whole merits of the case depend really on a single question, and upon that question the case must be decided.

[21] Eddy v. Simpson, 3 Cal. 249, 58 Am. Dec. 408, 15 Morr. Min. Rep. 175.

[22] The difficulties in the way of the court caused the court later in a case involving the diversion of water to remark in Bear River Water Co. v. New York Min. Co., 8 Cal. 327, at 333, 68 Am. Dec. 325, 4 Morr. Min. Rep. 526: "The business of gold mining was not only new to our people, and the cases arising from it new to our courts, and without judicial or legislative precedent, either in our own country or in that from which we have borrowed our jurisprudence; but there are intrinsic difficulties in the subject itself that it is almost impossible to settle satisfactorily, even by the application to them of the abstract principles of justice. Yet we are compelled to decide these cases, because they must be settled in some way, whether we can say after it is done that we have given a just decision or not."

[23] 63 Am. Dec. 113, 15 Morr. Min. Rep. 178.

[24] The italics are ours.

[25] Murray, C. J., concurred, though he dissented in Conger v. Weaver, *infra*, sec. 89.

The proposition to be settled is whether the owner of a canal in the mineral region of this State, constructed for the purpose of supplying water to miners, has the right to divert the water of a stream from its natural channel, as against the claims of those who, *subsequent to the diversion,* take up lands along the banks of the stream for the purpose of mining. *It must be premised that it is admitted on all sides that the mining claims in controversy, and the lands through which the stream runs and through which the canal passes, are a part of the public domain, to which there is no claim of private proprietorship;* and that the miners have the right to dig for gold on the public lands was settled by this court in the case of Hicks et al. v. Bell et al., 3 Cal. 219.[26]

"It is insisted by the appellants that in this case the common-law doctrine must be invoked, which prescribes that a watercourse must be allowed to flow in its natural channel. But upon an examination of the authorities which support that doctrine, it will be found to rest upon the fact of the individual rights of landed proprietors upon the stream, the principle being both at the civil and common law that the owner of lands on the banks of a watercourse owns to the middle of the stream, and has the right in virtue of his proprietorship to the use of the water in its pure and natural condition. In this case the lands are the property either of the State or of the United States, and it is not necessary to decide to which they belong for the purposes of this case. It is certain that at the common law the diversion of watercourses could only be complained of by riparian owners, who were deprived of the use, or those claiming directly under them.[27] Can the appellants assert their present claim as tenants at will? To solve this question it must be kept in mind that their tenancy is of their creation, their tenements of their own selection, and subsequent, in point of time, to the diversion of the stream. They had the right to mine where they pleased throughout an extensive region, and they selected the bank of a stream from which the water had been already turned, for the purpose of supplying the mines at another point.

"Courts are bound to take notice of the political and social condition of the country which they judicially rule. In this State

[26] Note the way this is put. The court says it, itself, settled the right to mine *on public land.* And that is just what happened, as time went on.

[27] The court here has in mind that, the land being public land, neither litigant was a landowner, and hence neither could claim to be a *riparian proprietor,* not owning the soil.

the larger part of the territory consists of mineral lands, nearly the whole of which are the property of the public. No right or intent of disposition of these lands has been shown either by the United States or the State governments, and with the exception of certain State regulations, very limited in their character, a system has been permitted to grow up by the voluntary action and assent of the population, whose *free and unrestrained occupation* of the mineral region has been tacitly *assented to* by the one government, and heartily *encouraged* by the expressed legislative policy of the other. If there are, as must be admitted, many things connected with this system, which are crude and undigested, and subject to fluctuation and dispute, there are still some which a universal sense of necessity and propriety have so firmly fixed as that *they have come to be looked upon as having the force and effect of res judicata.* Among these the most important are the rights of miners to be protected in the possession of their selected localities, and the rights of those who, by prior appropriation, have taken the waters from their natural beds, and by costly artificial works have conducted them for miles over mountains and ravines, to supply the necessities of gold diggers, and without which the most important interests of the mineral region would remain without development. So fully *recognized* have become those rights, that, without any specific legislation conferring or confirming them, they are alluded to and spoken of in various acts of the legislature in the same manner as if they were rights which had been *vested* by the most distinct expression of the will of the lawmakers; as, for instance, in the Revenue Act 'canals and water-races' are declared to be property subject to taxation, and this when there was none other in the State than such as were devoted to the use of mining. Section 2 of article 9 of the same act, providing for the assessment of the property of companies and associations, among others mentions 'dam or dams, canal or canals, or other works for mining purposes.' This simply goes to prove what is the purpose of the argument, that however much the policy of the State, as indicated by her legislation, has *conferred the privilege* to work the mines, it has equally *conferred the right to divert the streams* from their natural channels,[28] and as these two rights stand upon an equal footing, when they conflict, they must be

[28] Bear in mind that it is of streams *on the public domain* that the court is speaking; it started with that as a premise.

decided by the fact of priority, upon the maxim of equity, '*Qui prior est in tempore, potior est in jure.*' The miner who selects a piece of ground to work, must take it as he finds it, subject to prior rights, which have an equal equity, on account of an equal *recognition from the sovereign power.* If it is upon a stream, the waters of which have not been taken from their bed, they cannot be taken to his prejudice; but if they have been already diverted, and for as high and legitimate a purpose as the one he seeks to accomplish, he has no right to complain, no right to interfere with the prior occupation of his neighbor, and must abide the disadvantages of his own selection.

"It follows from this opinion that the judgment of the court below was substantially correct, upon the merits of the case presented by the evidence, and it is therefore affirmed."

(3d ed.)

§ 78. Prior Rights by Appropriation Upheld by the Courts.— This is the pioneer Western decision recognizing the doctrine. The rule of prior appropriation of water *on public land* was thus established independently of legislation. The act of April, 1850, had adopted the common law as a general rule of decision in the State, and the act of 1851 had adopted the customs of miners where not in conflict with the laws of the State, and an act (mentioned in the opinion) had taxed ditches and canals; but closer than this there was nothing. Nor were the courts aided by direct legislation until the act of the Federal Congress of 1866.

The case treated together both the questions to which we have referred; that is, the question of local law involving riparian rights, and the question of Federal public land law. The common law was held inapplicable, not because "unsuited to public welfare," but *because there was no private land on the stream.* Adopting the argument of counsel (afterward judge of the supreme court), Baldwin, the court expressly excluded riparian rights from a consideration of the case because *it was all vacant public land.* The intention was, said a contemporary writer,[1] to provide an entirely new system wherever the mining customs prevailed (which customs prevailed on what was then all public domain). But at the same time it must be carefully noted that it was premised in the case as "admitted on all sides that the lands through which

[1] Yale on Mining Claims and Water Rights, p. 161.

the stream runs are a part of the public domain, to which there is no claim of private proprietorship," and "if it is upon a stream the waters of which have not been taken from their bed, they cannot be taken to his [meaning the private landowner's] prejudice," which exception has since overshadowed the rest, in California.

The case having thus held riparian rights not involved because there was no private, but only public, land on the stream, then went on to hold for the public land that both the United States and State, whichever may be the owner, had permitted "free and unrestrained occupation of the mineral region," so as to give the customs the force of *"res judicata"* and thereby *"conferred"* the right to divert the streams"; and thus the court merged the whole matter into a question of public land law.[2]

(3d ed.)

§ 79. Endeavors to Follow and not Disregard the Common Law.—Although the question of Federal public land law became controlling, there was also difficulty in the position taken as a question of local State law.

The court was in some quarters accused of judicial legislation because the legislature had adopted the common law as the general rule of decision by the statute already quoted. Chief Justice Murray had first opposed the recognition of the doctrine of appropriation at all, dissenting in Conger v. Weaver;[3] and when overruled by the rest of the court, acquiesced only on the ground (now the basis of the "Colorado doctrine"[4]) that the statute had not adopted the common law because unsuited to conditions.[5]

[2] A very concise statement of the situation under which Irwin v. Phillips was decided is given in the recent case of Meng v. Coffey, 67 Neb. 500, 108 Am. St. Rep. 697, 93 N. W. 713, 60 L. R. A. 910, saying that government and law were not yet established, there was no agricultural population, *and were no riparian owners,* and streams could be put to no use except for mining. "It was a crude attempt to preserve order and the general peace, and to settle customary rights among a body of men subject to no law, under which so many and so valuable rights arose that when the law stepped in it was obliged to recognize them. In this way the rule of appropriation became established in the Pacific States, in opposition to the common law, with reference to streams or bodies of water which wholly ran through or were situated *upon the public lands of the United States.*"

[3] 6 Cal. 548, 65 Am. Dec. 528, 1 Morr. Min. Rep. 594.

[4] *Infra,* sec. 167.

[5] Hoffman v. Stone, 7 Cal. 47, 4 Morr. Min. Rep. 520; Crandall v. Woods, 8 Cal. 136, 1 Morr. Min. Rep. 604. See, also, Hill v. King, 8 Cal. 338, 4 Morr. Min. Rep. 533.

His opinions were, however, the only ones at that time taking that ground, and it was regarded by some as an admission by the chief justice that the court had simply entered into judicial legislation.[6]

Such criticism, whether now appearing sound or not, at that day, when the matter was all new and untried, induced in some of the judges a desire to reconcile their decisions to the common law, and not to acknowledge a departure from it. For example, in Conger v. Weaver the court said: "In the decisions we have heretofore made upon the subject of private rights in the public domain, we have applied simply the rules of the common law. We have found that its principles have abundantly sufficed for the determination of all disputes which have come before us, and we claim that we have neither modified its rules, nor have we attempted to legislate upon any pretended ground of their insufficiency."

The first explanation to this effect rested upon the merger that had been made with the question of the government title. Conger v. Weaver, below quoted,[7] said it had applied simply the common-law rule in respect to presumption of title of mere possessors on a third person's (the government's) land, or water, one against the other,[8] and, at the same time, against the government itself as landowner, estoppel by conduct, and grant of right conclusively presumed upon equitable grounds to bind the United States, being matters with which we shall find the subsequent history having much to do; here mentioned only because they were then said to be applications of the common law.[9] (It may be that, applied to ordinary private landowners, such arguments would not have disturbed the common law; but the United States was not an ordinary landowner, but a very extraordinary one, owning the whole State; and when applied to such a case, a new law between the citi-

[6] In Yale on Mining Claims and Water Rights, page 129, the learned author says: "The complaint of the supreme court was, in the opinion of some of its members, that they were compelled to take the place of the legislature in framing rules in regard to water-rights. This was undoubtedly the case; the only rule adopted by the legislature touching the subject was the adoption of the common law as the rule of decision, by the act of April, 1850. It was, therefore, as the chief justice said, left to the courts, and this can be admitted without injustice to the members of the court in the days of its early organization."

[7] *Infra*, sec. 89.

[8] See *infra*, secs. 246, 627.

[9] The leading authority upon mining rights holds that certain mining rights arising out of the pioneer Possessory System are not in derogation of the common law. (Lindley on Mines, secs. 535 et seq., 568, speaking of the theory of the extralateral right in mining, and saying: "Instead of being in derogation of the common law, this class of grants is in absolute harmony with it." Sec. 568.)

zens on the public lands was made in practice concerning waters. Any consistency with the common law upon such arguments was remote, while the inconsistency in detail was immediate.)

A second ground of reconciling the rules of water appropriation to the common law appeared later. The common law of riparian rights regards all riparian proprietors (all landowners upon a stream's banks) as upon an equal footing, their rights being *correlative* or adjustable for their common benefit, refusing to recognize a right in anyone by priority, and giving each a reasonable use of the stream for his own land at any time.[10] In some early California cases the court argued that the rights of an appropriator were likewise correlative to those of later users, so as not to be independent or exclusive, following out to some extent the policy of Conger v. Weaver that the common law had not been departed from. This did not prevail, however. It is considered at some length hereafter.[11]

(3d ed.)

§ 80. The Common Law Departed from.—Despite these few early attempts to reconcile the doctrine of appropriation to the common law, the consensus of opinion has, as to water-rights at all events, long admitted that the doctrine of prior right by appropriation is in derogation of the common law[12] (though there has never, so far as the writer has found, been any attempt to narrowly construe the subsequent statutes on that account). In the first case dealing with water-rights the California court, as already quoted, said that the rule "is a departure from all the rules gov-

[10] See *infra*, secs. 310, 739. True, there were some earlier English decisions favoring the doctrine of prior appropriation (*infra*, secs. 666–669), but the pioneer California court referred to them only once, and then only to disclaim reliance upon them, in Hill v. King, 8 Cal. 336, 4 Morr. Min. Rep. 533.

[11] *Infra*, sec. 310 et seq.

It may be noted that in some features the law of appropriation nevertheless clearly did borrow from the common law. Thus was early borrowed the principle that the right is solely usufructuary (Eddy v. Simpson, 3 Cal. 249, 58 Am. Dec. 408, 15 Morr. Min. Rep. 175. See *infra*, sec. 276), and the rule permitting change of point of diversion. (Kidd v. Laird, 15 Cal. 161, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571. See *infra*, sec. 496.)

[12] Lux v. Haggin, 69 Cal. 255, 10 Pac. 674, saying: "The doctrine of 'appropriation,' so called, is not the doctrine of the common law." Atchison v. Peterson, 87 U. S. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583; Basey v. Gallagher, 87 U. S. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683; Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240, 4 Morr. Min. Rep. 504; Yale on Mining Claims and Water Rights, 129, 137; Pomeroy on Riparian Rights, sec. 20. See *infra*, sec. 180 et seq., views of the supreme court of the United States.

of State proprietorship of waters.[20] But the sentiment of the Eastern part of the country then as well as now held the mines and waters and other natural resources to be Federal property and part of the public domain of the United States.[21] The California court next said it may be *either* the State or national government;[22] but when the question came up for decision, at the time of the opening of the Civil War, the court emphatically, under the leadership of Judge Field, held the lands and everything connected with the soil to belong to the United States.[23] The pioneers themselves had accepted this,[1] and the records of the time are wholly lacking in any attempt to distinguish waters from lands and mines. All went together in the mind of the day as one large question arising out of ownership by the United States.

(3d ed.)

§ 83. The Pioneers as Trespassers Against the United States. Since, then, an outstanding title was recognized to all this region, the question was raised, not whether the pioneer miners on the public domain had common-law water-rights or not, but whether they had any rights at all. The people had, from the first discovery, been declared trespassers against the United States by Colonel Mason, and the same contention appeared before the courts in suits which arose between the miners.[2] General Halleck, in his pioneer book on mining law, laid it down that the United States district attorney could file suit to oust all from the region.[3] Colonel Mason had spoken offhand, but lawyers now cited the

[20] *Infra*, sec. 170.

[21] Yale on Mining Claims and Water Rights, c. I.

[22] Irwin v. Phillips, 5 Cal. 140, 63 Am. Dec. 113, 15 Morr. Min. Rep. 178; Conger v. Weaver, 6 Cal. 548, 65 Am. Dec. 528, 1 Morr. Min. Rep. 594; Bear River etc. Co. v. New York etc. Co., 8 Cal. 327, 68 Am. Dec. 325, 4 Morr. Min. Rep. 526.

[23] Moore v. Smaw, 17 Cal. 199, 79 Am. Dec. 123, 12 Morr. Min. Rep. 418, Field, C. J., rendering the opinion.

[1] In their engrossed customs and regulations they had placed preambles such as "Whereas the *Congress of the United States* have in their wisdom made it incumbent on the miners of the various districts of California, to provide such laws for the protection and regulation," etc., or "As *Congress* has made no rules and regulations," etc. Yale on Mining Claims and Water Rights, pp. 70, 84.

[2] "As this wealth came from public land belonging to the United States, he [Colonel Mason] took into serious deliberation how he could secure for the government a reasonable rent or fee for the privilege of extracting it." Hittell's History of California, vol. III, p. 693.

[3] Halleck's Introduction to De Fooz. Halleck had been a lieutenant under Colonel Mason on the same expedition as Sherman, both remaining in California during the fifties, Halleck to drift into law practice, while Sherman went into banking.

authorities to show that digging for minerals on the public domain of the United States was a trespass, entitling the government to damages in an action at law, and was such waste as would be restrained by injunction.[4] By the act of the 3d of March, 1807, to prevent settlements on lands ceded to the United States until authorized by law, the President was empowered, by aid of the marshals of the United States and the military force, to remove intruders from the public land, and the improvements upon their settlements became forfeited to the government. It was later said: "By the United States statutes in force, both miners and ditch-owners were trespassers on the public lands and could have been removed by the military."[5]

From the contention arising here came the point upon which the California law finally turned. There were leading lawyers who denied any right in the California courts to do anything but to adjust the rights of trespassers between themselves; claiming that until Congress passed statutes it was of no moment who had the ultimate right to the mines or waters; that, as between the pioneers themselves, at all events, prior possession was good enough, by the common law itself, against a mere later possessor; and that this was all that concerned the California judges. Hence the designation of private rights to real estate throughout the West as "possessory rights," referring not only to waters, but to mines and lands as well; meaning that no one could have title to waters (or to anything else) until Congress should be heard from.

(3d ed.)

§ 84. Spread of the Possessory System.—The entire West was at this period unsettled vacant public domain, and people continued coming in; some for the California gold-fields, but stopping before reaching them, some leaving the California gold-fields in search of new ones, and some, who had gone to California, giving up gold hunting and turning to farming and other pursuits in the

[4] Yale on Mining Claims and Water Rights, p. 331. This contemporary writer set forth the situation as follows: "Digging for minerals on the public domain of the United States was a trespass, entitling the government to damages in the action at law; and was such waste as would be restrained by an injunction from a court of chancery, pending the action at law. These rights belonged to the government as a proprietor of the land in common with an individual owner of land, in the absence of protective legislation. They were also secured by legislation."

[5] Reporter's Statement in Titcomb v. Kirk, 51 Cal. 288, at 290, 5 Morr. Min. Rep. 10.

California and other Western valleys. They took possession of the public lands, mines, water and timber wherever they located, following out as between themselves the customs and rules of prior appropriation of all of these things prevailing in California, and not hearing from Congress one way or the other.[6] Private rights to real estate all rested upon this rule of priority of occupation upon public land. "For a long period the general government stood silently by and allowed its citizens to occupy a great part of its public domain in California, and to locate and hold mining claims, water-rights, etc., according to such rules as could be made applicable to the peculiar situation; and when there were contests between hostile claimants, the courts were compelled to decide them without reference to the ownership of the government, as it was not urged or presented. In this way—from 1849 to 1866—a system had grown up under which the rights of locators on the public domain, as between themselves, were determined, which left out of view the paramount title of the government."[7]

The system spread throughout the West, and all the Western courts in the early days followed the California decisions and adopted them in their first cases. In Nevada, for example, the early court said it felt it a duty to follow the California decisions;[8] and in an early Colorado water case the court said: "We adopt the rule laid down by the courts of California and Nevada."[9]

In the following passage the late Judge Hawley describes the free and unrestrained occupation of the public domain by the pioneers as a bit of his own biography. Referring to early Nevada he says: "The first settlements were made in the valley in the 'early fifties,' when the country was a part of the territory of Utah and subject to its laws. The settlements were made by persons who might be denominated as 'squatters' on the public land of the United States, without any title thereto save such as the custom of the locality recognized, or in some few instances such as might be acquired

[6] The doctrine of appropriation of water upon public land in accordance with this universal custom was assailed by counsel as late as McDonald v. Bear River Co., 13 Cal. 220, 1 Morr. Min. Rep. 626, in 1859, but the matter passed unnoticed by the court. Yale on Mining Claims and Water Rights, 157. In Logan v. Driscoll, 19 Cal. 623, 81 Am. Dec. 90, 6 Morr. Min. Rep. 172, the court rebuked counsel for disputing it.

[7] Cave v. Tyler, 133 Cal. 566, 65 Pac. 1089.

[8] Mallett v. Uncle Sam M. Co., 1 Nev. 188, 90 Am. Dec. 484, 1 Morr. Min. Rep. 17.

[9] Sieber v. Frink, 7 Colo. 148, 2 Pac. 901. See, also, Murray v. Tingley, 20 Mont. 260, 50 Pac. 723, 19 Morr. Min. Rep. 137.

under the various provisions of the laws of Utah. They raised cattle, that roamed at large, and in many places they cut the natural grasses which grew at that time in great abundance all over the river bottom." And he says that they would "allow their cattle and horses to roam at large, or picket them out to graze upon the natural grasses which then grew of sufficient height to almost hide the stock from view, and was as *free and open to all comers* as the air that wafted its gentle breeze through the valley from the mountains, the tops of which were covered by the snow that had fallen during the winter season. The writer of this opinion was one of the sojourners who made that trip in the year 1852, and the reading of the record in this case brings to his mind vivid recollections of the joy and hope, courage and confidence, inspired in the breast of every pilgrim, of the bright future which he then thought awaited him when he reached the golden regions of the Eldorado of the West. . . . . The water during this period continued to flow into various sloughs, and spread over all the land at high water. There were, as a general rule, no specific appropriations made of the water. . . . . Some of them remained but a short period, and voluntarily left and abandoned the land, free to the occupancy of the next comer who concluded to settle thereon. Others traded their rights, whatever they were, for a horse or wagon, or anything of value, no matter how insignificant it might be. No conveyances were made. One party would leave; the other party would come upon the land, and stay until he got ready to move elsewhere." [10]

This picture of early Nevada shows a more irresponsible and loose condition than prevailed in the California mining regions, however, where rights were of high value and zealously guarded. In time, farmers made permanent homes everywhere, and valuable mining claims were "located" outside of California.

This Possessory System whereby lands, mines and waters were claimed by "prior appropriation" had all the force of a *system* of law governing real estate all over the West, for there was no other land law of consequence upon the public domain, and it was all public domain.

(3d ed.)

§ 85. Possessory System not Confined to Mining.—The California legislature, while, as has been said, providing no direct

[10] Union Mining Co. v. Dangberg, 81 Fed. 73.

legislation concerning waters, by its early mining legislation indirectly complicated the question. The lands on which operations were carried on belonged to the United States and were not at the disposal of the State. But the State legislature, under the guise of regulating procedure in State courts, favored the miner against others. In 1852, the Possessory Act [11] allowed possessors of public lands to sue in State courts, for interference with their possession; with a proviso excepting the possessors of lands for agriculture or grazing from protection against miners if the land contained mines. This was supplemented in 1855 by the Indemnity Act,[12] which required the miner who entered upon the agriculturist to give a bond for whatever damages might follow to the agriculturist's improvements.

In spite of this favoritism shown to the miner by the legislature, the supreme court declared its purpose as far as possible to place all pursuits on an equal footing.[13] The court restricted the operation of the statutes. They were held in no way to warrant interference of any kind with lands owned by good private title but only applicable to public lands.[14] The proviso was restricted to such public lands only as were used strictly for agriculture or grazing and not applied to lands used for dwellings, town lots, sawmills, etc.[15] The latter two cases in the foregoing note held that appropriations of water to run a sawmill, being prior in time, prevailed against later appropriations by miners. Even in strictly agricultural uses (in regard to which the Indemnity Act required indemnity only where crops were growing, and left the Possessory Act unaffected in other cases), the court restricted the right of a miner to a mere right of entry, without the right to destroy any improvements whatsoever erected by the agriculturist, any such interference being held still a trespass; and held that the preference amounted only to a right of entry on land, so that a water-right of an agriculturist was protected even against miners.[16] The final

[11] Stats. 1852, p. 158.

[12] Act of April 25, 1855.

[13] Tartar v. Spring etc. Min. Co., 5 Cal. 395, 14 Morr. Min. Rep. 371; McDonald v. B. R. etc. Co., 13 Cal. 220, 1 Morr. Min. Rep. 626; Wixon v. Bear River etc. Co., 24 Cal. 367, 85 Am. Dec. 69, 1 Morr. Min. Rep. 656, and many other cases; Yale on Mining Claims and Water Rights, p. 49.

[14] Tartar v. Spring etc. Mining Co., 5 Cal. 395, 14 Morr. Min. Rep. 371; Boggs v. Merced, 14 Cal. 279, 10 Morr. Min. Rep. 334; Smith v. Doe, 15 Cal. 100, 5 Morr. Min. Rep. 218.

[15] Fitzgerald v. Urton, 5 Cal. 308, 12 Morr. Min. Rep. 198; Tartar v. Spring etc. Mining Co., 5 Cal. 395, 14 Morr. Min. Rep. 371; Ortman v. Dixon, 13 Cal. 33.

[16] Rogers v. Soggs, 22 Cal. 444, 14 Morr. Min. Rep. 375; Levaroni v. Miller, 34 Cal. 231, 91 Am. Dec. 692, 12 Morr. Min. Rep. 232.

result was that all pursuits were treated impartially as concerns waters.[17] In Rogers v. Soggs,[18] the court says: "Such, in general terms, are the rights of the miner; but these rights are subject to limitations and restrictions, necessary to prevent an interference with rights of property vested in others, and which are entitled to equal protection with his own. Thus he has no right to use water to work his mine which has been appropriated to other legitimate purposes.[19] Nor has he a right to dig a ditch to convey water to his mine over land in the possession of another.[20] Nor can he mine land used for a residence and for purposes connected therewith.[21] Or land used for houses, orchards, vineyards, gardens and the like."[22] In Montana,[23] it was in a very early case strongly urged that the doctrine of appropriation applied only to mining, and could not be extended to irrigation, and the only two judges who sat being divided upon the matter, it passed undecided in the case. In Atchison v. Peterson,[24] the supreme court of the United States upheld the rule as applied to mining, but it was by the decision in Basey v. Gallagher[25] that it was established in that court as applying to irrigation also.

The law to-day respecting impartiality in uses for different purposes (where not modified by statute) is stated as follows in Natoma etc. Co. v. Hancock[1] (discussing the case of Rupley v. Welch):[2] "The point, and the only point, contended for by the defendants was that a prior appropriation of water for irrigation was of no avail against a subsequent appropriation for mining. The court merely decided that the appropriation for irrigation was good against miners as against others, and that the defendants could not prevent the water so appropriated from flowing into the

17 Yale on Mining Claims and Water Rights, 139.

18 22 Cal. 444, 14 Morr. Min. Rep. 375. Opinion by Crocker, J. For appellant, John Garber. For respondent, Searls and Niles (both later on the supreme bench). Judgment for appellant.

19 Citing Irwin v. Phillips, 5 Cal. 140, 63 Am. Dec. 113, 15 Morr. Min. Rep. 178; Tartar v. The Spring Creek Water etc. Co., 5 Cal. 395, 14 Morr. Min. Rep. 371.

20 Citing Burdge v. Underwood, 6 Cal. 45, 4 Morr. Min. Rep. 517; Weimer v. Lowery, 11 Cal. 104, 4 Morr. Min. Rep. 543.

21 Citing Fitzgerald v. Urton, 5 Cal. 308, 12 Morr. Min. Rep. 198.

22 Citing Smith v. Doe, 15 Cal. 101, 5 Morr. Min. Rep. 218; Gillan v. Hutchinson, 16 Cal. 153, 2 Morr. Min. Rep. 317.

23 Thorp v. Freed, 1 Mont. 651.

24 87 U. S. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583.

25 87 U. S. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683.

1 101 Cal. 42, at 55, 31 Pac. 112, 35 Pac. 334.

2 23 Cal. 453, 4 Morr. Min. Rep. 243.

reservoir prepared for impounding it. This is a doctrine which, at the present day, no one disputes, but in early mining times the paramount right of the miner was strenuously insisted upon by the miners, and in the mining sections often exercised with a high hand, as it was by the defendants in Rupley v. Welch."[3]

The Possessory Act is still in force in California.[4] The Indemnity Act was held unconstitutional,[5] but was later upheld.[6] No express repeal of the Indemnity Act appears, but it is probably superseded by the Federal statutes concerning public lands and mining.

(3d ed.)

§ 86. Precarious Status of Possessory Rights on the Approach of the Civil War.—While the people were thus taking possession of the public domain for all purposes, Congress continued silent. But the approach of the Civil War, with its intense feeling, brought the possessory situation to a focus. The matter of "Federal rights," into which the Federal government itself had not entered, now became prominent. With the assertion in the South of "State rights" threatening the Union, loyal leaders in California felt that to uphold Federal rights was more important than anything else.

There had, in the years following 1858, been an attempt on the part of the attorney general of the United States to oust certain miners on the claim that the minerals belonged to the United States, in litigation which, under the name of the "Castillero" litigation, aroused much excitement in California. This litigation spread over a large ground, much of which is of no bearing here, such as the validity of a certain Mexican grant and certain alleged fraudulent

[3] 23 Cal. 453, 4 Morr. Min. Rep. 243.

[4] Gray v. Dixon, 74 Cal. 508, 16 Pac. 305.

[5] Gillan v. Hutchinson, 16 Cal. 153, 2 Morr. Min. Rep. 317.

[6] Rupley v. Welch, 23 Cal. 452, 4 Morr. Min. Rep. 243, without referring to the former decision, of which Mr. Yale says: "Such practice by the American judiciary, if it be extensively indulged in, of overruling the recent decisions of the same court, which they have announced as law, involving grave constitutional questions upon the rights of private property, without even referring to or citing the overruled case of the preceding term, by answering the arguments upon which it is based, must be regarded as a wide departure from the revered practice of their predecessors in the science of jurisprudence at Westminster Hall, and is an unworthy example to their humble followers at the bar." Yale on Mining Claims and Water Rights, p. 55, commenting upon Gillan v. Hutchinson, 16 Cal. 153, 2 Morr. Min. Rep. 317, and Rupley v. Welch, 23 Cal. 452, 4 Morr. Min. Rep. 243.

conspiracies on the part of high Federal officials. Among the array of counsel were Benjamin R. Curtis, Judah P. Benjamin, and W. H. Halleck. But, as concerns the present matter, the attorney general of the United States stepped into litigation begun by adverse private claimants, and, on the contention that the land involved was public land, secured in the United States circuit court in California an injunction against the working of the mine, and a writ was issued under the hand of President Lincoln for the employment of the military to remove the miners.[7] "The claim made by the government in this case was the assertion of a general principle, namely, the right to restrain the working of all mines upon public land, and could have been made to apply to any other mining claim in the State, besides the Almaden."[8]

It was likewise about this time, with the Civil War facing the country, when one of the California senators (though he denied it) was reported as saying that California would secede with the South,[9] that Judge Field, a leader of the loyalists who held California to the Union, affirmed in the State court, where he was chief justice, in most emphatic terms, the Federal rights, in Boggs v. Merced,[10] decided in 1859, and Moore v. Smaw,[11] decided in 1861. He said in the Boggs case, with regard to mining claims (and his position applied equally to ditch-owners and water diverters and most other property claimants in the Western regions): "It is sometimes said, in speaking of the public lands, that there is a general license from the United States to work the mines which these lands contain. But this language, though it has found its way into some judicial decisions, is inaccurate, as applied to the action, or, rather, want of action, of the government. There is no license in the legal meaning of that term. . . . . The most which can be said is that the government has forborne to exercise its rights, but this forbearance confers *no positive right* upon the miner, which would avail as a protection against the assertion of its claims to the mineral. The supposed license from the general government, then, to work the mines in the public lands, consists in its simple forbearance. Any other license rests in mere assertion, and is untrue in

[7] United States v. Parrott (1858), 1 McAll. (C. C.) 271, Fed. Cas. No. 15,998, 7 Morr. Min. Rep. 335.

[8] Yale on Mining Claims and Water Rights, p. 335.

[9] See Bancroft's History of California.

[10] 14 Cal. 374, 10 Morr. Min. Rep. 334.

[11] 17 Cal. 199, 79 Am. Dec. 123, 12 Morr. Min. Rep. 418.

fact and unwarranted in law." This was a declaration that the western population were wholly without rights of any kind, to water or to anything else. It made him unpopular, and his decisions were strenuously attacked as below noted.[12]

(3d ed.)

§ 87. Revocation of Possessory Rights by Federal Patent.—The same matter in a secondary form arose regarding water. The lands had long remained (and still largely remain) unsurveyed, nor was there any efficient statute for acquiring the formal government title to land until the Homestead Act, passed in 1862, and the Pacific Railway Act, passed in 1864. But in the course of the sixties, formal land patents began to be taken out under these Acts covering the land containing streams, and the patentees now claimed, as the only true successors of the United States, the same right to oust the appropriators that had come to be claimed for the United States itself. This came to decision in Nevada, in the State and Federal courts, in the cases of Van Sickle v. Haines and Union Mining Co. v. Ferris, the most discussed decisions, in the seventies, in the Western law of waters, and here considered by anticipation.[13]

These decisions dealt with the question what the law was prior to any statutes thereon from Congress; and, as Congress passed its acts (below referred to) only in 1866 and 1870, the question really was, what is the status of all water claims whose title goes back to the fifties and early sixties? The subsequent acts of Congress can give no validity to such claims; they must stand or fall

[12] The decision was affirmed by the United States supreme court in Mining Co. v. Boggs, 70 U. S. 304, 18 L. Ed. 245, but expressly avoiding a consideration of the doctrine laid down by Judge Field; for, as hereafter quoted, the United States supreme court took a more liberal view of the rights of the pioneers, as did also Judge Field when a member of that court, and after the war was over, as below considered.

Boggs v. Merced and Moore v. Smaw arose out of Mexican grants, but the California court held such grants equivalent to grants from the United States, which is the way the public land questions came to enter these cases. Field further, by upholding the validity of the private Mariposa grant deraigned under Mexican title, had made trespassers, against a handful of great landowners, of the population of several counties, and he was attacked in the California newspapers as an opponent of the rights of the people. As to the nature of a Mexican grant, the supreme court of the United States now holds contrary to these rulings of Judge Field. See Boquillas etc. Co. v. Curtis, 213 U. S. 339, 29 Sup. Ct. Rep. 493, and Los Angeles Co. v. Los Angeles, 217 U. S. 217.

[13] Van Sickle v. Haines, 7 Nev. 249, 15 Morr. Min. Rep. 201; Union Min. Co. v. Ferris, 2 Saw. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90. See, also, Thorp v. Freed, 1 Mont. 651, Wade, C. J.; Ison v. Nelson Min. Co., 47 Fed. 199.

on the original law. What, then, was the original law? It was, they held, that the long accumulation of rulings that had been made upholding appropriation of water, simply settled rights between trespassers against the government's paramount title, wherefrom it followed that all appropriators were trespassers against a grantee thereafter of that paramount title; and since the United States could have ousted all as trespassers, all could be ousted just as much by the government's patentee, no matter how long the appropriators had already been diverting the stream to use,[14] and even though it would mean ruin to the water supply of towns, farms, mines and other enterprises throughout the West. Water users were told that the appropriation of the waters of streams running over the public lands could never become complete against the United States, and was subject to be revoked and abrogated at any time by the United States; and that a patent, by which the full legal title of the United States, with all of its incidents, was conveyed to the patentee, was such a revocation, and necessarily clothed such patentee with all rights over the land which had belonged to the United States and which the people had been illegally enjoying.[15] Judge Garber, concurring in the Van Sickle case, said that the result, though correct, will disappoint expectations

[14] Prescription not running against the United States.

[15] In the Van Sickle case, the plaintiff had appropriated and diverted a stream in 1857, and the defendant later in 1864, by a patent from the United States, without any exception or reservation in the patent, acquired the riparian land on which plaintiff's point of diversion lay. The defendant, now claiming as a riparian owner, diverted the water on his land and prevented it from flowing to the plaintiff, the prior appropriator. The Nevada court said: "He [the appropriator] could acquire no right against the United States, for as to that government he was a trespasser." Then, after saying the patent to Haines of the riparian land above the appropriator passed to Haines, there being no exception in the patent, the unencumbered fee of the soil, its incidents and appurtenances, says: "He became the owner of the soil, and as incident thereto, had the right to the benefit to be derived from the flow of the water therethrough; and *no one* could lawfully divert it against his consent." Injunction and damages for Haines against the prior appropriator ordered, reversing the lower court.

In the Ferris case the facts were substantially the same, and the holding was the same, adding that, until the act of 1866, a sale of the public land would put the possessory rights "at the mercy of the buyer of the legal title." The effect of the act of 1866 "appears to be to *grant* to the owner of possessory rights to the use of water under the local customs, laws and decisions, the *absolute right* to such use, which the government alone could grant. But the act is prospective in its operation, and cannot be construed as to devest a part of an estate granted before its passage." And held that patents issued before the passage of the act of 1866 are in no way qualified by that act, passed subsequent to their issue, nor in any way subordinated to prior appropriations of water.

long considered by the *public* as well founded. (In later days, as leader of the bar in California, he did his best to discredit this decision in which he had reluctantly concurred, and it has been said that the decision drove Judge Lewis, who wrote the opinion, off the bench). It was ruled in the Ferris case that a sale by the United States of the public land to a private patentee would put the pioneers' water-rights "at the mercy of the buyer of the legal title," resulting in the entire revocation of the doctrine of prior appropriation.[16] Field's California rulings had held that the pioneers had no rights whatsoever against the United States, and these Nevada rulings carried that to the sure result that the United States' patentee was the only one who could have a right to *anything*, because he alone had a formal grant from the United States, whether the property involved were water, or a right of way, a ditch, or a mine.

So great was the popular disapproval and the reaction against these decisions, that most of the younger States came to deny any right to waters in any landowner as such, whether it be the United States or a private person; rejecting thereby any Federal title to waters, and abrogating *in toto* the common law of riparian rights, as we shall have occasion to see hereafter. But we continue here to follow up the events as they occurred.

D. THE THEORY OF FREE DEVELOPMENT OF THE PUBLIC LANDS UNDER LOCAL LAW.

(3d ed.)

§ 88. **Unpopularity of the "Trespasser" Basis of the Possessory System.**—Judge Field was attacked in the California newspapers for the foregoing decisions as an opponent of the rights of the people,[17] and with regard to the Castillero case the California legislature in 1860 adopted a resolution in strong terms of denunciation, declaring that to make the rights of miners dependent upon the "will of the Federal power" would be "an outrageous violation of free government," and calling upon the California representatives in Congress to secure relief from these decisions.[18]

[16] In the Montana case above cited (Thorp v. Freed, 1 Mont. 651) the chief justice (though no decision was reached in the case) not only recognized such as its result, but declared it to be a desirable result.

[17] Bancroft's History of California.

[18] The resolution is in Cal. Laws of 1860, p. 419, too long to give here in full. It is also printed in Yale on Mining Claims and Water Rights, pages 346, 347. It declared that Congress had been silent as to the matter in order "to encourage the discovery, en-

These results had, from the first California days, been anticipated from the "trespasser" doctrine, as had also the result that possessory rights would fall against Federal patent. It had been the endeavor of the earlier judges to anticipate these results by in some way connecting the pioneers with the Federal title, thereby lifting them out of the position in which the possessory doctrine, in its legal strictness, placed them.

(3d ed.)

§ 89. The Theory of a Grant With the Dignity of a Fee.—We must at this point look back again to the earliest California decisions, before Field's rulings and before the Civil War threw its shadow upon the subject, to learn the theory at first adopted to protect the pioneers. They had admitted the title of the United States as proprietor of the ultimate right to the waters as well as the whole region, but at the same time denied the contention that the pioneers were trespassers, by declaring that the United States had, by its conduct in holding out the public domain to free development, bound itself to the pioneers as fully as though it had *granted* the water to the man who diverted it, was bound to respect the diversion for all time because it had encouraged the pioneers, had recognized their acts, and thereby tacitly conferred or transferred to the pioneers the Federal title to the mines and to the waters actually diverted—a permanent title of the dignity of a fee and equal to subsequent patent—equivalent to a patent. The court held that an appropriation of water was of the force of a *grant from the United States*, such that the government itself could not impair, that no later patent of riparian land could override, and to which no title was paramount.

Irwin v. Phillips,[19] the original precedent, declared that by its conduct in permitting "free and unrestrained occupation" the

joyment, and working of mines by the people, wherein consists the legitimate development of our great source of the wealth of this State"; that local regulations made by the people governed the subject, and that State law "protected and maintained his right of property in his mine"; that "it would be a great grievance and an outrageous violation of free government, if the right of property in the mineral lands of this State were held by the people at the will of the federal power"; that the injunction to stop mining in the Castillero case "has been productive of great injury to the people of California, and is the exercise of a power dangerous to the general mining interests of the State."

[19] 5 Cal. 140, 63 Am. Dec. 113, 15 Morr. Min. Rep. 178, quoted *supra*, sec. 77.

United States had "conferred" or "recognized" a full right in the appropriator with all the force of "*res judicata.*"

In Conger v. Weaver,[20] Judge Heydenfelt said: "Every judge is bound to know the history and the leading traits which enter into the history of the country where he presides. . . . . We must, therefore, know that this State has a large territory; that upon its acquisition by the United States, from the sparseness of its population, but a small comparative proportion of its land had been granted to private individuals; that the great bulk of it was land of the government; that but little, as yet, has been acquired by individuals by purchase; that our citizens have gone upon the public lands continuously, from a period anterior to the organization of the State government to the present time; upon these lands they have dug for gold; excavated mineral rock; constructed ditches, flumes and canals for conducting water; built mills for sawing lumber and grinding corn; established farms for cultivating the earth; made settlements for the grazing of cattle; laid off towns and villages; felled trees; diverted watercourses; and, indeed, have done, in the various enterprises of life, all that is usual and necessary in a high condition of civilized development. All of these are open and notorious facts, charging with notice of them not only the courts who have to apply the law in reference to them, but also the government of the United States, which claims to be the proprietor of these lands; and the government of the State, within whose sovereign jurisdiction they exist. In the face of these notorious facts the government of the United States has not attempted to assert any right of ownership to any of the large body of lands within the mineral region of the State. The State government has not only looked on quiescently upon *this universal appropriation of the public domain* for all of these purposes, but has studiously encouraged them in some instances, and recognized them in all. Now, can it be said, with any propriety of reason or common sense, that the parties to these acts *acquired no rights?* If they have acquired rights, these rights rest upon doctrine of presumption of a *grant of right,* arising either from the tacit assent of the sovereign, or from expressions of her will in the course of her general legislation, and, indeed, from both." "A license," the court added, "to everyone who chose to possess himself of the franchise"; "a positive right in the constructors and owners of

[20] 6 Cal. 548, 65 Am. Dec. 528, 1 Morr. Min. Rep. 594.

these works to hold and enjoy them as property—*a vested right which cannot be taken away.*"[21]

Referring to this opinion, the court also said it had adopted the theory that there was "a general license to all" to divert the public streams, and "when these ditches have been constructed they *are regarded as a franchise or easement* belonging to the proprietors."[22] In another case: "In repeated decisions of this court it has been uniformly held that the miners were in possession of the mineral lands *under a license* from both the State and Federal governments."[23] In another: "They are there by the clear license of both governments, and have such a title as will hardly be devested, even by the act of the superior proprietor. There are equitable circumstances connected with these mining claims, that are clearly *binding upon the conscience of the governmental proprietor,* that this court must, with all due respect, presume *will never be disregarded.* Rights have become vested in virtue of this license, that *cannot be devested* without a violation of the principles of justice and reason."[24]

Judge Baldwin, who, as counsel, had taken part in the original precedent of Irwin v. Phillips,[25] laid this down in a later case,[1] when he said, "We hold the *absolute property* in such cases to pass by appropriation *as it would by grant*"; and in the next volume of the reports he laid it down in Merritt v. Judd very strongly with regard to the rights of the pioneers generally, saying: "From an early period of our State jurisprudence, we have regarded these claims to public mineral lands, as *titles.* They are so practically. It is very evident that the government will not change its policy

[21] See *infra,* sec. 556, "executed parol license," which was probably the idea in mind.

[22] Hill v. King, 8 Cal. 338, 4 Morr. Min. Rep. 533. "The right to appropriate the waters of the streams of this State, for mining and other purposes, has been too long settled to admit of any doubt or discussion at this time," saying that the court "based this right on the ground that the legislation of the State has given to everyone not only a privilege to work the 'gold placers,' but also to divert the streams for this and other purposes. The legislation of the State has been held to amount to a *'general license to all'* (whether properly, is not for me to say, the point having been decided by a majority of the court against my own opinion—see Conger v. Weaver, October 2, 1856), and when these ditches have been constructed, they are regarded as a franchise or easement belonging to the proprietors, and are entitled to protection as any other property." Hall v. King, 8 Cal. 338, 4 Morr. Min. Rep. 533.

[23] Bear River etc. Co. v. New York etc. Co., 8 Cal. 327, 68 Am. Dec. 325, 4 Morr. Min. Rep. 526.

[24] Merced M. Co. v. Fremont, 7 Cal. 317, 327, 68 Am. Dec. 262, 7 Morr. Min. Rep. 313. Italics ours.

[25] 5 Cal. 140, 63 Am. Dec. 113, 15 Morr. Min. Rep. 178.

[1] Ortman v. Dixon, 13 Cal. 33.

in respect to them; that they will not be sold, nor the present tenure altered. [This was before the act of 1866, in which this prophecy was fulfilled.] Our courts have given them the recognition of *legal estates of freehold,* and so, to all practical purposes,—if we except some doctrine of abandonment, not, perhaps, applicable to such estates,—unquestionably they are and we think it would not be in harmony with this general judicial system to deny to them the incidents of *freehold estates* in respect to this matter. If to decide thus be a departure from some technical rules of law [the title of the United States being regarded as merely technical], it is but following other rules, which hold that a system of decisions, long established and long acted upon, shall not be departed from when important rights have vested under it, merely because the reasons upon which it rests might not, in the judgment of subsequent judges, be considered sound."[2]

And, finally, in the case of Lux v. Haggin:[3] "The law of California, with reference to priority of possession on the public lands, has been so long established that we are apt to forget the whole system was built upon a presumption entertained by the courts of a *permission* from the United States to occupy."[4]

Accordingly, in practice, the attributes of freehold realty were enforced. Ejectment was allowed for mining claims, and justices

[2] Merritt v. Judd, 14 Cal. 64, 6 Morr. Min. Rep. 62. (Italics ours). This case is in the same volume of reports as Biddle Boggs v. Merced Mining Co., in which Judge Field had, as heretofore quoted (*Supra,* sec. 86), so positively laid down the "trespasser" doctrine, saying that the "freehold" theory was mere assertion, untrue in fact and unwarranted in law. It is consequently interesting to note that Judge Field did not sit in Merritt v. Judd because he was absent from the State, while Judge Baldwin did not sit in Boggs v. Merced Co. because he had been counsel in the case. As will appear hereafter, Judge Field later gave up his support of the trespasser theory, and when on the bench of the supreme court of the United States did more than anyone else to support the full vested character of the rights of the pioneers.

[3] 69 Cal. 255, 10 Pac. 674. In Morton v. Solambo Min. Co., 26 Cal. 527, 4 Morr. Min. Rep. 463, *mines* were said to be *publici juris* (just as waters are to-day said to "belong to the public"), and open to the first appropriator.

[4] Regarding the attitude of the people to this effect from the earliest days, it may be noted that Colonel Mason, in 1849, had thought of putting out the miners, but he said: "Upon considering the large extent of the country, the character of the people engaged, and the small, scattered force at my command, I am resolved not to interfere, but to permit all to *work freely,* unless broils and crimes should call for interference." Costigan on Mining Law, p. 3. And thus left to *work freely,* "they proceeded upon the theory that the public domain belonged to the people; that the mineral therein was the subject of free private acquisition, as a reward for discovery and occupation; and thus defied, in effect, the settled traditions and laws of other countries, and the right of the United States as a government to the mineral contained in its land." Costigan on Mining Law, p. 8.

of the peace had no jurisdiction, and probably dower was enforced,[5] and the usual law of fixtures was held to apply,[6] and the claims were such property as to have jurisdictional value,[7] and usually conveyances had to be in writing;[8] although on all these and many other points the reverse would be true if Field's ruling had been enforced logically and if the pioneers had been treated as mere trespassers (and, indeed, in some of these points the freehold theory had difficulty in making its way).[9]

(3d ed.)

§ 90. **Same.**—The freehold theory is set forth in cases of other Western courts. Thus, in an Oregon case:[10] "The right of mining for the precious metals is a franchise, and the attendant circumstances raise the presumption of a general grant from the sovereign of the privilege. Accepting this as a postulate, it follows that the general government itself could not equitably interfere with or abridge the rights of the miner." In Nevada the court in the first volume of its reports said: "So far, then, as the anomalous rights and character of the miner locating upon the public land for the purpose of mining are defined and established by the courts of California, we feel it our duty to recognize them whenever their decisions may be applicable to our condition. . . . . To repudiate the theory and principles upon which they have acted would be to overturn the foundation upon which half our rights rest."[11]

Before the law was finally settled this way in the act of 1866 as below set forth, the supreme court of the United States in general terms encouraged the stand taken. In one case, for example, it said that mining claims on the public land existed under the *implied sanction* of the national government, for "we cannot shut our eyes to the public history,"[12] and other expressions by the supreme court of the United States to the same effect are hereafter quoted.

5 See Lindley on Mines, and Yale on Mining Claims and Water Rights, for mining decisions.

6 Merritt v. Judd, 14 Cal. 64, 6 Morr. Min. Rep. 62.

7 Sparrow v. Strong, 3 Wall. (70 U. S.) 104, 18 L. Ed. 50, 2 Morr. Min. Rep. 320.

8 *Infra*, sec. 542.

9 See, especially, *infra*, sec. 555, Parol Sale.

10 Gold Hill Co. v. Ish, 5 Or. 104, 11 Morr. Min. Rep. 635.

11 Lewis, C. J., in Mallett v. Uncle Sam Min. Co., 1 Nev. 188, 90 Am. Dec. 484, 1 Morr. Min. Rep. 17.

12 Sparrow v. Strong, 3 Wall. (70 U. S.) 104, 18 L. Ed. 50, 2 Morr. Min. Rep. 320. Field's denial of this in Boggs v. Merced Mining Co., the supreme court of the United States had avoided passing upon when the

(3d ed.)

§ 91. **"Excepting the Government."**—The freehold theory continued to rule, and, as Congress continued unheard from, its opponents, although retaining the "trespasser" doctrine, acknowledged (as Field had in Boggs v. Merced) that such must be accepted in practice. They reserved their technical position by "excepting the government," but admitted the pioneers' rights to be freehold rights against all the world "except the government." The phrase "except the government" came to be much used.[13]

Whether, before the act of 1866, the appropriator's title against the government or its patentees be called legal under a grant, as Conger v. Weaver presumed and Merritt v. Judd declared at law, or equitable from conduct as the mining cases seem to say, yet it would seem but a matter of names. Without congressional action, interests in the public domain could not pass out of the United States so as to be enforced in a court of equity more than in one of law, and either in law or equity Judge Field's words are equally applicable: "The supposed license from the general government, then, to work the mines in the public lands, consists in its simple forbearance. Any other license rests in mere assertion, and is untrue in fact and unwarranted in law."[14] The appropriators' rights in this respect rested wholly on moral grounds; it was a political matter forced upon the judges; the exigencies required

Boggs case came before it on appeal. See *supra*, sec. 86.

In Sparrow v. Strong the contention was that the possessory rights had no value, being in fact no *right* at all, and hence the jurisdictional value was lacking; but the court held otherwise.

[13] For example, after saying that the United States is the riparian proprietor, and after "excepting the government," one case says: "Upon this subject it is only necessary to consider that none of the rights involved in this controversy are founded upon a legal title, and that the safety and security of the parties require that the rights of each, as fixed by the priority and extent of their respective appropriations, should be regarded *as perfect and absolute* as if they had been acquired by prescription, or were held under an express grant from the riparian owner." Kidd v. Laird, 15 Cal. 161, at 181, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571. See, also, Hughes v. Devlin, 23 Cal. 501, 12 Morr. Min. Rep. 241; Spencer v. Winselman, 42 Cal. 479, 2 Morr. Min. Rep. 334; Buchner v. Malloy (1909), 155 Cal. 253, 100 Pac. 687; Miller v. Imperial Water Co. (1909), 156 Cal. 27, 103 Pac. 227, 24 L. R. A., N. S., 372; Lindley on Mines, 2d ed., sec. 642, p. 1196.

[14] Biddle Boggs v. Merced Mining Co., 14 Cal. 375, 10 Morr. Min. Rep. 334. "That there was an implied license from the government to mine for the precious metals upon the public land, by reason of its indulgence, if not the direct encouragement extended to the mining population, *as claimed by every miner*, has been expressly denied by judicial authority." Yale on Mining Claims and Water Rights, pp. 332, 333.

them to formulate a theory that would give permanent stability to the pioneers' claims, Congress failing to do so, or to act one way or the other. "Tradition and the habits of the community count for more than logic";[15] and the fact is that the pioneers' rights came to be treated and acted upon as actual freehold rights in practice, and the phrase "excepting the government" remained (as to waters, at least) a mere formula of words without practical force, however sound it might have been in technical theory.

E. THE ACT OF 1866.

(3d ed.)

§ 92. It may be well, for the sake of clearness, and because of the importance to-day of questions arising out of the act of 1866, to recapitulate briefly the ground just covered, which led up to that act.

In the development of the law from the discovery of gold in 1848, mines and waters were governed by the same general law and decisions; there was no distinction made between the mining and the water questions. So far as there was any written law at the beginning, it was that the pioneers were trespassers upon the public lands of the United States. But the courts, in seeking to protect the pioneers and to give effect and recognition to the local laws and customs governing mining and the appropriation of water, held that although the ultimate title to the land was in the United States, yet, Congress having made no regulations governing the subject, the miners had a presumptive title to mines on the public domain and to water diverted and appropriated thereon. It was held to be the policy of the State to encourage the working of mines and the diversion of the streams for beneficial use in accordance with local law, under a presumptive license from the United States to do so; and because the United States stood silently by during this universal appropriation of the public domain, and because the property rights of almost the whole Western region had thus arisen, the State courts declared that this license, based upon the encouragement of Federal silence, amounted to a grant in fee to the appropriator when acted upon, equally as to mines and waters and ditches. The pioneers' rights were declared positive, vested rights by grant from the United States, which could not be devested.

[15] Mr. Justice Holmes in Laurel Hill Cemetery v. City and County of San Francisco (1910), 216 U. S. 358, 30 Sup. Ct. Rep. 301, 54 L. Ed. 515.

This was the popularly accepted law up to 1859, when, at the approach of the Civil War, the protection of Federal rights became a paramount question; and, in the Castillero case, and in opinions of the California court rendered by Judge Field, the foregoing decisions and contentions were denied; the pioneers were held but trespassers upon the public lands. Though recognizing the previous rulings to the extent of holding the pioneers' rights properly treated as vested freehold interests as between themselves, and against everyone "except the government," yet against the government or its patentees the pioneers' rights were held to be no rights at all. Thus, at the opening of the Civil War, the courts were holding that the rights in realty of the greater part of the Western population were wholly revocable by Federal action. Congress might expressly revoke them, or they would impliedly be revoked as to waters when the United States issued patents to the lands over which the waters flowed, or through which the ditches ran. The prospect of either of these results made the decisions announcing them intensely unpopular in the West. The California legislature denounced them in strong terms, and called upon the California representatives in Congress to seek redress by congressional action. But while the Civil War was in progress, the matter lay dormant.

(3d ed.)

§ 93. **Congress and the Public Domain.**—The California legislature had, as already quoted in connection with the Castillero case, called upon Congress in forcible terms to declare the freedom of the mines, and in the same year (1860) Senator Gwinn, of California, had introduced in Congress an equally emphatic proposition, to wit: "That it shall be lawful for any citizen of the United States, or for any person who may have declared his intention to become a citizen of the United States, who shall be an actual settler, to enter upon and remain on any public land of the United States containing minerals not specially reserved for public uses, within the States of California and Oregon, and to work the mines on the said lands for their own use and benefit, according to the laws and usages of the said States respectively, and no person who has heretofore worked the said mines on said lands for their own use and benefit shall be regarded as a trespasser

against the United States." But he was voted down.[16] In the meantime the Homestead Act got passed, however (1862), holding open the *agricultural* lands to free acquisition by settlers.[17]

The Civil War came to a close in 1865. There was then introduced in Congress, to pay off the war debt, at the request of the Secretary of the Treasury, a bill to withdraw the mines from the miners, fix a price and sell them, with a royalty to the United States after the sale. The Secretary believed it would yield a large revenue. Great discoveries at the Comstock mines in Nevada had recently attracted the world's attention. The following statement, somewhat exaggerated, perhaps, was communicated from Washington by one of the editors of the San Francisco "Alta California," and published in that newspaper May 17, 1867. Senator Stewart declared it to be substantially correct, and it is quoted by Yale:[18] "The miners of California and the States and Territories adjacent thereto have but a very inadequate idea of the imminent peril in which the pursuit in which they are engaged was placed at the commencement of the Thirty-ninth Congress. Two years ago there was a strong disposition in Congress and the East generally to make such a disposition of the mines as would pay the national debt. The idea of relieving the nation of the payment of the enormous taxes which the war has saddled upon us by the sale of the mines in the far distant Pacific slope, about which few people here have any knowledge whatever, was the most popular that was perhaps ever started—compelling other people to liquidate your obligations, has been in all ages and in all nations a highly comfortable and popular proceeding. There were some at the time of which I write who would not be satisfied with the sale of the mines. They held that even after the sale the government should be made a sharer in the proceeds realized from them.

[16] Yale on Mining Claims and Water Rights, p. 347.

[17] The first Federal legislation upon the rights of the pioneers was a proviso in an act of 1865 concerning Federal courts in Nevada, saying: "That no possessory action between individuals in any of the courts of the United States for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the lands on which such mines are, is in the United States; but each case shall be adjudged by the law of possession." 13 Stats. 441. While asserting the Federal title, this had also the effect of asserting that the miners' possession was equivalent to a freehold title. It was hence neutral, and had little effect upon the theories involved, being overshadowed by the act of 1866.

[18] Yale on Mining Claims and Water Rights, p. 10.

The first bill on the subject was introduced in the Senate by Mr. Sherman, of Ohio, and in the House by Mr. Julian of Indiana." Such is the way it was put in the newspapers of the day. The part quoted is mild compared with the way it continued. These and similar things we quote without reference to our own day, but to reflect the thought of those days which culminated in the act of 1866.

Senator Stewart of Nevada became the leader of Western members, and, to prevent such action (and not of his own initiative), introduced a counter-bill to confirm the rights of the miners and appropriators upon lines similar to those previously attempted by Mr. Gwinn, so that their rights should no longer be denied them as trespassers. In the Senate, Mr. Stewart spoke with great effect.[19] The question of royalty was extensively argued. Those who had favored it changed their position as the debate proceeded, and opinion became generally opposed to it.[20]

Stewart's counter-bill passed in the Senate, but was held in the public lands committee of the House.[21] A bill relating only to

[19] His speech is referred to with high approval by Judge Field in Jennison v. Kirk, *infra*.

[20] Debates had been had in previous years in which "the system of landlord and tenancy between the nation and its citizens was strongly condemned in principle and policy, as inconsistent with the duty of a government in the encouragement and reward of industry to individuals, and as fallacious in all theories aiming at remunerative returns." Yale on Mining Claims and Water Rights, p. 342. See the last paragraph of Moore v. Smaw, 17 Cal. 199, at 226.

[21] The difficulty in passing the act rested upon several grounds. Yale ascribes it to the advocates of a tenancy and royalty. An additional cause, however, was the Sutro Tunnel Act, an incident in the history of the Comstock mines in Nevada. It was the fame of these great mines, as much as the California mines, that brought the question of mining rights to the front of public notice. The act of 1866 was specially intended to give stability to Comstock titles by issuance of mining *patents*. At the same time an act was being considered in Congress in aid of the Sutro Tunnel Project to pierce the mountain in which the Comstock mines lay, by a tunnel primarily for drainage purposes, the bill granting to the tunnel company all ore bodies it might cut in its tunnel, not already discovered on the surface. The Sutro Tunnel advocates feared that Senator Stewart's bill would legalize surface claims to their disadvantage if passed first, and hence held up his bill until the day after the tunnel bill went through. (It is interesting to note that the Sutro Tunnel was found almost wholly barren when completed.) Still another source of difficulty was that Senator Williams, of Oregon, while approving the general purpose of the act and the clauses which concern us here, was nevertheless opposed to the other clauses relating to the issuance of mining *patents*, fearing that they were impractical and in the interests of speculators.

I have examined the Congressional Globe upon these matters. (Cong. Globe, vol. 1865–66, p. 3952, etc.) The royalty feature urged by Sherman was withdrawn by him, and he eventually supported the act on the ground that it was better to have the region developed than to tax it at

ditches and water-rights was reported to the House from another committee and passed. In the Senate, thereupon, the Western members secured the substitution of the entire original bill covering both mines and waters; and in this way the House committee on public lands was evaded, and the entire bill eventually passed in the form in which originally passed by the Senate. The title of the House bill for which it was substituted had to be retained, however. In this way while primarily a mining bill, it is entitled, "An act granting the right of way to ditch and canal owners through the public lands, and for other purposes."[22]

(3d ed.)

§ 94. The Act of 1866.—The act applied mostly to mining, in which respect it was crude and was repealed for a more detailed act in 1872[23] along the same lines. But the section referring to water-rights was preserved in the Revised Statutes, and has remained unchanged to the present day.

Section 1 of the act as originally enacted provided: "Be it enacted that the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be *free and open* to exploration and occupation by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States."[24] Then followed some provisions for issuance of mining patents.

The section (section 9) referring to waters and remaining now in force is contained in section 2339 of the Revised Statutes:

Revised Statutes, section 2339: "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same

expense of development; while Williams expressed strong approval of the bill if the patent feature were omitted, and hence approval of the only clauses which concern us here.

22 Mr. Yale says: "The result of the whole fight is the *grant* of all the mines to the miners, with some wholesome regulations as to the manner of holding and working them, which are not in conflict with existing mining laws, but simply give uniformity and consistency to the whole system. The escape from entire confiscation was much more narrow than the good people of California ever supposed." Yale on Mining Claims and Water Rights, p. 12.

23 Act of 1872, 17 Stats., c. 152, p. 9.

24 Italics ours.

are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."[25]

In the placer mining law of 1870 (the act of 1866 was a lode mining law) this was amended, or rather supplemented, by a section now incorporated and in force in section 2340 of the Revised Statutes, and always taken with the act of 1866:

Revised Statutes, section 2340: "All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water-rights, or rights to ditches and reservoirs used in connection with such water-rights, as may have been acquired under or recognized by the preceding section."[1]

(3d ed.)

§ 95. **The Act Explained by Judge Field and Other Authorities.**—The obscurity of the wording of these sections when considered apart from their history has been frequently pointed out. In Nevada,[2] Lewis, C. J., speaks of Revised Statutes, section 2339, as: "This section, which by its turbid style and grammatical solecisms, more surely than by the enacting clause of the act, is shown to be a production of Congress, may be found on page 253, volume 14, of the Statutes at Large," and that it "is about as clear and certain as the object and purposes of the acts of Congress usually are. It is true, the most apt words to indicate this purpose are not employed. That could scarcely be expected," etc. And Mr. Justice Stephen J. Field, in the supreme court of the United States, said that "the language used is not happy."[3]

25 A. C. July 26, 1866, sec. 9; 14 Stats. 253, c. 262; U. S. Comp. Stats. 1901, p. 1437.

1 A. C. July 9, 1870, sec. 17; 16 Stats. 218, c. 235; U. S. Comp. Stats. 1901, p. 1437.

2 Hobart v. Ford, 6 Nev. 77, 15 Morr. Min. Rep. 236.

3 Basey v. Gallagher, 87 U. S. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683. Judge Lindley says (Lindley on Mines, sec. 567) as to mining, with which the act of 1866 dealt more than with waters: "The truth is manifest. The act is crude and imperfect." (The mining part of it was repealed and a better act, along the same lines, substituted in 1872.)

After considering the history and some of the leading authorities construing the act, it becomes clear enough, however. The classical exposition is contained in the opinion of Judge Field in Jennison v. Kirk.[4] This opinion, so far as it deals with the meaning of the act of 1866, is merely a condensation of the Congressional Globe report of Senator Stewart's speech in the Senate, and by adopting that Judge Field here, as in other decisions when a member of the supreme court of the United States, gives up his former stand, and, now that the war is over, becomes a strong supporter of the theory of the pioneers regarding the obligations of the Federal government. Judge Field's opinion is in part as follows:

"The object of the section was to give *the sanction of the United States, the proprietor of the lands,* to possessory rights, which had previously rested solely upon the local customs, laws and decisions of the courts, and to *prevent such rights from being lost on a sale of the lands.* The section is to be read in connection with other provisions of the act of which it is a part, and in the light of matters of public history relating to the mineral lands of the United States. The discovery of gold in California was followed, as is well known, by an immense immigration into the State, which increased its population within three or four years from a few thousand to several hundred thousand. The lands in which the precious metals were found belonged to the United States, and were unsurveyed, and not open, by law, to occupation and settlement. Little was known of them further than that they were situated in the Sierra Nevada Mountains. Into these mountains the immigrants in vast numbers penetrated, occupying the ravines, gulches and canyons, and probing the earth in all directions for the precious metals. Wherever they went, they carried with them that love of order and system and of fair dealing which are the prominent characteristics of our people. In every district they occupied, they framed certain rules for their government, by which the extent of ground they could severally hold for mining was designated, their possessory right to such ground secured and enforced, and contests between them either avoided or determined. These rules bore a marked similarity, varying in the several districts only according to the extent and character of the mines; distinct provisions being made for different kinds of mining, such as placer mining, quartz mining, and mining in drifts or tunnels. They all recognized dis-

[4] 98 U. S. 453, 25 L. Ed. 240, 4 Morr. Min. Rep. 504. Italics ours.

covery, followed by appropriation, as the foundation of the possessor's title, and development by working as the condition of its retention. And they were so framed as to secure to all comers, within practicable limits, absolute equality of right and privilege in working the mines. Nothing but such equality would have been tolerated by the miners, *who were emphatically the lawmakers, as respects mining upon the public lands in the State.* The first appropriator was everywhere held to have, within certain well-defined limits, a better right than others to the claims taken up; and in all controversies, except as against the government, he was regarded as the original owner, from whom title was to be traced. But the mines could not be worked without water. Without water the gold would remain forever buried in the earth or rock. To carry water to mining localities, when they were not on the banks of a stream or lake became, therefore, an important and necessary business in carrying on mining. Here, also, the first appropriator of water to be conveyed to such localities for mining or other beneficial purposes was recognized as having, to the extent of actual use, the better right. The doctrines of the common law respecting the rights of riparian owners were not considered as applicable, or only in a very limited degree, to the conditions of miners in the mountains. The waters of rivers and lakes were, consequently, carried great distances in ditches and flumes, constructed with vast labor and enormous expenditures of money, along the sides of mountains and through canyons and ravines, to supply communities engaged in mining, as well as for agriculturists and ordinary consumption. Numerous regulations were adopted, or assumed to exist, from their obvious justness, for the security of these ditches and flumes, and for the protection of rights to water, not only between different appropriators, but between them and the holders of mining claims. These regulations and customs were appealed to in controversies in the State courts, and received their sanction; and *properties to the value of many millions rested upon them.* For eighteen years, from 1848 to 1866, the regulations and customs of miners, as enforced and molded by the courts and sanctioned by the legislation of the State, *constituted the law* governing property in mines and in water on the public mineral lands. Until 1866, no legislation was had looking to a sale of the mineral lands. The policy of the country had previously been, as shown by the legislation of Con-

gress, to exempt such lands from sale. In that year, the act, the ninth section of which we have quoted, was passed. . . . .

"The Senator of Nevada, Honorable William M. Stewart, the author of the act, in advocating its passage in the Senate, spoke in high praise of the regulations and customs of miners, and portrayed in glowing language the wonderful results that had followed *the system of free mining* which had prevailed with the tacit *consent* of the government. The legislature of California, he said, had wisely declared that the rules and regulations of miners should be received in evidence in all controversies respecting mining claims, and, when not in conflict with the constitution or laws of the State or of the United States, should govern their determination;[4a] and a series of wise judicial decisions had molded these regulations and customs into 'A comprehensive system of common law, embracing not only mining law, properly speaking, but also regulating the use of water for mining purposes.' The miner's law, he added, was a part of the miner's nature. He had made it, and he trusted it and obeyed it. He had given the honest toil of his life to discover wealth, which, when found, was protected by no higher law than that enacted by himself, *under the implied sanction of a just and generous government.*[5] And the act proposed continued *the system of free mining,* holding the mineral lands *open to exploration and occupation,* subject to legislation by Congress and to local rules. It merely recognized the *obligation* of the government to respect private rights which had grown up under its tacit *consent and approval.* It proposed *no new system,* but sanctioned, regulated, and confirmed a system *already established, to which the people were attached.* (Cong. Globe, 1st Sess., 39th Cong., pt. IV, pp. 3225–3228.)"

The supreme court of the United States further declared[6] about the early views, that some thought the Mexican law governed. "Others believed that, whether this were so or not, it would be a wise policy for the government to secure to itself a fair proportion of the metal produced from its own ground. But while Congress delayed and hesitated to act, the swarm of enterprising and industrious citizens filled the country, and, before a State could be

[4a] Referring to Field's Act quoted *supra*, sec. 72.

[5] It is noteworthy that Judge Field here adopted the "implied sanction of a just and generous government" which he had so strenuously denied in Boggs v. Merced Co.

[6] Ivanhoe M. Co. v. Keystone M. Co., 102 U. S. 167, 26 L. Ed. 126, 13 Morr. Min. Rep. 214.

organized, had become its dominating element, with wealth and numbers and claims which demanded consideration. Matters remained in this condition, with slight exception, until the year 1866, when Congress passed a law by which title to mineral land might be acquired from the government at nominal prices, and by which the idea of a royalty on the product of the mines was forever relinquished."[7] That was the purpose of the act not only for mines, but for waters also. The agricultural lands had been formally opened by the Homestead Act; the mines were opened by the first section of the act of 1866; and the waters and rights of way were held free under its ninth section. "It was for the purpose of protecting the rights of appropriators of water for beneficial uses on the public lands which had vested and accrued, by virtue of local customs, laws, and decisions of the courts, that the ninth section of the act of Congress of July 26, 1866, the substance of which is included in section 2339 of the Revised Statutes, was enacted. It was apparent to Congress, and, indeed, to everyone, that neither local customs nor State laws or decisions of State courts could vest the title to public land or water in private individuals without the sanction of the owner, viz., the United States."[8]

[7] In another case the free development theory is set forth regarding mines, saying that a patent adds little to a claim perfected since act of 1866. Chambers v. Harrington, 111 U. S. 350, 4 Sup. Ct. Rep. 428, 28 L. Ed. 452. Free pasturage was also the government policy (Camfield v. United States (1896), 167 U. S. 527, 17 Sup. Ct. Rep. 864, 42 L. Ed. 260), until changed by the Forest Service.

In speaking of the mining phase of the act an eminent writer relates its purpose in the same terms as Judge Field applied to waters: "By the first of these provisions [that all the mineral lands of the public domain should be free and open to exploration and occupation], the government, for the first time in its history, inaugurated a fixed and definite legislative policy with reference to its mineral lands. It forever [until the very recent public demand for the policy of conservation, the policy of freedom was regarded as fixed in the West "forever"] abandoned the idea of exacting royalties on the products of the mines, and gave free license to all its citizens, and those who had declared their intention to become such, to search for the precious and economic minerals in the public domain, and, when found, gave the assurance of at least some measure of security in possession and right of enjoyment. What had theretofore been technically a trespass became thenceforward a licensed privilege, untrammeled by government surveillance or the exaction of burdensome conditions. Such conditions as were imposed were no more onerous than those which the miners had imposed upon themselves by their local systems. That such a declaration of governmental policy stimulated and encouraged the development of the mining industry in the West, is a matter of public history." Lindley on Mines, 2d ed., sec. 55.

[8] Benton v. Johncox, 17 Wash. 277, 61 Am. St. Rep. 912, 49 Pac. 498, 39 L. R. A. 107.

(3d ed.)

§ 96. An Enactment of the Policy That the Waters on Public Lands were Open to Free Development Under Local Law.—It will thus be seen that the purpose of the Act of 1866 (now sections 2339 and 2340 of the Revised Statutes of the United States) was to put the contention that the pioneers were trespassers at rest by "acknowledging" that they never were trespassers; that they were upon the lands of right from the beginning. The Federal title had never been more than a disturbing technicality to the pioneer, and should henceforth remain nominal only, as a trustee who shall resign when the people come into their own (such was their idea). Congress, for the same reason as the first California decisions (namely, to confirm the doctrine of free development under local law), passed this act regarding waters and rights of way (note the wording), "acknowledging" that "rights" had "vested and accrued" in the locators already, even before the statute, and "acknowledging and confirming" the vested character thereof. The water sections were in substance the enactment of the policy of free development of waters and rights of way on public land under local law—the policy we have traced among the people and the original pioneer decisions; a declaration that the pioneers' rights need no longer (and never had needed) to "except the government."

(3d ed.)

§ 97. Operates as a Grant.—The act of 1866, for all diversions of water on public land, declares a grant from the United States to the appropriator equal in force with, and equivalent to, a patent to riparian land. The supreme court of the United States called the act "An unequivocal grant."[9] The act is entitled, "An act *granting* the right of way to ditch and canal owners through the public lands, and for other purposes," and became accepted as merely a formal establishment of the original pioneer theory of a grant or general license from the United States to all citizens who took or should hereafter take possession of mines, waters, rights of way or reservoir sites on public land, under regulations of local law. For many years this explanation of the act of 1866 as a grant ran through the Western reports.[10]

[9] Broder v. Natoma Water Co., 101 U. S. 274, 275, 25 L. Ed. 790, 5 Morr. Min. Rep. 33.

[10] Numerous authorities to this effect are quoted in a later chapter. *Infra*, sec. 155. In part, more techni-

(3d ed.)

§ 98. Only Declaratory of the California Law.—And in thus declaring the theory of a grant, the act added nothing new to the law. Until the act the United States had made no formal grant to the water users, it is true, but the western courts and people had held such a grant to exist nevertheless, and the act, rather than establishing such a grant for the first time, was a declaration that the courts and people had been correct in spite of the fact The assertion of a Federal grant before the act was a fiction, but the act declared in substance, not that it now for the first time supplied the grant, but that the fiction was and always had been the true law.

That the act introduced nothing new, and is only declaratory of the theory of the original law as, before the statute, it always existed, became the express doctrine of Judge Field and the United States supreme court. Through Field that court said in one case that the United States had from the beginning encouraged free and unlimited use of the public lands for mining and thereby, even before the act, "by its silent acquiescence, *assented* to the general occupation," etc.,[11] and in Jennison v. Kirk,[12] quoted in a previous section, said that the act "merely recognized the obligation of the government to respect private *rights* which had grown up under its tacit consent and approval. It proposed *no new system*, but sanctioned, regulated, and confirmed a system *already established*, to which the people were attached."[13] In Broder v. Natoma Water Co.,[14] the supreme court of the United States said:

"We are of the opinion that it is the established doctrine of this court that rights of miners who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and

cally, it was a *release* by a disseisee to his disseisors (although this is only an idea here suggested by the way, and it would be only in part applicable).

[11] Atchison v. Peterson, 20 Wall. (87 U. S.) 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583.

[12] 98 U. S. 453, 25 L. Ed. 240, 4 Morr. Min. Rep. 504, quoted *supra*, sec. 95.

[13] After the act of 1866 Judge Field thus modified his views about the pioneers having been trespassers as he had formerly held in Boggs v. Merced (*supra*, sec. 86). He there said the miners could have no rights because the government had reserved its mineral lands; here he adopts the miners' view that this reservation was not *against* them, but *for* them, "to encourage their free and unlimited use"; and he here also accepts the tacit consent or license which he had rejected in the Boggs case.

[14] 101 U. S. 274, 25 L. Ed. 790, 5 Morr. Min. Rep. 33. Note that there is an error in the report in the Lawyers' Edition reprint.

for purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged and *was bound to protect before the passage of the act of 1866,* and that the section of the act which we have quoted was rather a *voluntary recognition of a pre-existing right of possession* constituting a *valid* claim to its continued use, than the establishment of a new one." In this case an 1853 appropriation was held to prevail against an 1864 railway grant of land, made before the act of 1866, and the court expressly said, "*We do not think that defendant is under the necessity of relying on that statute.*" The railway grant had contained a clause excepting "any lawful claim," and the supreme court of the United States held a ditch and an appropriation of water to be a *lawful* claim against the United States itself even before the act of 1866.[15] And this has since been the general ruling.[16]

Thus Congress and the supreme court of the United States finally joined with the supreme court of California in holding that the pioneers (the appropriators) had not been trespassers; that the doctrine of appropriation was founded on the theory that the public domain was open to free development under local law, and that an appropriator is, and always was, a grantee of the United States of rights of way and of waters diverted on public land of equal dignity with a patentee of land, and if prior in time will, and always would, prevail against a later *patent* to riparian land; not merely a right of possession against later mere appropriators, but title against the world as a grant from the United States of an interest in fee in the public land.

Whatever this may have lacked in logic or legal reasoning is made up by the fact that it actually triumphed and became a fact of history. Until the act of 1866, Congress had never made an actual grant, but nevertheless, during the preceding years, under the rulings of the courts and acceptance of the people, rights in

[15] See Van Dyke v. Midnight Sun Co. (Alaska), 177 Fed. 90.

"The construction given to the language of the reservation [in Broder v. W. Co.] of course implies that those who appropriated lands or waters on the public lands, prior to the acts of 1864 and 1866, had not been treated by the government in those acts as mere trespassers, but as there by license." Lux v. Haggin, 69 Cal. 255, at 347, 4 Pac. 919, 10 Pac. 674. At the same time it must be noted that the opinion in Lux v. Haggin contains some expressions of a contrary tendency. The act of 1864 referred to is the Pacific Railway grant and right of way act.

[16] *Infra,* sec. 257.

the public domain as to mines and rights of way and waters were acquired and became vested against the world under the fictitious grant deduced from its silence. In this the public land law of the pioneers was an illegitimate thing, but it was the law in practice; the act of 1866 legitimated it and this legitimation related back to its birth and continued for the future. It is a clear case where the law was evolved from the exigencies of the times, molded by circumstances pressing it now one way, then the other; the growth of two wars and the winning of desert and wilderness and the peopling of a continent, more potent than closeted logic.

(3d ed.)

§ 99. **Conclusion.**—The act of 1866 gave the formal sanction of the United States to the prevailing theory of a grant to the holders of existing rights upon public land, which indeed was its primary object; for the statute had in view chiefly appropriations already made rather than future ones, and the protection of existing rights on public land against the United States itself (by the act of 1866) and against its later riparian patentees (by the enactment of 1870) was the primary object. Those rights had been built up in reliance upon the tacit acquiescence of the United States, the true owner of the lands and (under the assumption of those days) waters on which appropriations were made, and these statutes acquiesced therein expressly, "a voluntary recognition of a pre-existing right rather than the establishment of a new one." [17]

It further provided the same method for acquiring water-rights on public land in the future; a vindication of the existing system for the future as well as for the past; as to which the following very recent expression is one of many filling the Western reports: "The doctrine of appropriation thus established was not a temporary thing, but was born of the necessities of the country and its people, was the growth of years, permanent in its character, and fixed the status of water-rights with respect to public lands," and it was held that the act is in force for the waters of Alaska.[18] Appro-

[17] Osgood v. Water Co., 56 Cal. 571, 5 Morr. Min. Rep. 37; Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Broder v. Natoma Water Co., 101 U. S. 274, 25 L. Ed. 790, 5 Morr. Min. Rep. 33; Jacob v. Day, 111 Cal. 578, 44 Pac. 243; Pomeroy on Riparian Rights, secs. 17, 28.

[18] Van Dyke v. Midnight Sun M. Co., 177 Fed. 90.

"It has, as we interpret this law, authorized any person wishing to construct a canal or ditch for mining or agricultural purposes to construct it over any public land," and nothing more is required than that the land is public and that the ditch is constructed. Hobart v. Ford, 6 Nev. 77, 15 Morr. Min. Rep. 236; accord, Jacob v. Lorenz, 98 Cal. 332, 33 Pac. 119.

priators of water on public land to-day, at least in the States following the California system, always claim to deraign title ultimately under the act of 1866.[19]

But as we proceed we must remember that it was wholly public land law, involving solely rights in the unoccupied public domain. In this regard there is, in the section in question of the act of 1866, a proviso requiring payment of damages to settlers for injury by appropriators. As below mentioned, the proviso was probably declaratory, for possessory riparian land claimants, of what Lux v. Haggin later laid down for riparian patentees.[20]

[19] Lux v. Haggin, 69 Cal. 255, at 339, 10 Pac. 674.

[20] *Infra*, secs. 221, 228, ditches on private land.

§§ 100–107. (Blank numbers.)

CHAPTER 6.

HISTORICAL REVIEW (CONTINUED)—FROM THE ACT OF 1866 TO THE PRESENT.

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§§ 143–150. (Blank numbers.)

A. THE PUBLIC LAND QUESTION LAID AT REST.

(3d ed.)

§ 108. The Federal Policy Settled.—The act of 1866 secured to the pioneers their existing rights in real property in mines, rights of way and waters appropriated from the public domain, and settled the same system for their free acquisition in the future;[1] and the question of governmental policy was never thereafter important until, at the time of this writing, the Policy of Conservation has again brought it to public attention. From the year 1866 to the year 1908 the Federal policy of free development of water-rights by appropriation upon the public lands under local rules had become so settled a part of "the law of the realm" in the West, that, as will appear hereafter, the newer States (and the supreme court of the United States) forgot its origin, and now regard it as a matter of course, inherent in local law, denying that Congress gave or can take away or modify.

The act of 1866 enacted a policy, and the essence of it was got into three sentences. It was a formal expression of the people's own way of thinking, nothing more; brought nothing into life (if legislation ever did or can), but gave security to the life the people were already leading. That life thereafter, as railroads were built and cities and new communities founded, went into the New West, whose name became the word for what was most intensely American. Each new State as it was admitted pointed to the resources that should build the greatness of the future within its borders. The "Dower of the People" and "the State's Heritage," they called the public domain: a great Horn of Plenty, in which everyone who came, especially the poor and homeless, should find something there for himself; the only price being in-

[1] The act of 1866 was simply a direct and positive recognition on the part of the government of these rights and a guaranty of a continuance of the same policy in the future, it is said in a case holding that a mining claim located before 1866 prevailed against an agricultural patent (issued in 1870). Gold Hill Co. v. Ish, 5 Or. 104, 11 Morr. Min. Rep. 635.

dustry and intelligence, the reward being a competence and independent prosperity for all, with even wealth and fortune for the lucky (for they did not deny wealth too); these and like words filled, during the decades following the act of 1866, the opinions of judges and resolutions of legislators, no less than the daily newspaper editorial and the Fourth of July oration. Indeed, most States put the "free development" theory into their constitutions or statutes by providing, "The right to appropriate unappropriated water shall never be denied," or words to the same effect.[2]

(3d ed.)

§ 109. **Early State Legislation.**—Shortly after the acts of Congress of 1866 and 1870 went into effect, California adopted its codes (1872). In the Civil Code thirteen sections[3] were devoted to this subject—a perfectly valid field for State legislation within constitutional limitations upon the legislative power of a State.[4] In the mining law, subject to the paramount power of Congress, the States have, from the earliest days, legislated regarding the public domain, whatever may be the source of their right so to do. Regarding water, it has, however, been said to be a part of the State's police power.[5] At all events, Congress had stepped aside, by the act of 1866, and there now opened the era of State legislation which has continued to the present day. No substantial innovations were made by the California Civil Code, and the California code merely settles, in legislative form, the decisions of the courts already made; a crystallization of the law of appropriation, superseding

[2] For example:

Colorado.—"The right to divert unappropriated waters of any natural stream for beneficial uses shall never be denied." Colo. Const., art. 16, sec. 6. This "guarantees in the strongest terms the right of diversion and appropriation for beneficial uses." Wheeler v. Northern Colo. Irr. Co., 10 Colo. 587, 3 Am. St. Rep. 603, 17 Pac. 487.

Idaho.—Const., art. 15, sec. 3; Stats. 1905, c. 23, 52b.

Nebraska.—Comp. Stats. 1903, sec. 6451; Cobbey's Stats., sec. 6797; Laws 1895, c. 69, p. 260, sec. 43.

New Mexico.—Laws 1905, p. 270, sec. 1.

North Dakota.—Laws 1905, c. 34, sec. 1; Rev. Codes (1905), sec. 7604.

South Dakota.—Laws 1905 and 1907 (see *infra*, Part VIII).

Wyoming.—Const., art. 8, sec. 3.

This list is probably not complete.

See Clark v. Nash, 198 U. S. 361, 25 Sup. Ct. Rep. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1171, as to how far the supreme court of the United States has gone in holding the development of the West to be of the utmost public interest.

[3] Sections 1410–1422.

[4] Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Gutierres v. Albuquerque etc. Co., 188 U. S. 545, 23 Sup. Ct. Rep. 338, 47 L. Ed. 588.

[5] White v. Farmers' etc. Co., 22 Colo. 191, 43 Pac. 1028, 31 L. R. A. 828; Kansas v. Colorado, 206 U. S. 46.

the miners' customs and rules, which thereafter ceased to have any operative force in the California law of waters. No new rules were incorporated except in minor details that will be hereafter noted.[6]

In one or two instances the principle of priority of appropriation of waters upon public land passed into legislative enactment as a statement of the decisions before the adoption of the California codes. In Wyoming the territorial legislature in 1869 passed a law, declaratory of the California decisions, for the development of the mining resources of the territory, and provided in that act for placing and recording notices of claims for ditches and water privileges; and requiring the completion of such ditches within a certain time after filing notice.[7] After the enactment of the California Civil Code, statutes were passed in other States generally copying its provisions upon appropriation of water.[8] The first legislation was generally modeled upon the California law as represented by the decisions of the California court and formulated in the Civil Code. In Nebraska, the rule was not enforced until recently.[9]

Since the enactment of the California Civil Code there has been (for reasons hereafter appearing) practically no legislation in California, though Professor Pomeroy wrote his work on Riparian Rights to urge it. The State legislation in California since then has been chiefly devoted to irrigation districts, leaving the law of waters in general untouched. But more recently there has been extensive legislation in most of the other States, and legislation was revived again in California in 1911.

As a rule, as will appear hereafter, the State legislation has its basis in the policy of free development.[10]

[6] Pomeroy on Riparian Rights, 89; Blanchard and Weeks on Mining Claims and Water Rights, 696. See *infra*, sec. 361 et seq.

[7] Laws 1869, pp. 310, 311, c. 22, secs. 15–17; Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210.

[8] *Infra*, sec. 361 et seq.

[9] Meng v. Coffey, 67 Neb. 500, 108 Am. St. Rep. 697, 93 N. W. 715, 60 L. R. A. 910, saying: "Irrigation is very young in this State, as the semi-arid portions did not begin to be settled till about 1880."

[10] In the Senate Committee on Public Lands, Feb. 16, 1910, it was said: *Senator Nelson, of Minnesota:* "Do the States charge anything for the use of the water?" *Senator Clark, of Wyoming:* "They do not." *Senator Smoot, of Utah:* "My State does not charge a cent." *Senator Hughes, of Colorado:* "The constitution of my State says that it shall be free." *The Chairman:* "Does any State make a charge?" *Senator Chamberlain, of Oregon:* "If anybody in Oregon appropriates water, he must develop it within a certain time or lose it." *The Chairman:* "But if he develops it in that time, does the State charge?" *Senator Chamberlain:* "It makes a small charge."

the question, Mr. Justice Holmes recently said in the supreme court of the United States regarding the doctrine of riparian rights: "Such a limitation would substitute accident for a rule based upon economic considerations, and an effort, adequate or not, to get the greatest use from all available land";[18] while Mr. Justice Brewer,[19] in words which run through the Western reports, says that under the law of prior appropriation barrenness disappears and the desert becomes a garden, blossoming like the rose.[20]

In the rest of the Western States,[21] the courts have been equally positive that the doctrine of riparian rights is a beneficial one for private land and that the law of appropriation is a system to be viewed with alarm. In California,[22] the court says that it would not require a prophetic vision to see that the law of appropriation alone would result in a monopoly of the waters of the State by a few individuals. In a very recent case the California court, under circumstances involving percolating water where they were totally unbound by precedent, brought in the riparian doctrine *de novo* as imperatively demanded by conditions.[23] In Montana,[24] the chief justice said that the common law of riparian rights is best adapted to irrigation, saying: "Water for irrigation in this country as naturally belongs to the lands through which the stream passes, in certain proportions, as in other countries it belongs to the land to supply the necessities of life." And he further says: "Is it not the true policy of this Territory to erect such a system of laws here as shall distribute our short supply of water to the best advantage to all our people? The common law applied to this country is ample and sufficient to secure this much desired end"; and after setting forth objections to the doctrine of appropriation, closes

Ed. 956, Theodore A. Bell, member of Congress from California; J. C. Needham, member of Congress from California; Henry C. Hansbrough, United States Senator from North Dakota; Alexander Oswald Brodie, former governor of Arizona; Francis E. Warren, United States Senator from Wyoming; Joseph M. Carey, formerly U. S. Senator from Wyoming, and many engineers testified to their opinion of the ruinous effect of the common law on irrigation.

18 Boquillas etc. Co. v. Curtis, 215 U. S. 339, 29 Sup. Ct. Rep. 495, 53 L. Ed. 822.

19 Kansas v. Colorado, 206 U. S. 46, 27 L. Ed. 655, 51 L. Ed. 956.

20 Quotations to this effect could be repeated from all the States given below, which reject the doctrine of riparian rights *in toto*. See, further, the quotations in Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210, given *infra*, sec. 168.

21 See list, sec. 117, below.

22 Lux v. Haggin, 69 Cal. 255, at 309, 10 Pac. 674, quoted *infra*, sec. 1015.

23 Miller v. Bay Cities W. Co., 157 Cal. 256, 107 Pac. 115, 27 L. R. A., N. S., 772.

24 Thorp v. Freed, 1 Mont. 651, Wade, C. J.

his opinion: "And all these consequences, so disastrous in any view, are to be visited upon Montana, that a few individuals may have what does not now, and never did, belong to them."[25] In Nebraska,[1] the court arraigns the unrestricted law of appropriation, and says it breeds monopolies; leads to antagonism, strife, dissension, gross exactions, abuses; is detrimental to the public welfare; has given rise to interminable litigation. Professor Pomeroy said: "The doctrine of prior appropriation is completely at war with a system which recognizes, harmonizes, and protects the rights of all parties in the State."[2]

These statements so far quoted are in the nature of a cross-complaint, or recrimination, so to speak. By way of reply to the assertion that the common law is inapplicable to conditions where irrigation is necessary, it is said in Nebraska:[3] "A great deal of what has been urged upon us as demonstrating the inapplicability of the rules of the common law upon this head to conditions in Nebraska proceeds upon an erroneous impression of the nature and purpose of such rules. Nor do we believe that the common-law rule of equality among riparian owners, administered liberally with respect to the circumstances of particular localities, is necessarily prohibitive of irrigation anywhere. If we bear in mind wherein the essential doctrine of the common law on this subject consists, we doubt whether a more equitable starting point for a system of irrigation law may be found." And in another case,[4] the same court says: "But it cannot be said that the common-law rule of riparian ownership is inconsistent with the use of water for irrigation purposes, for, as we shall see later on, the right to the use of water for irrigation purposes is one of the elements of

[25] He desired to refuse to allow the law of appropriation any recognition whatever for irrigation; that is, to apply the common law alone and reject the doctrine of appropriation *in toto* as concerns irrigation.

[1] Farmers' Irr. Dist. v. Frank, 72 Neb. 136, 100 N. W. 286.

[2] Pomeroy on Riparian Rights, sec. 160. In another place (page 264) he says: "As Colorado and these Territories become more fully settled, especially by an agricultural population, this system of water regulation will inevitably give rise to an enormous amount of trouble, controversy, and litigation. It is impossible to conceive of legislation tending more than this to create strifes, conflicts, and breaches of the peace. The right of prior appropriation on the public streams was a most fruitful cause of litigation in California, as is shown by the great number of reported cases; but this is a feeble illustration of the litigation and controversy which must arise from the statutes of Colorado and of the various Territories when they come into full operation upon an increasing population."

[3] Meng v. Coffey, 67 Neb. 500, 108 Am. St. Rep. 697, 93 N. W. 715, 60 L. R. A. 910.

[4] Crawford v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647, 93 N. W. 781, 60 L. R. A. 889.

property belonging to the riparian owner along with that of its use for domestic and water-power purposes." And in Washington:[5] "Now, the common-law doctrine declaratory of riparian rights, as now generally understood by the courts, is not, in our judgment, inconsistent with the constitution or laws of the United States or of this State. Nor is it incompatible with the condition of society in this State, unless it can be said that the right of an individual to use and enjoy his own property is incompatible with our condition—a proposition to which, we apprehend, no one would assent for a moment."[6]

The Oregon court has recently taken an intermediate position, saying that the common law of riparian rights is better adapted to domestic uses, though exclusive rights by priority of appropriation are better for irrigation, mining and manufacturing; but as to domestic uses, declares that an abrogation of riparian rights would be against the public welfare.[7]

In Texas there is a different rule for different parts of the State,[8] but in California the court said:[9] "It is said, it should be held that the streams in the more arid portions of California may be entirely diverted by the prior appropriator, as against those below, and that the common-law rights of riparian proprietors should prevail in the regions in which the climate more nearly resembles that of other States where the common-law rule is enforced. The aridity of the soil and air being made the test, the greater the aridity the greater the injury done to the riparian proprietors below by the entire diversion of the stream, and the greater the need of the riparian proprietor, the stronger the reason for depriving him of the water. It would hardly be a satisfactory reason for depriving riparian lands of all benefit from the flow that they would thereby become utterly unfit for cultivation or pasturage, while

[5] Benton v. Johncox, 17 Wash. 277, 61 Am. St. Rep. 912, 49 Pac. 498, 39 L. R. A. 107.

[6] "But suppose that decision should necessitate the adoption of the common law respecting the manner in which running water may be used by those having the right to it; although it may operate unjustly in some cases, still, as a general rule, none more just and reasonable can be adopted for this State. It is a rule which gives the greatest right to the greatest number, authorizing each to make a reasonable use of it, providing he does no injury to the others equally entitled to it with himself." Van Sickle v. Haines, 7 Nev. 249, 15 Morr. Min. Rep. 201. Since overruled.

[7] Hough v. Porter (1909), 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, affirmed, 102 Pac. 728.

[8] *Infra*, sec. 117.

[9] Lux v. Haggin, 69 Cal. 255, 10 Pac. 674.

much of the water diverted must necessarily be dissipated.[10] No precise line of separation between the regions so characterized is pointed out, and the attempted classification is itself somewhat uncertain and indefinite. It would seem there could be no doubt that the law, derived from the same sources, is the same everywhere in California. . . . . Whatever is the general law bearing on the subject, it is the same everywhere within the limits of the State."[11]

(3d ed.)

§ 112a. Same.—The first thing that strikes attention in this conflict of opinion is thus expressed by the Nebraska court:[12] "In all States which, like our own, are but partially arid, the common law is in force. The States holding to the contrary rule are wholly within the arid regions." The relative merits of the two systems would appear to depend on the relative scarcity of water where the systems are to be applied.

The reason for the difference may lie somewhat deeper. California, where the common law is (legally speaking) in force for private lands (as well as appropriation for public land), is as arid in some parts as are any of the other States.[13] In one case,[14] speaking of certain California land, it was said: "The water was so scarce that the land was liable to dry up and blow away." Aridity is, however, outside of California, a characteristic of the pioneer regions to-day; or rather, because entirely arid, certain of the interior States are sparsely settled and not largely developed. Be-

[10] Where riparian rights are rejected, the law of appropriation is not relaxed on this account, and it is no argument that the diversion "leaves these lands valueless and of no benefit for the only and natural uses to which they could be applied." That is held not to be material. Sternberger v. Seaton etc. Co. (1909), 45 Colo. 401, 102 Pac. 168. Compare Cascade Co. v. Empire Co. (Colo.), 151 Fed. 1011.

[11] To the same effect, Meng v. Coffey, 67 Neb. 500, 108 Am. St. Rep. 697, 93 N. W. 715, 60 L. R. A. 910. But see, in Washington, *infra*, sec. 635.

[12] Meng v. Coffey, 67 Neb. 500, 108 Am. St. Rep. 697, 93 N. W. 713, 60 L. R. A. 910.

[13] The portion of the public domain lying between the ninety-ninth meridian of longitude west from Greenwich and the Pacific Ocean is arid, and generally incapable of cultivation except by means of irrigation; that region embraces more than one-third of the geographical area of the United States, and comprises New Mexico, Arizona, Colorado, Wyoming, Utah, Idaho, Montana and Nevada and *large portions* of the States of *Oregon, California, Nebraska, Kansas, and Texas and of the Territories of Washington and Dakota.* Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210.

[14] Hewitt v. Story, 64 Fed. 510, 12 C. C. A. 250, 30 L. R. A. 265.

yond the matter of aridity is the more fundamental consideration that the law of appropriation is a pioneer doctrine, one to fit the development of sparsely settled and rough regions of any kind. Where there are few riparian proprietors and the region is new and unsettled public land, the rule of "first come first served" is eminently the system to accomplish settlement and development, while the restriction of use to riparian lands when the riparian lands have been little taken up impedes that much-desired result. On the other hand, in regions more closely settled, where the riparian lands have been more fully taken up, and the small holdings of land under private title are many, and the important enterprises are not merely a few on a large scale—in such regions the restriction to riparian lands is in the interest of a whole community (the riparian public), while the rule of "reasonable use" upon correlative lines, each riparian owner being required to adjust his use to the equality in right of his neighbor, has more element of justice than to exalt the first user over all the rest of the community. For the more settled communities, or for adjustment of rights upon the host of little streams, the rule of "first come first served" is inadequate, because based upon too selfish a principle, opening the way to monopoly.

The difficulty at present lies mainly in applying to unsettled regions a system which, like the law of riparian rights, presupposes a settled region, being drawn from long-settled landed communities. The history we have been tracing of the doctrine of appropriation shows that the pioneer conditions on the unsettled public domain in California were fundamental in giving rise to the doctrine of appropriation. In early California we saw that it was urged that it was peculiarly a mining doctrine, not to be applied to agriculture, and the court had much difficulty before it was accepted as a doctrine of general application and outlook. To-day, in the interior, the pendulum is swinging the other way; it is called peculiarly an irrigation doctrine. Neither in history nor results does this seem justified. It is neither an irrigation nor a mining doctrine; it is one admirably adapted to all pursuits so long as applied in a new region, but may with advantage be supplemented by the correlative rules of "reasonable use" of the common law, as the regions become more settled and developed.[15] For closely settled regions (especially upon small streams) the com-

[15] See *infra*, sec. 310 et seq.

mon law of riparian rights comes closer to "the people's system," of equal rights for all, and prior rights for none,[16] and seems quite in line with the conservation movement.

Upon California streams available for irrigation the situation now is that their summer flow, especially in Central California (the San Joaquin Valley) and in Southern California, is in full use and irrigating to full capacity (probably nearly three million acres irrigated, as much if not more than in any other State).[17] This has been accomplished under that part of the California doctrine which upholds appropriation upon public land, most large California irrigation systems being operated under appropriative rights of long standing, which were originally acquired while the land was public. The California doctrine, since permitting appropriation upon public land, has not stood in the way. New extension of irrigation will be in the storage of storm waters, and in the use of the waters of the northern part of the State (Sacramento Valley), as to neither of which has there been much attempt until the last few years, because there had been no call for it. These now are proceeding by grant (riparian owners usually sell their rights for five hundred to one thousand dollars), prescription (that is, riparian owners frequently do not stand on their rights), and condemnation: matters now in experiment and in course of being worked out. A few big riparian proprietors holding extensive ranches under Mexican grants have barred extension in some places, but so far as the public is concerned it is but resulting in a change of promoters, for these riparian holdings are coming to be made the basis of distributing systems by these riparian owners themselves. And of an importance not now appreciated are the little streams that cannot be made the basis of extended projects but can water neighboring farms along their banks; and further, the hundreds of little streams in nonirrigating regions, where the

[16] *Infra*, sec. 739.

[17] "The State of California, constituting a large and important part of the field where the art of irrigation is practiced, is also the great model for the rest of the region regarding the practical development of its water supply, and in the use of water as applied to the purpose of irrigation. California is not only ahead in the development of her water supply and the number, size and boldness of design of her irrigation works, but that State is also superior to all other States and Territories of the arid West in her method of applying and utilizing the water. It is safe to say that California owes the larger portion of the prominence which it occupies to-day to the results of irrigation." From Kinney on Irrigation, sec. 339. (Mr. Kinney is a member of the Salt Lake Bar. The quotation is condensed from the whole section.)

law of riparian rights is now (legally speaking) the sole law. In such cases the beneficial principles of the riparian system will surely show their force in the public interest as settlement advances. It is significant that the California court, in establishing its new law of percolating water, avowedly departing from precedent and actuated wholly by the desire to find upon principle a system based upon justice and beneficial result to the State, has (after having first made some tentative advances toward the law of exclusive rights by appropriation) built up a system for percolating water which, one can now see, very closely resembles the common law of riparian rights.[18]

The law of correlative use between riparian proprietors is the basis of the civil law as well as the common law; and the common law of riparian rights (while, because unsuited to unsettled regions, and not a law for big projects, hitherto unpopular with the people, and cannot be expected to become popular until the regions are well settled up) is not regarded by the courts (with appropriation for public land) as hostile to irrigation, where the system prevails under what is called the California doctrine,[19] the origin of which it is now our object to describe.

(3d ed.)

§ 113. Riparian Rights Before Lux v. Haggin.—The chief question in the early days was, as previously set forth, whether rights could be obtained *on public land.* It was immediately held in California that the possessory system applied to nothing already in private hands; that the free and untrammeled action of the pioneers upon public land must not encroach upon private owners; that private land, with all its accustomed rights, was as secure in California as elsewhere in the Union. This was evidenced by the rule that miners could not appropriate waters already in use by agriculturists, nor enter and build a ditch on the farmer's land, which was always held a trespass, despite the legislative attempt in the Possessory Act to enact the contrary.[20] That the right to appropriate mines could not be exercised on another's private land was definitely and forever settled by Judge Field in Biddle Boggs v. Merced Mining Co.[21] "There is something shocking to all our

[18] *Infra*, secs. 1090, 1104. See especially Miller v. Bay Cities W. Co., 157 Cal. 256, 107 Pac. 115, 27 L. R. A., N. S., 772; Hudson v. Dailey (1909), 156 Cal. 617, 105 Pac. 748.

[19] Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210.

[20] *Supra*, sec. 85.

[21] 14 Cal. 379, 10 Morr. Min. Rep. 334.

ideas of the rights of property," he there said, "in the proposition that one man may invade the possessions of another, dig up his fields and gardens, cut down his timber and occupy his land, under the pretense that he has reason to believe there is gold under the surface, or if existing, that he wishes to extract it and remove it." Upon the same lines, it was consistently ruled that there could be no appropriation of rights of way over land in private hands, nor of water flowing there,[22] nor of water on public land already appropriated by another.[23]

It was so ruled in the earliest decisions. In Irwin v. Phillips,[24] the original precedent upholding public land appropriation, it was said: "If it is upon a stream, the waters of which have not been taken from their bed, they cannot be taken to his [meaning the landowner's] prejudice." In the second case upon water-rights,[25] the court said: "It results from the consideration we have given the case, that the right to mine for the precious metals can only be exercised upon public lands; that although it carries with it the incidents of the rights, such as the use of wood and water, those incidents must also be of the public domain in like manner as the lands." In the third case in the reports the court said water-rights may exist "upon the ground of prior location upon the *land.*"[1] In the next volume of the reports the court said: "We have recognized the right to appropriate the water *where no riparian rights intervene*";[2] and again, in another case in the same volume: "Possession or actual appropriation must be the test of priority in all claims to the use of water, *whenever such claims are not dependent upon the ownership of the land through which the water flows.*"[3] This passed into clear and actual decision in 1857 in Crandall v. Woods,[4] holding that the new rule was by no means exclusive of common-law riparian rights, and that those rights attached to the land through which a stream flowed, in favor of settlers thereon, against all but appropriations actually made be-

[22] *Infra*, secs. 221 et seq., 227 et seq.

[23] *Infra*, sec. 299 et seq.

[24] 5 Cal. 140, 63 Am. Dec. 113, 15 Morr. Min. Rep. 178.

[25] Tartar v. Spring Creek W. Co., 5 Cal. 395, 14 Morr. Min. Rep. 371.

[1] Hill v. Newman, 5 Cal. 445, 63 Am. Dec. 140, 4 Morr. Min. Rep. 513.

[2] Conger v. Weaver, 6 Cal. 548, 65 Am. Dec. 528, 1 Morr. Min. Rep. 594.

[3] Kelly v. Natoma W. Co., 6 Cal. 108.

And Wixon v. Bear River Co., 24 Cal. 367, 85 Am. Dec. 69, 1 Morr. Min. Rep. 656; Ferrea v. Knipe, 28 Cal. 340, 87 Am. Dec. 128, and other cases. See cases cited in Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Pomeroy on Riparian Rights, sec. 109.

[4] 8 Cal. 136, 1 Morr. Min. Rep. 604.

fore the settlement thereon. It was said by Chief Justice Murray in that case: "If the rule laid down in Irwin v. Phillips is correct as to the location of mining claims and water ditches for mining purposes, and priority is to determine the rights of the respective parties, it is difficult to see why the rule should not apply to all other cases where land or water had been appropriated. . . . . Suppose he had located a farm and the water passing through his land was necessary for the purpose of irrigation, is not this purpose just as legitimate as using the water for mining? It may or may not be equally as profitable, but irrigation for agricultural purposes is sometimes necessary to supply natural wants, while gold is not a natural, but an artificial, want, or a mere stimulant to trade and commerce. If it is understood that the location of land carries with it all the incidents belonging to the soil, those who construct water ditches will do so with reference to the appropriations of the public domain that have been previously made, and the rights that have been already acquired, with a full knowledge of their own rights as against subsequent locators." Crandall v. Woods very distinctly decides that as between an occupant of riparian land and a subsequent appropriator of the waters of the stream, the former may assert the riparian right, and was so decided with the very view of protecting irrigation in the future, though leaving open in the case whether irrigation be proper. This is the first Western case dealing with irrigation at all, and it upheld the riparian right. Crandall v. Woods was affirmed in a later case in the same volume.[5]

Throughout the cases up to Lux v. Haggin this was asserted consistently, and even actually decided repeatedly.[6]

It had passed into statute. The act of Congress of 1866 contained the proviso[7] that appropriators of water interfering with the possession of settlers were liable in damages to the settlers.

[5] Leigh v. Independent D. Co., 8 Cal. 328, 12 Morr. Min. Rep. 97.

The point which gave difficulty was, *When* did the land become private respecting waters thereon? Was it from the mere taking possession by the settler? Or was it from the date he entered an application for the land in the land office? Or was it when he made final proof in the land office? Or was it when he got a certificate from the land office of full payment to the United States for the land? Or, finally, was it only when a patent actually issued to him for the land? See *infra*, sec. 261.

[6] Among others, Ferrea v. Knipe, 28 Cal. 340, 87 Am. Dec. 128; Creighton v. Evans, 53 Cal. 55, 8 Morr. Min. Rep. 123; Pope v. Kinman, 54 Cal. 3; Zimmler v. San Luis etc. Co., 57 Cal. 221; Anaheim etc. Co. v. Semi-Tropic Co., 64 Cal. 185, 30 Pac. 623.

[7] Quoted *supra*, sec. 94.

A similar provision is found in a California statute of 1863.[8] Moreover, the California Civil Code, in its provisions upon appropriation enacted in 1872, had ended with the provision in section 1422, "The rights of riparian proprietors are not affected by the provisions of this title." That not more was said was because the rights of private land had not been much involved in the litigation, of which the code was merely declaratory. While Lux v. Haggin was pending numerous attacks were made in the legislature upon this section, but were wholly unsuccessful. There were three such attacks defeated in 1881, and five in 1883. In the California constitutional convention of 1879 some similar attacks on riparian rights were made in debates, but without success.[9]

While the protection of common-law riparian rights was thus consistently the attitude of the California law whenever occasion demanded, there was, however, in the pioneer days, owing to the great unsurveyed expanse of the public domain, and the lack of laws for obtaining patent, little occasion to demand it. Private riparian land was seldom involved in the litigation, and even when involved, its riparian rights were not often asserted, the riparian owners usually having public land appropriations themselves, so that the result would have been the same under either rule.[10] Owing to the great preponderance of public land litigation it had, before Lux v. Haggin, become the prevalent impression that there had been a rejection *in toto* in California of the common law of riparian rights.[11]

[8] Stats. 1863–64, p. 375, sec. 10.

[9] See Debates of 1878–79, vol. 1, pp. 81, 95, 101, 143, 151, 165.

[10] E. g., Ferrea v. Knipe, 28 Cal. 340, 87 Am. Dec. 128. "This is the first case in these reports after that of Crandall v. Wood, 8 Cal. 136, 1 Morr. Min. Rep. 604, where the controversy concerning water-rights was between two farmers, or parties engaged in ranching, the plaintiff claiming under a settler." Yale on Mining and Water Rights, 199. The learned author further remarks that *the result* in that case would be the *same* under either rule. In Lux v. *Haggin* the court says that in some *of the* cases, "where the riparian *owner* claimed in his pleading and re*lied* at the trial on an actual prior appropriation of water, the court confined its inquiry to the existence or nonexistence of the facts alleged," citing, for example, McDonald v. B. R. Co., 13 Cal. 220, 1 Morr. Min. Rep. 626.

[11] See dissenting opinions in Lux v. Haggin. In Cal. Stats. 1878, p. 1070, the legislature called upon *Congress* to abrogate riparian rights by reserving them from patents.

"There seems to be a prevalent opinion that the common-law doctrines concerning 'riparian rights' of 'riparian proprietors' upon natural streams have no existence whatever in the law of California. . . . . This opinion is wholly unsupported by judicial authority." Pomeroy on Riparian Rights, sec. 108, p. 175.

(3d ed.)

§ 114. **Same.**—Outside of California the Nevada court, in Van Sickle v. Haines,[12] already considered at length,[13] had gone even to the length of holding that the passage of riparian land from the public domain into private title actually, because of its riparian rights, revoked even prior appropriations existing at the time (not now the law anywhere), and even this extreme position was approved by the chief justice of Montana,[14] and was followed in the Federal courts.[15] The extreme position taken by Van Sickle v. Haines was overruled in Nevada[16] while Lux v. Haggin was pending; but the overruling case did not involve land titles *prior* to, but only those acquired *subsequent* to, the diversion, and hence did not present the situation of Lux v. Haggin.[17]

In Colorado there had, at the time of Lux v. Haggin, been decisions wholly opposed to riparian rights, but they, like the Van Sickle case, did not on their facts involve land titles prior to, but only those acquired *after*, the diversion. Notice may also be taken, however, of an early Colorado statute preserving streams to the holders of possessory rights upon their banks. For convenience, we consider these in a later section.

In the supreme court of the United States, previous to Lux v. Haggin, the court, as already shown, had regarded the rule of appropriation as one of priority to rights on public lands.[18] So far as private riparian land was concerned, they had protected the

12 7 Nev. 249, 15 Morr. Min. Rep. 201.

13 *Supra*, sec. 87.

14 Thorp v. Freed, 1 Mont. 689.

15 Union Min. Co. v. Ferris, 2 Saw. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90, and Same v. Dangberg, 2 Saw. 450, Fed. Cas. No. 14,370, 8 Morr. Min. Rep. 113, both concerning rights in Nevada; Ison v. Nelson Min. Co., 47 Fed. 199, concerning rights in Oregon.

16 Jones v. Adams, 19 Nev. 78, 3 Am. St. Rep. 788, 6 Pac. 442.

17 In Van Sickle v. Haines, Judge John R. Garber, then on the supreme bench in Nevada, said against the appropriator: "On every point essential to the case of the petitioner, not merely the weight of authority, but all the authorities, are against him." Fifteen years later he led the other side in favor of the appropriator as leading counsel in Lux v. Haggin.

The Nevada Federal decrees were again before court in Union Mill etc. Co. v. Dangberg, 81 Fed. 73, after the State court had repudiated the common law. Judge Hawley held them binding as *res adjudicata*, but concluded that on the facts, the result would be the same under either the common law or appropriation.

18 The chief question had been between rival appropriators, and in recognizing their rights, Judge Field had said: "The government being the *sole* proprietor of the *public* lands, whether bordering on the streams or otherwise, there was no occasion for the application of the common-law doctrine of riparian proprietorship with respect to the waters of *those* streams." Field, J., in Atchison v. Peterson, 20 Wall. (87 U. S.) 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583.

existing appropriator against later patent to riparian land,[19] and held that the act of 1866 so affirmed in order to prevent the existing appropriator from losing his right on a later settlement and patenting of the land to someone else. But whether a settler could, when his land became private, assert his riparian right against *new* appropriators had been expressly left open in the United States supreme court's decisions. In Basey v. Gallagher,[20] it was said: "Neither party has any title from the United States. No question as to the right of riparian proprietors can therefore arise. It will be time enough to consider those rights when either party has obtained the patent from the government." [21]

(3d ed.)

§ 115. Lux v. Haggin.—A case arose out of the use of the Kern river for irrigation—the case of Lux v. Haggin,[22] decided in 1886. The defendant, J. B. Haggin, having organized an irrigation company, claimed the right to divert the entire waters of the Kern river by an appropriation to that effect, denying that any vested rights which, under the rule of riparian rights, would have prevented this, could be recognized in California. It is probably the most extended opinion in the California reports, covering, as it does, two hundred pages. The previous cases had almost all arisen out of mining, but here was one in the San Joaquin Valley, and it showed how the law must consider water-rights of immense value, though where mining was in no way concerned. The court said, emphatically: "The doctrine of appropriation so called is not the doctrine of the common law." [23] But while a rule independent of the common law, it is not destructive of the rule of riparian rights, the court held. Those rights attach to all land as soon as it becomes private, remaining subject to appropriations made prior to that time,[24] but free from all hostile appropriations thereafter made. Citing Crandall v. Woods,[25] the court declared this always

[19] Broder v. Natoma Water Co., 101 U. S. 274, 25 L. Ed. 790, 5 Morr. Min. Rep. 33.

[20] 20 Wall. (87 U. S.) 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683, Field, J.

[21] See *infra*, sec. 261.

[22] 69 Cal. 255, 10 Pac. 674. A former opinion to the same effect, not officially reported, being withdrawn on rehearing, is given in 4 Pac. 919. The case arose in 1878, and was hence in court for eight years. Mr. Justice McKinstry wrote the opinion.

[23] Pages 387–399.

[24] As to patents before 1866, the court distinguished Van Sickle v. Haines, though somewhat reluctantly, on the ground that in Lux v. Haggin the patents had all been issued, or related back to times, *prior* to the appropriation, while the reverse was the fact in the Van Sickle case.

[25] *Supra*, sec. 113.

to have been the law in California. Section 1422 of the Civil Code was held to be merely declaratory of this.[1] Riparian rights would further be protected on constitutional principles; to deny them would be taking the landowner's property without due process of law, and an unwarranted interference by the State with the primary disposal of the Federal lands.[2] The contentions that the section of the Civil Code[3] providing that "The rights of riparian proprietors are not affected by the provisions of this title," merely referred to riparian rights attaching to Mexican grants, which had never been public land, or else to riparian rights existing at the date of the enactment of the Civil Code, the Civil Code having no prospective operation, were rejected. The system of riparian rights was declared to be in effect in California in full force, subject only to prior appropriations made before the land became private.[4] The court decided against Haggin. That riparian rights were not done away with by the law of appropriation had all along been the contention of text-writers.[5] It was but a reassertion regarding water of what Boggs v. Merced Co. had once for all established regarding mines on private land.

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§ 116. Result of Lux v. Haggin.—Riparian rights are now firmly established in California side by side with the law of appropriation, the former for public land and the latter for private land. In theory, the two systems are of equal importance, and receive equal consideration from the court; but practically, since the larger part of the agricultural lands in California have now passed into private hands, the common law of riparian rights has a wider application so far as concerns acquisition of new uses hereafter.

1 Pages 368, 375, 380. "It is difficult to believe that the section, so far as it applies to riparian lands not those of the State, is other than *declaratory* of the pre-existing law. It certainly was intended to be declaratory in so far as it announces the protection of all private persons who had acquired riparian rights from any source before the provisions of the code went into operation, since (if the common-law right existed) such persons were protected independent of the section." Lux v. Haggin.

2 "Neither a grantee of the United States, nor the grantee of a private person, who was a riparian owner when the code was adopted, need rely for protection on section 1422. Such persons are protected by constitutional principles." Lux v. Haggin.

3 Sec. 1422.

4 See Lindley on Mines, 2d ed., sec. 838, p. 1504.

5 Pomeroy on Riparian Rights, chapters III, VII; Blanchard and Weeks on Mining Claims and Water Rights, p. 696; Yale on Mining Claims and Water Rights, p. 175.

In 1887, the year following the decision in Lux v. Haggin, section 1422 of the Civil Code, protecting the rights of riparian proprietors, was repealed;[6] but as Lux v. Haggin was decided largely independent of that section, the law in California remains undisturbed by this repeal.[7] Many cases since then have affirmed Lux v. Haggin.[8] The result in California is that the law of appropriation is confined to acquisitions on public lands, and the common law of riparian rights is becoming the general law for streams which have not hitherto been diverted, and which now in some part usually flow through private land.[9] Most emphatically is it asserted in the late case of Miller v. Madera etc. Co.[10]

Recent cases in California involve chiefly the law of riparian rights, and the few decided under the law of appropriation show a decided tendency to cease citing the older cases on appropriation, assuming the doctrines there laid down as established and familiar law. This indicates that in California the law of appropriation has taken its place as a complete system, diminishing in importance, past the formative period in which the system may be said still to remain in the younger States where it is the sole law.

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§ 117. Riparian Rights Upheld in Ten States and Territories. The combined system of appropriation and riparian rights existing side by side (the former regarding streams on public lands and the latter for all other streams), which, like the law of appropriation, was first firmly established in California, and has been called the "California doctrine,"[11] is in force in the following jurisdictions: California, Kansas, Montana, North Dakota, Okla-

6 Cal. Stats. 1887, p. 144.

7 "The repeal of a statute will not destroy vested rights [to water]." Knowles, J., in Thorp v. Freed, 1 Mont. 658.

8 *Infra*, sec. 117. Testimony of Congressman J. C. Needham, in Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. Rep. 655, 51 L. Ed. 956: "I have been out of practice for six years, and cannot now name any decision of the supreme court of the State of California which intimated that the court regretted the decision in Lux v. Haggin, but I could find it." It will be hard for him to find what does not exist. He elsewhere refers to Katz v. Walkinshaw, 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, as the decision in question, but such reference by him is without warrant. On the contrary, the California court has voluntarily adopted for its new law of percolating water a system very similar to the law of riparian rights. See Miller v. Bay Cities Co., 157 Cal. 256, 107 Pac. 115, 27 L. R. A., N. S., 772; Hudson v. Dailey (1909), 156 Cal. 617, 105 Pac. 748.

9 *Infra*, sec. 231, appropriation on private land.

10 155 Cal. 59, 99 Pac. 502, 22 L. R. A., N. S., 391.

11 Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210.

homa (possibly), South Dakota, Washington, and partially in Nebraska, Oregon and Texas, and has been applied in the supreme court of the United States.[12]

12 (This list is based upon the holdings of the courts, and at the same time, it must be noted that the legislatures in most of these States have very recently, as below set forth, adopted statutes in many ways opposed to the common law, but which their courts have not yet reviewed.)

California.—Lux v. Haggin, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674. See, also, Crandall v. Woods, 8 Cal. 136, 1 Morr. Min. Rep. 604; Van Bibber v. Hilton, 84 Cal. 585, 24 Pac. 308, 598; Alta Land Co. v. Hancock, 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. 645; Modoc etc. Co. v. Booth, 102 Cal. 151, 36 Pac. 431; McGuire v. Brown, 106 Cal. 660, 39 Pac. 1060, 30 L. R. A. 384; Hargrave v. Cook, 108 Cal. 72, 41 Pac. 18, 30 L. R. A. 390; San Luis Water Co. v. Estrada, 117 Cal. 168, 48 Pac. 1075; Baxter v. Gilbert, 125 Cal. 580, 58 Pac. 129, 374; Bathgate v. Irvine, 126 Cal. 135, 77 Am. St. Rep. 158, 58 Pac. 442; Rice v. Meiners, 136 Cal. 292, 68 Pac. 817; Anaheim Water Co. v. Fuller, 150 Cal. 327, 88 Pac. 978, 11 L. R. A., N. S., 1062; Duckworth v. Watsonville Water Co., 150 Cal. 520, 89 Pac. 338; Huffner v. Sawday, 153 Cal. 86, 94 Pac. 424; Rickey L. & C. Co. v. Glader (1908), 153 Cal. 179, 94 Pac. 768; Miller v. Madera etc. Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A., N. S., 391; Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748; Miller v. Bay Cities W. Co., 157 Cal. 256, 107 Pac. 115, 27 L. R. A., N. S., 772; San Joaquin etc. Co. v. Fresno etc. Co., 158 Cal. 626, 112 Pac. 182. In the Federal courts, California P. & A. Co. v. Enterprise Co., 127 Fed. 741; Anderson v. Bassman, 140 Fed. 14.

Kansas.—Clark v. Allaman, 71 Kan. 206, 80 Pac. 571, 70 L. R. A. 971. See, also, Mo. Pac. Ry. Co. v. Keys, 55 Kan. 205, 49 Am. St. Rep. 249, 40 Pac. 275; Parker v. City of Atchison, 58 Kan. 29, 48 Pac. 631; Montague v. Bd. Co. Com., 7 Kan. App. 160, 53 Pac. 145; Campbell v. Grimes, 62 Kan. 503, 64 Pac. 62. In the Federal courts, Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. Rep. 655, 51 L. Ed. 956.

Montana.—Prentice v. McKay (1909), 38 Mont. 114, 98 Pac. 1081 (affirming Smith v. Denniff, 24 Mont. 20, 81 Am. St. Rep. 408, 60 Pac. 398, 50 L. R. A. 741). Smith v. Denniff had left room for doubt, but Prentice v. McKay seems clear. See, also, Thorp v. Freed, 1 Mont. 651. In the Federal courts, Cruse v. McCauley, 96 Fed. 369; Howell v. Johnson, 89 Fed. 556; and cf. Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210, so construing Smith v. Denniff. Whether riparian rights exist in Montana was recently expressly left open in Winters v. United States, 74 C. C. A. 666, 143 Fed. 740, 207 U. S. 564, 28 Sup. Ct. Rep. 208, 52 L. Ed. 340, and Morris v. Bean, 146 Fed. 423. See 17 Yale Law Journal, 585, where Mr. Justice Hunt, of the Montana Federal court, says riparian rights are rejected in Montana. However, the case above now seems to have settled the point.

Nebraska.—Crawford etc. Co. v. Hathaway, 60 Neb. 754, 67 Neb. 325, 108 Am. St. Rep. 647, 60 L. R. A. 889, 84 N. W. 271, 93 N. W. 781. See, also, Clark v. Cambridge & A. Irr. Co., 45 Neb. 798, 64 N. W. 239; Eidemiller Ice Co. v. Guthrie, 42 Neb. 238, 60 N. W. 717, 28 L. R. A. 581; Slattery v. Harley, 58 Neb. 575, 79 N. W. 151; Plattsmouth Water Co. v. Smith, 57 Neb. 579, 78 N. W. 275; Meng v. Coffey, 67 Neb. 500, 108 Am. St. Rep. 697, 93 N. W. 713, 60 L. R. A. 910; Dunn et al. v. Thomas, 69 Neb. 683, 96 N. W. 142; McCook I. & W. P. Co. v. Crews, 70 Neb. 115, 102 N. W. 249; Gill v. Lydick, 40 Neb. 508, 59 N. W. 104; Barton v. Union Cattle Co., 28 Neb. 350, 26 Am. St. Rep. 340, 44 N. W. 454, 7 L. R. A. 457; Cline v. Stock, 71 Neb. 70, 98 N. W. 454, 102 N. W. 265; Kinkead v. Turgeon, 74 Neb. 580, 104 N. W. 1061, 109 N. W. 744, 1 L. R. A., N. S., 762, 13 Ann. Cas. 43. The doctrine of riparian rights is the sole doctrine in the eastern part of the

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§ 118. Riparian Rights Rejected in Eleven States and Territories.—In the following States and Territories the common law of riparian rights is rejected *in toto*, Lux v. Haggin and similar cases being either not considered, or commented upon and considered, but rejected.

The early California decisions had long been practically authority throughout the West for waters on the public domain, and

State, and riparian rights are abrogated by statute as to all lands patented since 1889. (*Infra*, sec. 126.)

North Dakota.—Bigelow v. Draper, 6 N. D. 152, 69 N. W. 570. In the Federal courts, Sturr v. Beck, 133 U. S. 541, 10 Sup. Ct. Rep. 350, 33 L. Ed. 761. The act of Congress of June 11, 1906, 34 Stats. 234, abrogates riparian rights in the Black Hills Forest Reserve.

Oklahoma.—Markwardt v. City of Guthrie, 18 Okl. 32, 90 Pac. 26, 9 L. R. A., N. S., 1150, 11 Ann. Cas. 581, *semble*. Town of Jefferson v. Hicks (1909), 23 Okl. 684, 102 Pac. 79, *semble*. The matter has not been specifically in question, but the latter says in passing: "This court has held, in several cases, that the rights of landowners *as to watercourses* and as to surface water are determined in this jurisdiction by the rules of the common law."

Oregon.—Carson v. Gentner, 33 Or. 512, 52 Pac. 506, 43 L. R. A. 130. See, also, Jones v. Conn, 39 Or. 30, 87 Am. St. Rep. 634, 64 Pac. 855, 65 Pac. 1068, 54 L. R. A. 630; Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1081, 102 Pac. 728. The last case cited, in establishing a new doctrine, below considered, for Oregon, states that Taylor v. Welsh, 6 Or. 198, is the first Oregon case bearing upon riparian rights. A long list of the Oregon cases upon the subject is collected in Hough v. Porter.

South Dakota.—Lone Tree D. Co. v. Cyclone D. Co., 15 S. D. 519, 91 N. W. 352; Same v. Same (S. D.), 128 N. W. 596. See, also, Metcalf v. Nelson, 8 S. D. 87, 59 Am. St. Rep. 746, 65 N. W. 911; Stenger v. Tharp, 17 S. D. 13, 94 N. W. 402; Lone Tree D. Co. v. Rapid City E. & G. L. Co., 16 S. D. 451, 93 N. W. 650. See Driskill v. Rebbe, 22 S. D. 242, 117 N. W. 135; Redwater Co. v. Reed (S. D.), 128 N. W. 702; Redwater Co. v. Jones (S. D.), 130 N. W. 85. In the Federal courts, Sturr v. Beck, 133 U. S. 541, 10 Sup. Ct. Rep. 350, 33 L. Ed. 761. See Rev. Code, sec. 278.

Texas.—McGhee etc. Co. v. Hudson, 85 Tex. 587, 22 S. W. 398. See, also, Haas v. Choussard, 17 Tex. 588; Rhodes v. Whitehead, 27 Tex. 304, 84 Am. Dec. 631; Tolle v. Correth, 31 Tex. 362, 98 Am. Dec. 540; Fleming v. Davis, 37 Tex. 173; Baker v. Brown, 55 Tex. 377; Mud Cr. Irr. A. & M. Co. v. Vivian, 74 Tex. 170, 11 S. W. 1078; Barrett v. Metcalf, 12 Tex. Civ. App. 247, 33 S. W. 758; Cape v. Thompson, 21 Tex. Civ. App. 681, 53 S. W. 368; Clements v. Watkins Land Co., 36 Tex. Civ. App. 339, 82 S. W. 665; Watkins L. Co. v. Clements, 98 Tex. 578, 107 Am. St. Rep. 653, 86 S. W. 733, 70 L. R. A. 964; Santa Rosa etc. Co. v. Pecas etc. Co. (Tex. Civ. App.), 92 S. W. 1016. In Texas on the arid lands riparian rights are not strictly enforced against appropriators, there being a different rule for the arid and nonarid lands. Barrett v. Metcalf, 12 Tex. Civ. App. 247, 33 S. W. 758. Arid regions in Texas are defined in Hall v. Carter, 33 Tex. Civ. App. 230, 77 S. W. 19, as those portions where rainfall is insufficient for agricultural purposes and irrigation is necessary; and merely that irrigation would be beneficial, though not necessary, is insufficient. See Biggs v. Leffingwell (Tex. Civ. App.), 132 S. W. 902.

Washington.—Benton v. Johncox, 17 Wash. 277, 61 Am. St. Rep. 912, 49 Pac. 495, 39 L. R. A. 107. See, also, Shotwell v. Dodge, 8 Wash. 337, 36 Pac. 254; Sander v. Wilson, 34 Wash. 659, 76 Pac. 280; City of New Whatcom v. Fairhaven L. Co., 24 Wash. 493, 64 Pac. 735, 54 L. R. A. 190; Nesalhous v. Walker, 45 Wash. 621,

had been ratified by the act of 1866, establishing free appropriation upon public land. In 1872 Colorado was still a Territory, and the case of Yunker v. Nichols, the first case in Colorado upon the subject, arose in the territorial court.[13] The case is quoted later herein on the point actually asserted, and as to which the writer conceives it is no longer law in any jurisdiction.[13a] The question was not one of appropriation of water, but of right of way for a ditch. There were three opinions given, none exactly the same, holding that an irrigator has a way of necessity over another's land to water. It did not involve a dispute as to rights in the water itself. But the court was emphatic that all landowner rights whatsoever are subject in Colorado to the necessity of those diverting water for irrigation. Though hence only *dictum* in its absolute rejection of riparian rights, it was very emphatic. Mr. Mills, of the Colorado bar, says of it:[14] "It practically swept away the common-law doctrine of riparian rights as applicable to Colorado, long before a case actually arose between an appropriator of water for irrigation and a riparian claimant along the natural stream. Such a case did not actually arise until some ten years later."

In the next case after Yunker v. Nichols,[15] the question was also of right of way over land for a ditch, not of riparian right to water. The prevailing opinion seems to be against the Yunker case as to a way of necessity, but the dissenting opinion of Thatcher, J., strongly reasserts it, saying that it "is founded on the imperious laws of nature, with reference to which it must be presumed the government parts with its title." In the next case,[16] the extent of the easement was limited "to the narrowest limits," with the least possible damage; "it has been well said that the necessity of

88 Pac. 1032; Kendall v. Joyce, 48 Wash. 489, 93 Pac. 1091; Hollet v. Davis (1909), 54 Wash. 326, 103 Pac. 423; Mason v. Yearwood (Wash. 1910), 108 Pac. 608. In Benton v. Johncox, the court cites numerous other cases.

United States Supreme Court.—Sturr v. Beck, 133 U. S. 541, 10 Sup. Ct. Rep. 350, 33 L. Ed. 761, is a positive decision in support of the California doctrine. (Arose on appeal from Territory of Dakota.) See, also, Winters v. United States, 207 U. S. 564, 28 Sup. Ct. Rep. 208, 52 L. Ed. 340.

Miscellaneous.—The Western law of appropriation in lieu of riparian rights, citing the Western cases, was urged in Wisconsin, Huber v. Merkel, 117 Wis. 355, 98 Am. St. Rep. 933, 94 N. W. 354, 62 L. R. A. 589, and in Illinois, Druley v. Adam, 102 Ill. 202, but in both the court refused to recognize appropriation at all. In Hawaiian Islands it is expressly left open whether the common law of riparian rights is in force. Wong Long v. Irwin (1896), 10 Hawaii, 271.

[13] 1 Colo. 551, 8 Morr. Min. Rep. 64.

[13a] *Infra*, sec. 223 et seq.

[14] Mills' Irrigation Manual, p. 34.

[15] Schilling v. Rominger, 4 Colo. 100.

[16] Crisman v. Heiderer, 5 Colo. 596.

one man's business is not to be made the standard of another man's right."

Coffin v. Left Hand Ditch Co.[17] is the next case. The appropriation had been made while the water flowed over public land. Those claiming as riparian owners had acquired their land title after the diversion, and would have no rights under the California doctrine,[18] for the point actually decided, "If appropriated by one *prior* to the patenting of such soil by another, it is a vested right, entitled to protection, though not mentioned in the patent,"[19] is part of the California doctrine. The California court considered the Coffin case in Lux v. Haggin, and pointed out that the Colorado court in actual decision was only protecting old appropriations made before the settlement. The Coffin opinion, however, made no distinction between prior and subsequent diversions, and declared that on the ground of imperative necessity no settlers can claim any right aside from appropriation. This *dictum* rejecting the riparian rights of the settler against *new* appropriations is generally taken as the original precedent for the rejection of the common law *in toto* under what is now called the Colorado doctrine.

The Colorado doctrine is in force in the following jurisdictions: Alaska, Arizona, Colorado, Idaho, New Mexico, Nevada, Utah, Wyoming, and partially in Nebraska, Oregon and Texas, and has been very recently sanctioned and applied by the supreme court of the United States.[20]

[17] 6 Colo. 443.

[18] Although the patent issued before 1866, that is immaterial under the California doctrine. The Coffin case on its facts was similar to Van Sickle v. Haines, and the actual decision was only a rejection of the Van Sickle "trespasser" theory above set forth. *Supra*, sec. 87.

[19] Page 449.

[20] *Alaska.*—Van Dyke v. Midnight Sun Co. (C. C. A. 1910), 177 Fed. 85. (Prior to this decision the matter was in doubt. See Ketchikan etc. Co. v. Citizens' etc. Co., 2 Alaska, 120; Thorndyke v. Alaska Perseverance Co., 164 Fed. 657; McCloskey v. Pacific Coast Co., 160 Fed. 794, 87 C. C. A. 568.) See, also, Madigan v. Kougarok M. Co., 3 Alaska, 63; McFarland v. Alaska etc. Co., 3 Alaska, 308.

Arizona.—Clough v. Wing, 2 Ariz. 371, 17 Pac. 453; Chandler v. Austin, sub. nom. 4 Ariz. 346; Austin v. Chandler, 42 Pac. 483; Boquillas etc. Co. v. Curtis, 11 Ariz. 128, 89 Pac. 504; S. C., 213 U. S. 339, 29 Sup. Ct. Rep. 493, 53 L. Ed. 822; Arizona Copper Co. v. Gillespie (Ariz. 1909), 100 Pac. 465.

Colorado.—Coffin v. Left Hand Ditch Co., 6 Colo. 443. See, also, Yunker v. Nichols, 1 Colo. 551, 8 Morr. Min. Rep. 64; Schilling v. Rominger, 4 Colo. 100; Crisman v. Heiderer, 5 Colo. 596; Hammond v. Rose, 11 Colo. 526, 7 Am. St. Rep. 258, 19 Pac. 466; Oppenlander v. Left Hand Ditch Co., 18 Colo. 142, 31 Pac. 854; Crippen v. White, 28 Colo. 298, 64 Pac. 184; Sternberger v. Seaton etc. Co. (1909), 45 Colo. 401, 102 Pac. 168 (citing this book, 2d ed.); Snyder v. Colorado etc. Co. (C. C. A.), 181 Fed. 62; Cascade etc. Co. v. Empire etc. Co. (Colo.), 181 Fed. 1011. But it seems that the common law of

In some of these the decision is aided by constitutional or statutory provisions cited and construed in the cases. In others, notably Nevada, it was reached without statute. In all of them the point

riparian rights applies to domestic uses (*infra*, sec. 308), and there are decisions in the Federal courts for Colorado based on the common law of riparian rights generally. Mason v. Cotton, 4 Fed. 792, 2 McCrary, 82; Schwab v. Beam, 86 Fed. 41, 19 Morr. Min. Rep. 279. (Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. Rep. 655, 51 L. Ed. 956, evaded the issue upon the law of waters.) In a late case, Humphreys etc. Co. v. Frank (1909), 46 Colo. 524, 105 Pac. 1093, it was left open whether a riparian owner "has still some rights which the law recognizes," though subordinate to that of a prior appropriator.

Idaho.—Drake v. Earhart, 2 Idaho, 750, 23 Pac. 541; Boise etc. Co. v. Stewart, 10 Idaho, 38, 77 Pac. 25, 321; Taylor v. Hulett, 15 Idaho, 265, 97 Pac. 39, 19 L. R. A., N. S., 535; Hutchinson v. Watson D. Co. (1909), 16 Idaho, 484, 133 Am. St. Rep. 125, 101 Pac. 1059, citing this book, 2d ed. In the Federal courts, see Krall v. United States, 79 Fed. 241, 24 C. C. A. 543. But riparian rights have been very lately held to exist in Idaho as regards access to navigable waters (Shepard v. Coeur d'Alene Co. (1909), 16 Idaho, 293, 101 Pac. 591), and exist also as against anyone diverting the stream without complying with the rules for securing a valid appropriation according to law. Hutchinson v. Watson D. Co., 16 Idaho, 484, 133 Am. St. Rep. 125, 101 Pac. 1059, citing Lux v. Haggin, 69 Cal. 255, 10 Pac. 674, and the second edition of this book.

Nebraska.—See note 12 of the preceding section.

New Mexico.—Trambley v. Luterman, 6 N. M. 15, 27 Pac. 312; United States v. Rio Grande etc. Co., 9 N. M. 303, 51 Pac. 674; S. C., 174 U. S. 706, 19 Sup. Ct. Rep. 770, 43 L. Ed. 1136; Albuquerque etc. Co. v. Gutierrez, 10 N. M. 177, 61 Pac. 357; S. C., Gutierres v. Albuquerque Land etc. Co., 188 U. S. 545, 23 Sup. Ct. Rep. 338, 47 L. Ed. 588; Hagerman etc. Co. v. McMurray (N. M. 1911), 113 Pac. 823, citing the second edition of this book.

Nevada.—Reno etc. Co. v. Stevenson, 20 Nev. 269, 19 Am. St. Rep. 364, 21 Pac. 317, 4 L. R. A. 60; Twaddle v. Winters, 29 Nev. 28, 85 Pac. 284, 89 Pac. 289 (though Van Sickle v. Haines, 7 Nev. 249, 15 Morr. Min. Rep. 201, had been the other way. Jones v. Adams, 19 Nev. 78, 3 Am. St. Rep. 788, 6 Pac. 442, is frequently referred to as overruling the Van Sickle case, but it did so only on a different point). In the Federal courts, Van Sickle v. Haines had been followed (before it was overruled) by Union etc. Co. v. Ferris, Fed. Cas. No. 14,371, 2 Saw. 176, 8 Morr. Min. Rep. 90; Union etc. Co. v. Dangberg, Fed. Cas. No. 14,370, 2 Saw. 450, 8 Morr. Min. Rep. 113, which were practically overruled by Union etc. Co. v. Dangberg, 81 Fed. 73. See, also, Anderson v. Bassman, 140 Fed. 14.

Oregon.—See note 12 of the preceding section.

Texas.—See note 12 of the preceding section.

Utah.—Stowell v. Johnson, 7 Utah, 215, 26 Pac. 290; Salt Lake City v. Salt Lake etc. Co., 25 Utah, 456, 71 Pac. 1069; Nash v. Clark, 27 Utah, 158, 101 Am. St. Rep. 953, 75 Pac. 371, 1 L. R. A., N. S., 208; S. C., Clark v. Nash, 198 U. S. 361, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171, 49 L. Ed. 1085; Cole v. Richards Irr. Co., 27 Utah, 205, 101 Am. St. Rep. 962, 75 Pac. 376. But see Willow Cr. etc. Co. v. McIntyre, 21 Utah, 248, 81 Am. St. Rep. 687, 60 Pac. 943, 51 L. R. A. 280.

Wyoming.—Moyer v. Preston, 6 Wyo. 308, 71 Am. St. Rep. 914, 44 Pac. 845; Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210.

United States Supreme Court.—At the time of the second edition of this book there had been no actual decision of the United States supreme court enforcing the Colorado doctrine against a riparian owner, yet cases

is to-day covered by statute.[21] There has been, however, an adoption of the common law in all the Western States as the basis of their general law.[22]

These States generally arrived at their conclusion in the same way as Colorado. In the earliest of them the facts usually presented an appropriation on public land prior to the riparian settlement, and the question really was only upon the "trespasser" theory of Van Sickle v. Haines; that is, whether a *subsequent* patent could oust an *existing* appropriator as a mere trespasser. Such, for example, were the cases in Colorado,[23] Idaho,[24] Nevada[25] and New Mexico, on whose facts the appropriator was *prior* to the riparian settlement. In rejecting the principle of the Van Sickle case (with its holding that appropriators, even those antedating the riparian settlement, were mere trespassers), so great was the popular disapproval and the reaction, that the courts of these younger States threw aside the common law of riparian rights absolutely (even should the riparian settlement in turn precede the diversion) and have ever since refused to recognize it at all, and therewith have refused to recognize any proprietary water-rights in a landowner as such under any circumstances, whether it be the United States or its private successors holding land patents.

For this the California decisions were misconceived to be authority which the younger courts believed they were following. For example, in New Mexico a case arose which, like the Coffin case, presented an appropriation prior to the riparian settlement, but the New Mexico court[1] cites the California cases, as support-

contained much matter showing a clear determination to uphold the Colorado doctrine in States that had adopted it. United States v. Rio Grande etc. Co., 174 U. S. 706, 19 Sup. Ct. Rep. 770, 43 L. Ed. 1136; Gutierres v. Albuquerque etc. Co., 188 U. S. 545, 23 Sup. Ct. Rep. 338, 47 L. Ed. 588; Clark v. Nash, 198 U. S. 361, 25 Sup. Ct. Rep. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1171; Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. Rep. 655, 51 L. Ed. 956. Since then, the decision in Boquillas etc. Co. v. Curtis (1909, from Arizona), 213 U. S. 339, 29 Sup. Ct. Rep. 493, 53 L. Ed. 822, very emphatically applied the doctrine against a riparian owner. See, also, Los Angeles v. Los Angeles etc. Co. (1910), 217 U. S. 217, 30 Sup. Ct. Rep. 452, 54 L. Ed. 736.

21 The constitutional provision relied on in Colorado is Colorado constitution, article 16, sections 5 and 6; in Idaho, article 15, section 3; in Wyoming, article 1, section 31.

22 U. S. v. Rio Grande etc. Co., 174 U. S. 706, 19 Sup. Ct. Rep. 770, 43 L. Ed. 1136.

23 Coffin v. L. H. D. Co. and Tynan v. Despain, *supra*, patent issued before 1866.

24 Drake v. Earhart, *supra*, and Hutchinson v. Watson D. Co., *supra* (1909), 16 Idaho, 484, 133 Am. St. Rep. 125, 101 Pac. 1059, patent issued after the appropriation.

25 Jones v. Adams, 19 Nev. 78, 3 Am. St. Rep. 788, 6 Pac. 442.

1 Trambley v. Luterman, 6 N. M. 25, 27 Pac. 312.

ing its ruling that "the common law, as to rights of riparian owners, is not in force in this Territory nor in California, Nevada, and other Pacific States." The California decisions were not clearly understood.

(3d ed.)

§ 119. Same—"Landowner" Statute.—In reaching the conclusion in Colorado, an early statute (quoted in the part of this book relating to statutes) was referred to. The Colorado territorial legislature in 1861[2] provided that all landowners on the banks of a stream are entitled to use the water for irrigation, and in 1862,[3] that no stream shall be diverted to the detriment of any landowner along it. In 1864,[4] "who have a priority of right" was inserted with reference to the landowner. As between such landowners themselves an equitable apportionment (and not priority) was provided for.[5] This statute has been copied in other States.[6] The Colorado court held it to be a positive rejection of riparian rights because it permitted irrigation.[7] So did the Wyoming court.[8] In Montana, South Dakota and Washington, however, and partly in Oregon, the contrary is declared. Instead of rejecting riparian

[2] Stats. 1861, p. 67, sec. 1; Rev. Stats. 1908, sec. 3165; M. A. S. 2256 et seq.

[3] Stats. 1862, p. 48, sec. 48.

[4] Stats. 1864, p. 68, sec. 32.

[5] Rev. Stats. 1908, sec. 3166; Gen. Stats., secs. 1375, 1714; Laws 1861, p. 68, sec. 4. See Rev. Stats. 1908, sec. 3427.

[6] *Colorado.*—As just cited. See Colorado Stats., sec. 1433, *infra.*

Idaho.—(Quoted in the part of this book relating to statutes, sec. 1435, *infra.*) Rev. Stats. 3184, quoted in Schodde v. Twin Falls etc. Co., 161 Fed. 43, 88 C. C. A. 207. Likewise McLean's Rev. Codes, sec. 3299; Rev. Stats. 1887, sec. 3180, cited in dissenting opinion in Drake v. Earhart, 2 Idaho, 750, 23 Pac. 541.

Montana.—Bannock's Stats. 367, secs. 1, 2; Thorp v. Freed, 1 Mont. 651.

North Dakota.—Rev. Codes, Civ. Code, sec. 4798; Bigelow v. Draper, 6 N. D. 152, 69 N. W. 570.

Oregon.—B. & C. Comp., sec. 5000, *semble.* See Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

South Dakota.—(As quoted in the part of this book relating to statutes, sec. 1445, *infra.*) Rev. Codes, secs. 278, 2563; Amd. Stats. 1899, sec. 2687; cf. Stats. 1907, p. 382; Lone Tree Co. v. Cyclone Co., 15 S. D. 519, 91 N. W. 354. Cf. Stats. 1911, c. 263, p. 468.

Washington.—Laws 1873, p. 520; Laws 1899, c. 131, p. 261; Pierce's Codes 1905, sec. 5123; Hill's Codes, secs. 1718, 1761, 1774. See Benton v. Johncox, 17 Wash. 277, 61 Am. St. Rep. 912, 49 Pac. 495, 39 L. R. A. 107; Weed v. Goodwin, 36 Wash. 31, 78 Pac. 36; Dickey v. Maddux, 48 Wash. 411, 93 Pac. 1090; Nielson v. Sponer, 46 Wash. 14, 123 Am. St. Rep. 910, 89 Pac. 155; Hollett v. Davis, 54 Wash. 326, 103 Pac. 423; State ex rel. Galbraith v. Superior Court (Wash. 1910), 110 Pac. 429.

Wyoming.—Comp. Laws 1867 (1876), c. 65, sec. 1; Rev. Stats. 1317; Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210.

[7] Coffin v. Left Hand D. Co., and other cases cited *supra*, sec. 118.

[8] Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210; Moyer v. Preston, 6 Wyo. 308, 71 Am. St. Rep. 914, 44 Pac. 845.

rights the statute is held a simple exposition thereof, preserving the stream to the neighboring landowners, who have settled prior to the appropriation, and a declaration that a possessory right to the land should be equivalent to the fee for this purpose.[9] A casual reading of the statute certainly would give the impression that it was very similar in intent to the early California provision that "The rights of riparian proprietors are not affected by the provisions of this title."[10] It certainly sounds like the expressions used by courts following the California doctrine in expressing the riparian owner's right to irrigate. The insertion of "priority of right" in 1864 strengthens this similarity, for the California doctrine, at its foundation, requires the riparian owner to have settled prior to the appropriation if he would assert his riparian right.[11] In Oregon the court recently, while departing from its previous rulings and rejecting riparian rights to a considerable extent, relied on this act as *prohibiting* a rejection *in toto*.[12] Nevertheless, it has been one of the features relied on in Colorado and Wyoming to support the absolute rejection of riparian rights, as above set forth.

(3d ed.)

§ 120. Same — Collateral Results of the Rejection.—This rejection of riparian rights under the Colorado doctrine is held to

[9] Thorp v. Freed, 1 Mont. 651, per Wade, C. J.; Lone Tree D. Co. v. Cyclone D. Co., 15 S. D. 519, 91 N. W. 354; Benton v. Johncox, 17 Wash. 277, 61 Am. St. Rep. 912, 49 Pac. 498, 39 L. R. A. 107; Dickey v. Maddux, 48 Wash. 411, 93 Pac. 1090; Kendall v. Joyce, 48 Wash. 489, 93 Pac. 1091. Cf., also, Bigelow v. Draper, 6 N. D. 152, 69 N. W. 570, and dissenting opinion of Berry, J., in Drake v. Earhart, 2 Idaho, 750, 23 Pac. 541.

[10] Cal. Civ. Code, sec. 1422. So, in Lux v. Haggin, a point was made of an earlier California section, still more similar to the Colorado one; Cal. Stats. 1863–64, p. 375, sec. 10, providing: "No person or persons shall divert the waters of any river or stream from its natural channel to the detriment of any person or persons located below them on the stream."

[11] In the supreme court of the United States it was said that such statute might be taken as a protection of riparian rights after patent issued, though refusing to pass upon the effect of such an act before patent. Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240, 4 Morr. Min. Rep. 504, concerning the proviso in the act of 1866.

[12] Saying: "And in this connection it will be observed that section 5000, B. & C. Comp., protects the owner contiguous to the stream, as against those claiming under the act of which that section is a part, *in his right to the flow of the stream to the extent required for household, domestic, and other uses incident thereto*, with sufficient quantity for irrigation purposes to the extent then actually needed and in use. An exception to that extent is accordingly made in favor of the landowner, as against, and only to the extent of, such rights as may be asserted under the act." Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

extend to a rejection of common-law riparian fishing rights in Colorado;[13] but in Idaho, not to include a rejection of the common-law riparian rights to accretion or access,[14] nor in Idaho, to a rejection of riparian right to domestic use against an appropriator not complying with the law in regard to making appropriations,[15] nor in Oregon (under its recent change of rule) to a rejection of the riparian right for domestic use in any event.[16]

The rejection of riparian rights in Colorado applies to lands acquired while Colorado was a territory, as well as those acquired after the adoption of the constitution,[17] and, in Arizona, to lands deraigned under Mexican grant as well as those deraigned under United States patent.[18]

(3d ed.)

§ 121. In the Supreme Court of the United States.—While Judge Field was on the bench, the decisions of the supreme court of the United States were given on the theory that the appropriator deraigned his rights from the United States as proprietor of the public lands, and that he was protected against the riparian claims of settlers only if the appropriation was prior in time to the settlement, and that the Federal statutes so affirmed in order to prevent the loss of the appropriation on a later sale of the public land by the United States to the private landowner. This earlier line of the decisions follows close to the historical rationale of the doctrine which gave it origin as a system of disposing of rights on the public domain, and culminated in Sturr v. Beck,[19] actually enforcing the California doctrine in favor of a prior settler when private riparian land was involved. This first stage of the United States supreme court's

[13] Sternberger v. Seaton etc. Co. (1909) 45 Colo. 401, 102 Pac. 168. Cf. State v. Barker (Utah), 108 Pac. 352.

[14] Hutchinson v. Watson D. Co. (1909), 16 Idaho, 484, 133 Am. St. Rep. 125, 101 Pac. 1059.

[15] *Ibid.*, and *quaere* in Colorado. See Sternberger v. Seaton Co., *supra;* and Humphrey T. Co. v. Frank (1909) 46 Colo. 524, 105 Pac. 1093, a case of pollution. The headnote of the Idaho case in the Pacific Reporter says:

"A riparian owner's right to use the water of a stream for domestic and culinary purposes and watering his stock, and to have the water flow by or through his riparian premises, is such a right as the law recognizes as inferior to a right acquired by appropriation, and superior to any right of a stranger to or intermeddler with the waters of such stream."

[16] Hough v. Porter, *supra.*

[17] Sternberger v. Seaton Co. (Colo. 1909), 45 Colo. 401, 102 Pac. 168.

[18] Boquillas etc. Co. v. Curtis, 11 Ariz. 128, 89 Pac. 504; S. C., 213 U. S. 339, 29 Sup. Ct. Rep. 493, 53 L. Ed. 822. But not, in Arizona, to a rejection of the common-law right of a riparian owner not to have the stream *backed up* upon his land. Kroeger v. Twin Buttes etc. Co. (Ariz.), 114 Pac. 553.

[19] 133 U. S. 541, 10 Sup. Ct. Rep. 350, 33 L. Ed. 761.

decisions includes Atchison v. Peterson,[20] Basey v. Gallagher,[21] Jennison v. Kirk,[22] Broder v. Water Co.,[1] and Sturr v. Beck.[2]

(3d ed.)

§ 122. Same.—But a second stage of the decisions of the supreme court of the United States has within recent years been reached, which disregards the proprietary rights of the United States as having any bearing upon the rights of an appropriator. Recent cases have all gone to that court from jurisdictions where the Colorado doctrine is in force, and the theory on which they are based is entirely that of the Colorado doctrine, regarding the right of appropriation as dependent purely on local sovereign power to fix the local law without attempting to reconcile this with the decisions of the earlier or "public domain" stage. This line of decisions includes United States v. Rio Grande etc. Co.,[3] Gutierres v. Albuquerque etc. Co.,[4] Clark v. Nash,[5] Kansas v. Colorado,[6] and Boquillas etc. Co. v. Curtis.[7] This line of authorities is based on a determination to uphold the Colorado doctrine in such States as have adopted it, and upon which rights have there grown up of great value. They are not, however, clear on the precise ground upon which it is to be upheld. The first two[8] declare for a construction of the early Federal statutes as the basis; while the last three[9] show a determination to pass by those statutes, and to treat the question as one inherent in local sovereignty, regardless of Federal proprietorship. This view, strongly asserted in Kansas v. Colorado, was not actually in that case decided because the decision was rested on the insufficiency of a showing of damage in the case by the riparianists such as would warrant an injunction, even if the anti-riparian system were not sound, but was actually enforced and decided in Boquillas etc. Co. v. Curtis. At the same time, in another very recent case, decided between Kansas v. Colorado and the Boquillas

[20] 20 Wall. (87 U. S.) 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583.

[21] 20 Wall. (87 U. S.) 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683.

[22] 98 U. S. 453, 24 L. Ed. 240, 4 Morr. Min. Rep. 504.

[1] 101 U. S. 274, 25 L. Ed. 790, 5 Morr. Min. Rep. 790.

[2] 133 U. S. 541, 10 Sup. Ct. Rep. 350, 33 L. Ed. 761.

[3] 174 U. S. 690, 19 Sup. Ct. Rep. 770, 43 L. Ed. 1136.

[4] 188 U. S. 545, 23 Sup. Ct. Rep. 338, 47 L. Ed. 588.

[5] 198 U. S. 361, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171, 49 L. Ed. 1085.

[6] 206 U. S. 46, 27 Sup. Ct. Rep. 655, 51 L. Ed. 956.

[7] (1909) 213 U. S. 339, 29 Sup. Ct. Rep. 493, 53 L. Ed. 822.

[8] United States v. Rio Grande etc. Co. and Gutierres v. Albuquerque etc. Co.

[9] Clark v. Nash, Kansas v. Colorado, and Boquillas etc. Co. v. Curtis.

case, it is said by Mr. Justice McKenna:[10] "The power of the government to reserve the waters and exempt them from appropriation under the State laws is not denied and could not be." This is inconsistent with what Mr. Justice Brewer said in Kansas v. Colorado, and he accordingly dissented.[11]

These decisions will be considered more at length later; for the purpose of this historical statement the following passage best shows the present attitude of the supreme court of the United States: "This court must recognize the difference of climate and soil which renders necessary these different laws in the States so situated."[12] That is, whatever may be the true theory, the water laws of each State will be upheld on the ground of expediency because of the valuable rights which have grown up under both systems.

C. LATER AND RECENT STATE LEGISLATION.

(3d ed.)

§ 123. Public Service Declared Under State Control.—In 1879 California adopted a new constitution. The history of the move-

[10] Winters v. United States, 207 U. S. 564, 28 Sup. Ct. Rep. 208, 52 L. Ed. 340. See Burley v. United States (1910), 179 Fed. 1.

[11] There should be added the case (decided since the above was written) of Los Angeles v. Los Angeles Co. (1910), 217 U. S. 217, 30 Sup. Ct. Rep. 452, 54 L. Ed. 736. The case arose in California under the pueblo right of Los Angeles, which the State court holds paramount to riparian rights. *Supra*, sec. 68. This decision is more particularly referred to hereafter. *Infra*, secs. 177, 183.

[12] Clark v. Nash, 198 U. S. 361, 25 Sup. Ct. Rep. 676, 49 L. Ed. 1085.

There have been the following decisions in the supreme court of the United States: Atchison v. Peterson, 87 U. S. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583; Basey v. Gallagher, 87 U. S. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683; Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240, 4 Morr. Min. Rep. 504; Broder v. Water Co., 101 U. S. 274, 25 L. Ed. 790, 5 Morr. Min. Rep. 33; Sturr v. Beck, 133 U. S. 541, 10 Sup. Ct. Rep. 350, 33 L. Ed. 761; Bybee v. Oregon etc. Co., 139 U. S. 663, 11 Sup. Ct. Rep. 641, 35 L. Ed. 305; Bear Lake etc. Co. v. Garland, 164 U. S. 1, 17 Sup. Ct. Rep. 7, 41 L. Ed. 327; United States v. Rio Grande etc. Co., 174 U. S. 690, 19 Sup. Ct. Rep. 770, 43 L. Ed. 1136; Kansas v. Colorado, 185 U. S. 125, 22 Sup. Ct. Rep. 552, 46 L. Ed. 838; Telluride etc. Co. v. Rio Grande etc. Co., 187 U. S. 569, 23 Sup. Ct. Rep. 178, 47 L. Ed. 307; Gutierres v. Albuquerque etc. Co., 188 U. S. 545, 23 Sup. Ct. Rep. 338, 47 L. Ed. 588; Clark v. Nash, 198 U. S. 361, 25 Sup. Ct. Rep. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1171; Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. Rep. 655, 51 L. Ed. 956; Winters v. United States, 207 U. S. 564, 28 Sup. Ct. Rep. 208, 52 L. Ed. 340; Boquillas etc. Co. v. Curtis, 213 U. S. 339, 29 Sup. Ct. Rep. 493, 53 L. Ed. 822; Rio Grande etc. Co. v. United States, 215 U. S. 266, 30 Sup. Ct. Rep. 97, 54 L. Ed. 97; Los Angeles v. Los Angeles Co. (1910), 217 U. S. 217, 30 Sup. Ct. Rep. 452, 54 L. Ed. 736; Rickey v. Miller (U. S., 1910), 31 Sup. Ct. Rep. 11. See Hudson etc. Co. v. McCarter (1908), 209 U. S. 349, 28 Sup. Ct. Rep. 529, 52 L. Ed. 828, 14 Ann. Cas. 560.

ment leading up to it is contained in Bryce's American Commonwealth; from which it seems that a strong sentiment had been aroused against capital and monopoly. The leader of the movement, Dennis Kearney, addressed himself chiefly, in this regard, against the railway and steamship lines; but in the convention the movement was widened to include other public services, including water. At the instance of Volney Howard, of Los Angeles, article XIV was placed in the new constitution, declaring the distribution of water to the public to be a public use, and subject to the regulation and control of the State; and the California provision, with variations, has been copied in numerous Western constitutions or statutes.[13]

(3d ed.)

§ 124. Water Codes.—In California and some of the States following the California doctrine, there has been no other recent legislation directly affecting the law of waters, just as, until 1909, California had practically no mining legislation. Legislation upon waters had been urged in the eighties by Mr. Hall, as State Engineer, based upon the law of appropriation,[14] but instead of adopting it, the legislature abolished his office. Later, Professor Pomeroy, in his work on Riparian Rights, urged legislation of a different kind, based more upon the law of riparian rights, but equally without result. In 1901 legislation was urged, based upon the law of appropriation, in what was known as the Works Bill, its features being those of the "Wyoming System," but this also, though it had the support of Professor Mead,[15] was unsuccessful in the legislature. A similar bill introduced in 1909 also failed of passage.[16] Up to January 1, 1911, there were no water codes of this kind in Arizona, California, Kansas, Montana, Texas or Washington. Any modifications of the foregoing in Statutes of 1911 are noted in the next section.

But in most of the other States, extensive codes have been adopted, within the last few years, based solely on the law of ap-

[13] *Infra*, sec. 1264 et seq.

[14] In his report, part I, page 220, he had said: "Indeed, the necessity for and general features of the proposed Californian law for 'The Discovery and Adjudication of Water-right Claims' were stated and outlined in the report of the State Engineer for 1878–79; the measure was drawn out in the report of 1880, and has been urged in every succeeding report."

[15] Bulletin 100, U. S. Dept. of Agric.

[16] Introduced by Senator Black, of Santa Clara.

propriation, and chiefly for the encouragement of irrigation, though applying to all pursuits, under the influence in some degree of the United States Reclamation Service. This legislation is still going on. The features of this legislation originated partly in Colorado, but chiefly in Wyoming, where they owe much to the influence of Professor Elwood Mead, formerly of the United States Department of Agriculture, and recently appointed head of the Irrigation Administration of Australia. In Utah, a code was adopted by the 1903 session of the legislature[17] and repealed by the next, and a new code substituted[18] very similar and in parts identical; and again in 1907.[19] In Wyoming there is much legislation on this subject, and in 1905 a statute was passed appointing code commissioners to draft a new code to be presented to the next legislature,[20] and a code adopted in 1907.[21] In Oregon a code was adopted in 1909 based upon the Wyoming law, in consultation with the State Engineer of Wyoming.[22] In eight of these States and Territories this legislation was adopted in whole or in large part in 1905. In 1907 and 1909 this legislation was continued in numerous States, being devoted to broadening the first enactments, confined to irrigation, into a wider scope applying to all uses, as a general Water Code. More or less elaborate codification in this line, having common characteristics, will be found in Colorado, Idaho, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah and Wyoming.[23] In Arizona[24] there are statutes somewhat similar to the above but somewhat influenced by the civil law of acequias borrowed from Mexico.

The main features of this new legislation are solely administrative. The substantive law concerning the extent of right, loss of right, and similar matters, remains as under the decisions of the courts, largely the early California decisions. The new statutes are chiefly administrative, providing for enforcement of the rights defined by case law, and for a policing of the waters. They are an application of the theory of public ownership of natural resources. Laws enacted since 1905 all provide for the rejection of applications the approval of which would be detrimental to the public interests. New Mexico and South Dakota place this power

17 Laws Utah 1903, c. 100.
18 Laws Utah 1905, c. 108.
19 See statutes, *infra*, sec. 1447.
20 Laws Wyo. 1905, p. 26. Likewise Montana, Stats. 1905, p. 184.
21 See statutes, *infra*, sec. 1449.
22 Oregon Stats. 1909, c. 216, p. 319.
23 Statutes *infra*, Part VIII.
24 Rev. Stats. 1901, p. 1045.

in the engineer, while in Oregon the engineer is to report such cases to the board of control, which is to decide thereon. The chief sponsor of this legislation says: "The growing belief in the public ownership of public utilities applies especially to water, that most essential of all utilities."[25] The essentials of all these statutes consist in an enactment of the law of appropriation as the sole law on the subject of waters, with a declaration of State or public ownership of all waters; a reorganization of the State for administrative purposes as concerns waters; a census, determination and listing of all existing appropriations; a comprehensive method of making appropriations hereafter; and various provisions for policing the waters. The object of the legislation is in the nature of police regulation under the police power to secure the orderly distribution of water for irrigation.[1]

In the act of 1866,[2] local customs, "*laws*" and decisions of courts are referred to, and this has been held to apply to local statutes,[3] and to the statutes of a Territory as well as those of a State.[4] The Nebraska court has said that a water code of this kind unconstitutional in part would be so in whole,[5] but the Idaho court held the contrary.[6] It is said that this legislation can only regulate, and cannot carry that regulation to the extent of impairing rights held by appropriators out of a policy favoring later claimants.[7]

This legislation being very new, it will take time to try it out. The State Engineer of Oregon estimates four to six years for a satisfactory test. For example, the Oregon act of 1909 enacted an annual tax upon new water-power projects, which has been found to cause the abandonment of fifty-six projects out of one hundred and twelve projected; that is, has cut power development in Oregon in half; from which experience the State Engineer has recommended its repeal.[8]

[25] Professor Elwood Mead in Bulletin 100, U. S. Dept. Agric., p. 64.

[1] Combs v. Farmers' etc. Co., 38 Colo. 420, 88 Pac. 399.

Says Mr. Lewis, State Engineer of Oregon, "The small water user, with limited means, cannot afford to fight for his rights in the courts. He must make his living by the application of water to his crops. If the water supply is stolen, his only hope of securing justice in the courts is gone."

[2] U. S. Rev. Stats., sec. 2339.

[3] Basey v. Gallagher, 20 Wall. (87 U. S.) 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683.

[4] Gutierres v. Albuquerque etc. Co., 188 U. S. 545, 23 Sup. Ct. Rep. 338, 47 L. Ed. 588.

[5] Crawford v. Hathaway, 61 Neb. 317, 85 N. W. 306.

[6] Bear Lake v. Budge, 9 Idaho, 703, 108 Am. St. Rep. 174, 75 Pac. 615; Boise etc. Co. v. Stewart, 10 Idaho, 38, 77 Pac. 25, 321.

[7] *Infra*, sec. 1193.

[8] Report of State Engineer of Oregon for 1909–10 (Third Report), pages 5, 7 and 82, 84.

(3d ed.)

§ 125. Same—Legislation in 1911.—In the legislation of this year the most extensive changes were in California. For the first time there now appears upon the statute books in California the declaration, borrowed from Wyoming, that waters in California are "the property of the people of the State"; and the Wyoming system of administration by a Board of Control has been enacted in California to cover water-power development (but covering such uses only). A resolution was also adopted for a constitutional amendment to create a Public Service Commission in California, with control over distribution of water to public uses; and such commissions were established in Kansas, Oregon, Washington and Nevada. Further, a Conservation Commission was created in California to investigate water laws and water resources, and the one already existing in Utah was given increased power over deciding what uses of streams are most in the public interest. The California statute for power projects follows the Wyoming rule that projects may be denied if the Board of Control considers them against public interest. In California there was further created a State Board of Engineering and a State Engineer, with duties, among others, of investigating water resources.

Power projects are limited to twenty-five years in the California statute, and a graduated royalty or tax upon horsepower is imposed. In Oregon the existing tax was not changed, and a new one was placed upon projects that had not been included in the law of 1909.

Idaho, Oregon, and Utah passed acts restricting, in some features, the power of the officials in cancellation or rejection of permits. The irrigation district statutes were amended in most States. The bill in Colorado which evoked most interest was the Carpenter Bill, with Parrish Amendment, to repeal a preference, appearing in an earlier statute, given to irrigation by direct application of flow from a stream, over irrigation from reservoirs supplied from the same stream. At the present writing, the bill has passed both houses, and will probably be signed by the governor.

The most interesting feature of this year's water legislation concerns interstate streams. California passed a resolution protesting against diversion into Nevada of the waters of Lake Tahoe, on the California-Nevada line and declaring the Lake to be mainly the property of California, and the Nevada legislature resolved that

the diversion should be allowed, "notwithstanding the protest of the people of the State of California, whose claim to those waters we do not concede." California further enacted that waters within its boundaries are the property of the State, and prohibited their diversion to points outside of the State, while Oregon enacted with reference thereto that the State Engineer of Oregon may refuse permits for diversion of Oregon waters to points in another State when the latter would not permit diversion of its waters for use in Oregon. Wyoming appropriated funds to enable the attorney general of the State to take steps to protect the rights of the State and its citizens in the waters of interstate streams.

References to these and other less important enactments in 1911 are given in appropriate sections hereafter, and also in the collection of statutes in Part VIII of this book.

(3d ed.)

§ 126. Effect of This Legislation upon Riparian Rights.—In all of the Western States there has been an adoption of the common law as the basis of the general legal system.[9] The only statute naming the common law of riparian rights in order to reject it is that of Arizona, which has not yet modeled its statutes upon the new water codes. The Arizona constitution says: "The common-law doctrine of riparian water-rights shall not obtain or be of any force or effect in this State."[10] On the other hand, the Oregon statute expressly mentions and preserves the existing rights of riparian owners;[11] and likewise Washington.[12] Aside from these exceptions, the common law of riparian rights is not expressly mentioned in any of these statutes; but is indirectly rejected *in toto* by a provision that the right to appropriate unappropriated water shall never be denied;[13] or a provision that the right to waters can arise by appropriation and in no other way,[14] adding a phrase common in the States rejecting riparian rights *in toto*, that "bene-

[9] United States v. Rio Grande Co., 174 U. S. 690, 19 Sup. Ct. Rep. 770, 43 L. Ed. 1136.

[10] Ariz. Const., art. XVII, sec. 1. Copied from Rev. Stats. 1901, sec. 4168 (Civ. Code). See Boquillas etc. Co. v. Curtis, 213 U. S. 339, 29 Sup. Ct. Rep. 493, 53 L. Ed. 822, affirming Same v. Same, 11 Ariz. 128, 89 Pac. 504. This constitution has not yet been ratified by Congress; but the provision is substantially the same in the territorial statutes.

[11] Laws 1909, c. 216, sec. 70 (see, also, sec. 1); Laws 1905, c. 228.

[12] *Infra*, sec. 1448.

[13] Citations *supra*, sec. 108.

[14] For example, Nev. Comp. Laws 1900, sec. 359; Nev. Stats. 1907, p. 30, sec. 7; Oregon Laws 1909, c. 216, sec. 1; Utah Laws 1905, c. 108, sec. 34.

ficial use shall be the basis, the measure and the limit of all rights to the use of water."[15] The Oregon statute of 1909 provides: "This act shall not be held to bestow upon any person, association or corporation, any riparian rights where no such rights existed prior to the time this act takes effect,"[16] and existing riparian owners are, it appears, required to have their rights established like appropriators, and are to be allowed only such water as is in beneficial use by them at the date of adjudication.[17] In Idaho it is declared that the right to appropriate unappropriated water shall never be denied, and that priority of appropriation gives the better right in appropriation of water,[18] and that "all rights to divert and use the waters of this State for beneficial purposes shall hereafter be acquired and confirmed under the provisions of this act."[19] Similar provisions exist in most States. At the same time they frequently contain a provision saving all existing rights.[20]

Most of the States adopting this legislation hostile to the common law of riparian rights are, as has been said, the arid States, where the courts had previously taken the same attitude. In Nebraska, North Dakota, Oregon and South Dakota, however, the courts had previously followed the California doctrine recognizing and enforcing the rights of riparian proprietors.[21] In the last three, these statutes being only adopted recently, there has been no chance for testing their effect upon the existing rights of riparian proprietors; but in Nebraska[22] the matter gave rise to much litigation, and the court held[23] that it would be beyond the power of the legislature, after riparian rights had been recognized and vested, to deprive riparian owners of those rights hitherto enjoyed by them. Statutes such as these, the court held, cannot take away the rights of existing riparian owners, as it would be a taking of property without due process of law. In its opinion the court says: "The right of a riparian proprietor to the reasonable use of water flowing in a

15 Citations *infra*, sec. 478.

16 Oregon Laws 1909, c. 216, sec. 70, subd. 8.

17 *Ibid*, secs. 13, 70, *et alia*.

18 Idaho Const., art. 15, sec. 3.

19 Stats. 1903, p. 223, sec. 41.

20 Nevada Stats. 1907, p. 30, sec. 2, saying, "All existing rights to the use of water, whether acquired by appropriation or otherwise, shall be respected and preserved, and nothing in this act shall be construed as enlarging, abridging or restricting such rights." See, likewise, Nevada Stats. 1909, p. 31; N. M. Laws 1907, p. 71, sec. 59.

21 *Supra*, sec. 117.

22 The legislation in Nebraska was substantially an adoption of the Wyoming laws. Farmers' Irr. Dist. v. Frank, 72 Neb. 136, 100 N. W. 286.

23 Crawford Co. v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647, 93 N. W. 781, 60 L. R. A. 889.

natural channel is property, which is protected by the aegis of the constitution, and of which he cannot be deprived against his will, except for public use, and upon due compensation for the injury sustained. If the legislature had undertaken to sweep away and abolish this right, we would not be warranted in giving the act judicial sanction. Where, by any possible construction of a reasonable nature, legislation can be upheld, it is our duty to give it such a construction as will uphold, rather than destroy it. The irrigation act of 1895 is valid when construed as not interfering with vested property rights which have been acquired by riparian proprietors."

A recent California case very emphatically denies power in the legislature to restrict the right of existing riparian owners,[24] and the new California water-power statute above mentioned says that it "shall not impair or affect any rights to water or the use of water which shall have become vested prior to the making of the application above provided for."[25]

The Nebraska decisions upheld the statute as introducing appropriation, and abrogating riparian rights accruing *thenceforth* (that is, upon public land that may be patented *thereafter*), and considered appropriation as resting solely on these statutes, holding that before the statutes appropriation did not exist at all.[26] In so far as Nebraska upholds the abrogation of the common law by State statute for future patents, it is contrary to Lux v. Haggin. The California court placed its decision to a great extent on the ground that abrogating the rule of riparian rights would interfere with the primary disposal of the Federal lands, an interference not depending upon the date of a statute, and equally an

[24] Miller v. Madera Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A., N. S., 391.

See, also, a *quaere* regarding rights if once vested, in Boquillas etc. Co. v. Curtis, 11 Ariz. 128, 89 Pac. 504, 213 U. S. 339, 29 Sup. Ct. Rep. 493, 53 L. Ed. 822. *Quaere*, also, what might be the bearing, if any, of the doctrine of Muhlker v. New York etc. Co., 197 U. S. 544, 25 Sup. Ct. Rep. 522, 49 L. Ed. 872?

In Texas it was held that General Laws of 1889, page 100, section 2, providing that the unappropriated waters of every river or natural stream within the arid portions of the state, as described in section 1, are thereby declared to be the property of the public, and may be acquired by appropriation for irrigation, cannot operate on the rights of riparian owners, existing when the law was passed, but was intended to operate only on such interest as the state had by reason of its ownership of land bordering on natural streams. McGee Irr. Ditch Co. v. Hudson (Tex. Sup.), 22 S. W. 967.

[25] Stats. 1911, c. 406, sec. 14. See *infra*, sec. 1193.

[26] Meng v. Coffey, 67 Neb. 500, 108 Am. St. Rep. 697, 60 L. R. A. 910, 93 N. W. 715.

interference if only abrogating for future patented land. To this extent departing from Lux v. Haggin, the Nebraska court said:[1] "That it was competent for the legislature to abrogate the rule of the common law as to riparian ownership in waters as to all rights which might have been acquired in the future, and substitute a system of laws providing for the appropriation and application of all the unappropriated waters of the State to the beneficial uses as therein contemplated, there exists, it would seem, no reasonable doubt."[2] As the decision in Lux v. Haggin was rested largely on constitutional grounds, a strict adherence to the California doctrine does not recognize any power in the legislature to abrogate riparian rights present or future. As to present rights, it would take them away without due process of law (that is clear),[2a] and as to future patents, Lux v. Haggin held that it would interfere with the primary disposal of the public lands (which, however, in view of Kansas v. Colorado,[3] while not disproved, has been cast in doubt).

The question under the new Oregon act is considerably affected by the recent decision in Hough v. Porter elsewhere considered.[4]

(3d ed.)

§ 127. **Irrigation Districts—Wright Act.**—The California legislature in 1872 passed an act[5] providing that the owners of land susceptible of one mode of irrigation may combine for the common purpose, contributing the water-rights owned by each or acquiring new ones in the usual ways. Similar legislation already existed for the formation of "Reclamation Districts" to reclaim swamp lands.[6] In 1887[7] the statute well known as the "Wright Act" was passed for the same purpose, an elaborate statute providing for the formation of irrigation districts. It was held in violation of the constitution of the United States by Judge Ross in the southern

1 Crawford Co. v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647, 93 N. W. 781, 60 L. R. A. 889, *supra*.

2 The Nebraska court further held in the same case: "In the irrigation act of 1889 the legislature sought to classify the streams in this State, and restrict riparian rights to those owning lands bordering on streams not exceeding a certain width; but this attempted restriction proved abortive as an unwarranted act calculated to deprive riparian proprietors of vested property rights without due compensation, contrary to constitutional provisions in that regard." Citing Clark v. Cambridge Irr. Co., *supra*.

2a See *infra*, sec. 1193.

3 206 U. S. 46, 27 Sup. Ct. Rep. 655, 51 L. Ed. 956.

4 *Infra*, sec. 129.

5 Stats. 1871–72, pp. 945–948.

6 *Infra*, sec. 350.

7 Act of March 7, 1887.

district of California,[8] but on appeal to the supreme court of the United States was upheld,[9] reversing Judge Ross. It has been copied in many other States and its constitutionality since always upheld. The act was repealed in California and a new act passed in 1897, which has been since amended. Statutes for the formation of irrigation districts based on the Wright Act of California exist in California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, Oregon, Texas, Utah, Washington and Wyoming.[10]

The law of irrigation districts is further considered elsewhere in this book.[11]

D. LATER AND RECENT FEDERAL LEGISLATION.

(3d ed.)

§ 128. The Desert Land Act.—Since the statutes of 1866 and 1870, Congress has only indirectly touched the subject of private rights in waters. In 1877, by the Desert Land Act,[12] the right to appropriate such an amount of water as might be necessarily used for the purpose of irrigation and reclamation of desert land, part of the public domain, was granted, and it was further declared, "Provided, however, that the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres shall depend upon *bona fide* prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights." [13]

[8] Bradley v. Fallbrook Irr. Dist., 68 Fed. 948.

[9] Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 17 Sup. Ct. Rep. 56, 41 L. Ed. 369.

[10] See statutes collected *infra*, c. 58, sec. 1356 et seq.

[11] *Infra*, sec. 1356 et seq.

[12] Act of Congress March 3, 1877, 19 Stats. at Large, 377, c. 107, U. S. Comp. Stats. 1901, p. 1549. See, also, A. C. June 27, 1906, 34 Stat. 520; A. C. March 26, 1908, 35 Stat. 48; A. C. March 28, 1908, 35 Stat. 52. This statute applied to the entire West except Colorado, which was included in 1891. 1 Supp. Rev. Stats. 941, 942.

[13] The act of 1877 is considered to some extent in the following cases: Williams v. Altnow, 51 Or. 275, 95 Pac. 200, 97 Pac. 539; Farm Investment Co. v. Carpenter, 9 Wyo. 110, 87 Am. St. Rep. 918, 61 Pac. 258, 50 L. R. A. 747; United States v. Conrad Inv. Co. (C. C.), 156 Fed. 123, 128; United States v. Rio Grande

Whatever may be the beneficial result of construing these provisos one way rather than another, until the recent Oregon decision below considered they were regarded as but declaratory of the act of 1866, and inserted in the Desert Land Act only out of abundant caution, as a repetition of the former statute; that is, repeating the policy of "free development" as to the waters while on public land. The United States circuit court of appeals held the law under this statute to be well settled as the same as under the act of 1866, neither of them having application to waters diverted subsequent to the patenting of the riparian land over which they flowed, but only to waters flowing over unoccupied public land at the time of the diversion.[14]

(3d ed.)

§ 129. **Same—Hough v. Porter.**—But a very recent Oregon decision has established for Oregon a new system of water law upon the basis of this act. In Hough v. Porter[15] it was held that, with the exceptions below noted, the common law of riparian rights was abrogated by Congress in this act as to all public land, and that thereafter the passing of land into private title does not prevent the diversion of water therefrom against a landowner who has not himself put it to use when diverted from his land. The court reaffirms that both this act and the act of 1866 enact for waters *while on public land* the policy of "free development," or, as it is here put, a dedication of the waters to the public while on public land; but it further holds that the Desert Land Act made this dedication irrevocable so that it remains attached to the waters

Irr. Co., 174 U. S. 690, 19 Sup. Ct. Rep. 770, 43 L. Ed. 1136; Gutierres v. Albuquerque Land Co., 188 U. S. 545, 23 Sup. Ct. Rep. 338, 47 L. Ed. 588; Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. Rep. 655, 51 L. Ed. 956; State ex rel. Liberty Lake Ice Co. v. Superior Court, Spokane County, 47 Wash. 310, 91 Pac. 968; Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728; Winters v. United States, 143 Fed. 740, 74 C. C. A. 666; S. C., 207 U. S. 564, 28 Sup. Ct. Rep. 208, 52 L. Ed. 340.

Regarding land entries under this act, questions of land law rather than water law are involved, and the act is here considered only with reference to its bearing upon general water questions, and not with reference to acquisition of land titles under the act. Circulars of the General Land Office may be obtained upon application, dealing with the land questions, such as the irrigable character of the land, the amount of irrigation for which proof is required, and similar matters. Regulations are also printed in 39 Land Dec. 253. See, also, for example, 37 Land Dec. 317, and 38 Land Dec. 157 (stock in irrigation company as expenditure under the act); 38 Land Dec. 420; 38 Land Dec. 438; 39 Land Dec. 285.

[14] Winters v. United States, 143 Fed. 740, 74 C. C. A. 666.

[15] (1909) 51 Or. 318, 95 Pac. 732; 98 Pac. 1083, 102 Pac. 728, rehearing denied, 102 Pac. 731.

(even though as yet unappropriated) when the lands over which they flow are patented. Consequently, the doctrine of riparian rights (with the exception below) was held inapplicable to any of the many claimants in the case, because their riparian patents, although in numerous instances issued prior to the appropriation of water by others, had issued subsequent to the passage of the act of 1877.[15a]

The exceptions recognized in the decision are: (1) lands patented before 1877; (2) waters in actual use by the riparian owner; and (3) the common-law right to a perpetual (though unused) flow of such quantity as could in the future be used for domestic use and stock-raising. The reason for the first and second is obvious; the reason for the third lay partly in an Oregon statute which was held to prevent going further,[16] but chiefly the use of the words "irrigation, mining and manufacturing" in the Desert Land Act, which words were held to restrict the abrogation to water claimed by a riparian owner for those purposes. Indeed, as to domestic use, the preservation of the common-law riparian right for that purpose is strongly upheld upon principle.[17] Upon principle the court thus concludes, as a matter of policy, that the common law of riparian rights is better adapted to domestic use than is the law of appropriation, while the latter is better for irrigation, mining

[15a] It may be pertinent to note that there may be some connection between the proviso in the Desert Land Act and a California resolution of the same year (Laws 1877, p. 1070), calling upon Congress to abrogate riparian rights and to declare as to waters "that the same be granted and dedicated to the States and Territories where the same are situated."

[16] Sec. 5000, B. & C. Comp. See *supra*, sec. 119, "Landowner" statute.

[17] In this regard the court said (per Mr. Justice King): "The language used in this act [Desert Land Act of 1877] was clearly intended to change the rule respecting the right of riparians to the use of water for irrigation, mining and power purposes; but as in the last case cited, it has its limits. It does not go so far as to affect the rights originally giving rise to the doctrine of riparian rights; that is, for domestic use, including the watering of domestic animals and such stock as may be essential to the sustenance of the owners of lands adjacent to the streams or other bodies of water. [Nor, it is held, does it allow interference with navigation.] . . . . Presumably the best possible results for all concerned were intended, which it is clear could best be obtained by permitting the settler to retain the quantity of water essential to the sustenance of his family and to other natural wants incident thereto, but, if he does not see proper to apply it to any of the uses specified in the act, then to permit the first home-builder on other lands to make such use of it as will bring into cultivation the lands not adjacent to the streams, thereby protecting the settlers upon both classes of lands, and at the same time not only encourage home building but enable the government to dispose of more of its lands, and to enhance its revenues proportionately." Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

and manufacturing, and that the act of 1877 is in accord with this view of the proper policy.

But with these exceptions, there are, under this decision, no riparian rights to unused water in Oregon for lands patented since 1877.[18]

(3d ed.)

§ 130. **Same—New Oregon Doctrine Based on the Desert Land Act.**—As already said, this view is as yet confined to Oregon, for until this decision the Desert Land Act had not really entered the discussion of water law in the decisions or text-books. Into California law, especially, it has never entered; the writer recalls no case in which it was even cited, and feels that it can be confidently said that no California case has made it the basis of actual decision regarding water-rights. The California law has regarded the act of 1866 as the sole "charter" of Western water law, and all subsequent acts of Congress as subordinate thereto and merely declaratory thereof. The Oregon court in Hough v. Porter also says: "So far as we are able to determine, the question, as here presented, has not heretofore been squarely before any of the courts," and upon petition for rehearing[19] occurs the expression, "a doctrine hitherto unknown." That, however, if the policy taken be good, is rather a merit of the decision, since it was made with full knowledge of that fact, and only after a learned examination of the previous law. The decision was also preceded by intimations to the same effect in other recent Oregon cases,[20] and since then the supreme court of the United States has declared it to rest on plausible grounds.[21]

It is an entirely new phase of the law that is thus presented, and only time can show what effect this decision will have, though

[18] In an extended opinion, the court, through Mr. Justice King, said: "Construed, then, with the act of 1866 and other provisions of the act of 1877, we are of the opinion that all lands settled upon after the date of the latter act were accepted with the implied understanding that, except as hereinafter stated, the first to appropriate and use the water for the purposes specified in the act should have the superior right thereto"; and that appropriation becomes practically the sole law of use for irrigation, mining or manufacturing in Oregon excepting only the riparian rights of land patents issued before 1877, and before any appropriation had been made of water thereon.

[19] 51 Or. 318, 102 Pac. 729, petition denied.

[20] Davis v. Chamberlain, 51 Or. 304, 98 Pac. 154; Williams v. Altnow, 51 Or. 275, 95 Pac. 200, 97 Pac. 539; Hough v. Porter, 51 Or. 318, 95 Pac. 732.

[21] Boquillas etc. Co. v. Curtis, 213 U. S. 339, 29 Sup. Ct. Rep. 493, 53 L. Ed. 822.

its importance seems to indicate much discussion of it in and out of Oregon.[22] The *proviso* in the Desert Land Act (however it be construed) applies to the remaining public land in all States, California included.

(3d ed.)

§ 131. **Federal Right of Way and Reservoir Site Acts.**—In 1888, an appropriation bill provided for an examination of feasible plans for reservoirs and irrigation projects, irrigable lands, etc., to be withdrawn from entry (similar to the National Irrigation Law of June 17, 1902).[23] In 1890 the reservation of lands, excepting for reservoir sites, was repealed.[24] In the same year (1890) patents for land were made subject to (reserving) rights of way for ditches and canals, west of one hundredth meridian "constructed by the authority of the United States."[25] This is the only act prior to the National Irrigation Act which applies to Federal ditch building, that not being covered by the act of 1866, Revised Statutes, 2339, 2340.[1] All private land since patented is subject to government ditch building.[2]

In 1891 right of way over public lands and government reservations was granted for reservoirs, canals and ditches upon filing articles of incorporation, maps and statements in the land office,[3] and the act has been since supplemented, especially in 1901 and 1905 and 1911. The act of March 3, 1891, was intended to be cumulative to the act of 1866, which required no filings. The construction of these acts is being extended and their scope is being enlarged to cover a rapidly developing system of Federal law. In 1911 a new act allows power rights of way and reservoir sites to be granted for fifty years. Further comment is given later herein.[4]

[22] A recent Washington case mentions the matter and leaves it open. Spokane Co. v. Arthur Jones Co. (1909), 53 Wash. 37, 101 Pac. 515.

[23] 1 Supp. Rev. Stats. 698.

[24] Id., pp. 791, 792.

[25] *Ibid.*, p. 792; 26 Stats. at Large, 391.

[1] Green v. Wilhite, 160 Fed. 755; Same v. Same, 14 Idaho, 238, 93 Pac. 971.

[2] *Ibid.*

[3] 26 Stats. 1095; 1 Supp. Rev. Stats. 946.

[4] See *infra*, secs. 203, 208, 211, 430 et seq.

The following is an enumeration of the Federal right of way acts: Rev. Stats. 2339, 2340; A. C. Aug. 30, 1890, 26 Stat. 391; A. C. March 3, 1891, 26 Stat. 1101; A. C. Jan. 21, 1895, 28 Stat. 635; A. C. Jan. 13, 1897, 29 Stats. 484; A. C. May 11, 1898, 30 Stat. 404; A. C. Feb. 15, 1901, 31 Stat. 790; A. C. Feb. 1, 1905, 33 Stat. 628; A. C. March 4, 1911, being part of the appropriation act for the Department of Agriculture.

The purport of congressional action has been almost entirely (until the recent national conservation movement) to facilitate the development of the public domain under the local law of each State; and usually provisos were placed in the acts that they should not interfere with State control over waters. A collection of these provisos is made in a later chapter.[5]

(3d ed.)

§ 132. **Carey Act.**—To aid the States in the reclamation, settlement, and cultivation of the arid land, an act of Congress,[6] commonly called the Carey Act, granted to each State not exceeding one million acres of public lands upon condition that the State should cause to be irrigated, reclaimed, occupied, and cultivated by actual settlers twenty acres of each one hundred and sixty-acre tract within ten years after the passage of the act. The act has been since amended in important points. A separate chapter hereafter is devoted to this act.[7]

(3d ed.)

§ 133. **National Irrigation Act.**—The National Irrigation Act (passed in the year 1902) [8] does not directly affect the law of waters. It aims at the building of irrigation works by national financial and engineering aid under existing State laws concerning waters. The essence of the National Irrigation Act is that the United States as landowner provides for certain engineering projects upon its lands, to be carried out in conformity with State law. Indirectly, it has had much influence, in that the water codes of most of the States and Territories above mentioned were adopted under the influence of the Reclamation Service for the purpose of forwarding the work of the Federal government.

President Roosevelt, in an annual message,[9] among other things, said: "The distribution of the water, the division of the streams among irrigators, should be left to the settlers themselves in conformity with State laws and without interference with those laws or with vested rights." In another annual message [10] he stated:

[5] *Infra*, sec. 176, and sec. 1429.

[6] Section 4 of the Civil Appropriation Act of the fiscal year ending June 30, 1895, dated August 4, 1894 (28 Stat. 422).

[7] *Infra*, sec. 1380 et seq.

[8] Given in full in Part VIII.

[9] To the Fifty-seventh Congress, 1st Session, Cong. Rec., vol. 35, pp. 85, 86.

[10] Of December 6, 1904, to the 58th Congress, 3d Session, found in volume 39 of the Congressional Record, page 14.

"The reclamation act has been found to be remarkably complete and effective, and so broad in its provisions that a wide range of undertakings has been possible under it. . . . . The act should be extended to include the State of Texas." The act was so extended by Congress in 1906. In 1910 an issuance of bonds for thirty million dollars was authorized in aid of the work.[11]

It has been said: "At the time the act [National Irrigation Act] was passed, the government was the proprietor of boundless tracts of arid lands, practically worthless in their natural condition. The smaller, more accessible, streams had been largely appropriated for the irrigation of private lands. Private capital had not, to any considerable extent, looked with approval upon the usually speculative and often perilous enterprise of lifting from the deep canyons, in which they not infrequently flow, the waters of the larger streams, for the irrigation of great bodies of land, as yet either wholly unoccupied, or at most but sparsely settled; and as a rule such lands would not be purchased or entered without some assurance of water for their future irrigation. Contemplating these conditions, Congress passed this act, primarily for the reclamation of these public lands. The government, as a proprietor, was directly interested in a pecuniary way in improving and rendering marketable that for which, in its natural condition, there was neither use nor demand." [12] The act was not framed as a basis of national governmental functions, but contemplates in section 6, that when the lands are settled up (under certain conditions), the works and their control shall pass to the settlers themselves, and the United States shall withdraw.[13]

[11] Chapter 407, 61st Congress, 2d Session.

[12] United States v. Burley (1909), 172 Fed. 615, affirmed in Burley v. United States, 179 Fed. 1.

[13] The possibilities of this great governmental investment in irrigation works are remarkable. It has been said by the director of the Reclamation Service, speaking generally of irrigation aside from the act as well as under it, that up to the present time, as shown by the census investigations, there have been irrigated upward of ten million acres within the arid region, and a population of approximately three million persons is dependent upon them. It is probable, he says, that by complete storage of all the flood waters, by pumping water from underground, and by the most thorough application of water to the soil, upward of fifty or sixty million acres may ultimately be reclaimed, and if that is done within the next generation or century, it will probably result in a population of one person to two acres irrigated; or one person to one acre irrigated, or, roughly, fifty millions of people may be supported in addition to the number now within the arid region. F. H. Newell in his testimony in Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. Rep. 655, 51 L. Ed. 956.

The subject of national irrigation is further considered in a later chapter.[14]

(3d ed.)

§ 134. Water Users' Associations.—The National Irrigation Act provides that the persons receiving water from the government systems shall organize into associations, in which associations title to the waterworks used shall vest in the time and manner prescribed by the act. Preliminary associations, called "water users' associations," are now being organized. Owners must agree to turn over to the management of the association any water-rights they may already have, to be administered in connection with the additional water supply to be furnished from the government works. Some States have passed statutes for the organization of such associations as corporations. The articles of incorporation of the Salt River Valley Water Users' Association in Arizona were originally used as a guide to the form of drawing the articles. The circulars and forms furnished by the Reclamation Service and the law of each State must be referred to.

A later chapter is devoted to this matter.[15]

(3d ed.)

§ 135. Other Recent Federal Legislation.—A recent act of Congress represents the first attempt on the part of Congress to directly affect the law of waters in any State (excepting the Oregon construction of the Desert Land Act), since the act of 1866. Congress, in a proviso in one act,[16] expressly reserves out of patents, and denies to patentees, any riparian rights on lands granted in the Black Hills Forest Reserve. The California legislature, after the decision of Van Sickle v. Haines,[17] had, many years ago, petitioned Congress to adopt such a course regarding the public domain generally,[18] for, according to California law as it has hitherto been, that is a matter which rests with Congress, as concerns waters on the public domain yet undisposed of, and not with the State.

An act of first importance in its bearing upon the future of the Western law of waters is the Withdrawal Act passed by Congress in June, 1910, giving the President power to withdraw public

14 *Infra*, cc. 60–63.
15 *Infra*, cc. 62, 63.
16 A. C., Act June 11, 1906, 34 Stat. 234.
17 *Supra*, secs. 87, 88.
18 Cal. Stats. 1877, p. 1070.

lands at will. Under it large bodies of land have been withdrawn along streams, withholding access to them, as is also true of lands withdrawn by forest reservation; amounting in all to-day to two hundred million acres of withdrawn land. By withdrawing the right of access to streams, the State law is thus being affected by a body of Federal law based upon an extension of the Federal Right of Way Acts.[19]

(3d ed.)

§ 136. Recent Revival of Discussion of Federal Policy.—The pioneer policy of "free development under local law" stood for half a century, and the act of 1866 enacting it remained the "charter" of Western water law. In fact, so firmly did the law of appropriation become regarded as the fixed Federal policy regarding waters on public lands, that numerous States passed that statute by, and came to regard it as inherent law independent of Federal legislation.

A change of Federal policy is now in progress. Forest reserves were created, beginning with the year 1891, and now cover (I was informed by Mr. Graves, the Chief Forester, estimating roughly) all timber land in the public domain excepting about five per cent, and the policy of withdrawing other public lands also received strong support, resulting in the withdrawal bill above mentioned.

In the extension of the reserved policy the effect upon existing water law was indirect, for the Forest Service disclaims jurisdiction over waters directly, saying water control rests with the States. But by control over rights of way (that is, over access to the streams) Federal control over water projects is advancing rapidly (as more particularly considered in a later chapter), although not without opposition from the States.[20]

[19] *Infra*, sec. 430 et seq.

[20] *Infra*, c. 19. The legislature of Colorado in 1909 authorized the attorney general to "investigate acts of the Federal government in regard to public lands in the State of Colorado, and in regard to the waters of the State; and to institute such suits as he may deem necessary in the name of the State to determine whether or not the Federal government is encroaching upon or usurping the rights and powers of the State to the detriment of the interests of the people, or in any way in Colorado violating the laws or the constitution of the United States." The suit of Light v. United States was brought to the supreme court of the United States to test the validity of the Federal grazing laws in Colorado. (It was decided May 1, 1911, in favor of the Federal and against the State power.) In April, 1910, the Colorado Conservation Commission passed a resolution: "Resolved, That as the waters of this State are the property of the State, the power developed by such water should remain forever under control of the State, and that all legislation tending to

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§ 137. **Conservation.**—The preparation of this third edition of this book took place during the progress and culmination of the conservation movement. Each stage caused the writer to add to or change what first had been written in this section, until it grew quite lengthy. When time for final revision came, it was necessary to condense more and more, until now nothing remains. It is so controversial and contains so much not concerning law, that a law-book upon a limited field had best not enter. The section heading is retained, however, to remind some reader who may chance to take up this book in after years that this edition was written in the time of the conservation movement, the Pinchot-Ballinger controversy, the regulation of monopoly, and Mr. Roosevelt's New Nationalism.

It may be noted that the term "conservation" is coming into use in judicial opinions as a substitute for "beneficial use."[21]

E. THE FUTURE.

(3d ed.)

§ 138. The future of the Western law of waters will depend much upon the course of the policy of conservation; at present that policy is in the ascendant, and demands a great change of the existing law. It is a great political question, one for statesmen to deal with, upon which no prophecy is here ventured; this book, as a law-book, is confined to the following observations upon other lines relating to the law of waters as, at present, a branch of local jurisprudence.

(3d ed.)

§ 139. **Transitionary State of the Law of Appropriation Within Itself.**—Throughout the law of appropriation there is now occurring a transition regarding the attributes of a right of appropriation within itself, irrespective of any question of riparian rights

abridge or restrict such control be discouraged." The Wyoming legislature in 1911 (46 Cong. Rec. 3711) petitioned Congress to grant the natural resources to the States. The legislature of California in 1911 passed an act to control power uses, which hitherto have been the objective of Federal action (Cal. Stats. 1911, c. 406), and declared waters the property of the people of the State (Stats. 1911, c. 407). A resolution of the Oregon legislature in 1911 says that Federal withdrawals in Oregon are an obstacle to settlement and development (Stats. 1911, p. 531).

[21] E. g., Kelly v. Hynes (Mont. 1910), 108 Pac. 785; Sullivan v. Jones (Ariz.), 108 Pac. 477; Avery v. Johnson (Wash.), 109 Pac. 1028.

or of Federal rights. The transition is from a possessory system, based upon possession of the stream, to a "particular purpose system" based upon the requirements of a specific use, such as the irrigation of a specific tract of land or the running of specific machinery. With this change of attitude the law of appropriation is being modified throughout, old decisions are becoming obsolete, and old rules are giving place to new. This we shall consider particularly as occasion arises, but we wish here to bring these matters together.

The law of appropriation arose as a branch of the law of possessory rights upon the public domain.[22] It hence took on the attributes of a possessory system (though the right was turned into one of freehold by the act of 1866).[23] The method of making an appropriation was deduced from the requisites of obtaining possession of the stream.[24] Actual use was not a prerequisite to the creation of the right and to invoking the doctrine of relation; actual diversion was enough, if with a *bona fide* intent.[25] Having diverted the stream and thereby taken possession, capacity of the ditch, as measuring the amount in possession, was the chief measure of the right.[1] Injunctions against interference with the *flow* to that capacity were granted, although no interference with use was shown.[2] The right to the possession of that flow was independent of the place or character of use made of it;[3] the flow could be transferred and changed from place to place or from use to use, changes being immaterial;[4] alienation of right was similarly unrestricted;[5] a parol sale was an abandonment simply because it relinquished possession, and because of some authority that the statute of frauds did not apply to *possessory* rights on the public domain.[6] Actual use was represented only by a *bona fide intention;*[7] it did not have to be immediately accomplished to create a right, but the *flow* could be held for future needs;[8] nonuse was immaterial unless it was accompanied with an actual intent to permanently abandon the possession,[9] or continued for a specific statutory number of years.[10] This possessory attitude of the early law, based upon the idea that the right consisted in possession and

22 Sec. 82 et seq.
23 Secs. 96 et seq., 155, 285.
24 *Infra*, sec. 361 et seq.
25 *Infra*, secs. 364, 395.
1 *Infra*, sec. 475 et seq.
2 *Infra*, sec. 642.
3 *Infra*, sec. 281.
4 *Infra*, secs. 496, 497.
5 *Infra*, secs. 537, 557.
6 *Infra*, sec. 555.
7 *Infra*, sec. 377.
8 *Infra*, sec. 483 et seq.
9 *Infra*, sec. 569.
10 *Infra*, sec. 575 et seq.

ownership of a specific *flow*, rather than a specific use, runs through the early cases, and in some respects is being laid down in recent cases.

But the rapid tendency of recent decision and statute is to substitute a "use" system for this "possessory" one. The most marked change has been in making beneficial use the sole measure of the right,[11] and spreading the change through the law as a deduction from that. Consequently, present-day decisions and statutes will be found opposed to almost all the rules above mentioned. Thus, the law has forgotten its origin as a possessory right upon the public domain, and an entirely different explanation is usually given of it to-day;[12] actual application to use rather than diversion has frequently come to be a prerequisite in the very creation of the right;[13] capacity of ditch has fallen almost to no measure of right at all;[14] injunctions are no longer granted to protect that capacity when interference does no damage to use;[15] changes and alienation are being restricted or prohibited, and the right is being made to inhere in the initial place and purpose of use;[16] nonuse is more and more coming to be regarded as immediately limiting the right, without intent to abandon, or even without waiting for the lapse of any number of years.[17]

This well-defined change from a possessory to a specific use system is now in progress, leaving inconsistent decisions upon the matters noted. The law of appropriation is now in a state of evolution within itself. In all these matters the transition is taking place much more rapidly in the States following the Colorado doctrine, where appropriation is the sole law, than in California, where appropriation is confined to the public domain and is consequently diminishing in importance.

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§ 140. **Converging of Appropriation and Riparian Rights.**— Before the National Irrigation Congress at Spokane in 1909, Mr. Morris Bien, Supervising Engineer and at times acting Director of the United States Reclamation Service, expressed the following views of the lines upon which development of the law may be expected:

11 *Infra*, secs. 478, 481 et seq.
12 *Infra*, sec. 167 et seq.
13 *Infra*, sec. 396.
14 *Infra*, sec. 479 et seq.
15 *Infra*, sec. 642.
16 *Infra*, secs. 282, 506, 509.
17 *Infra*, secs. 480, 481, et seq., 574 et seq. 577.

"The doctrine of rights by prior appropriation has been adopted in nearly all the States where irrigation is required; but this doctrine as now generally understood will necessarily require modification. While a number of the States have adopted very satisfactory legislation to regulate and control the appropriation, use and distribution of water, a great deal undoubtedly remains to be done in order to meet the many practical conditions which concern individual irrigators and the rights involved in the large irrigation systems. We may consider that most of the States have passed through one stage of the development of the law of water-rights, namely, the rejection of the rigid doctrine resulting from riparian ownership and the adoption of the doctrine of prior appropriation. The next stage through which most of the States are now passing is that of perfecting the doctrine of appropriation so as to meet the growing necessities of irrigation development. The third stage is now within sight in some districts, namely, the adoption of rules to control the situation where all the water supply of a drainage system has been taken up and is in actual use. The adjustment of such rights to the fluctuations in water supply from year to year will require careful consideration and must undoubtedly be met in many districts within a short time.

"In the Yale Law Journal for January, 1909, is a discussion of the idea of reasonable use, whether under the doctrine of riparian rights or the doctrine of appropriation. It shows that the courts have frequently called attention to the fact that the doctrine of appropriation must be modified by the idea of reasonable use which is also a fundamental limitation of the riparian doctrine. This idea of reasonable use will undoubtedly become an important factor in future years when valuable interests depending upon the entire water supply have grown up within many of the irrigation districts, and it becomes necessary to protect these interests in cases of temporary deficiencies which sometimes continue for a number of years in succession. The legislators will soon be called upon to recognize this situation, and must provide for a *pro rata* division of the water supply whenever in cases of shortage it becomes necessary to provide for all rights which have been reduced to actual beneficial use. The courts in a number of cases have recognized the right of irrigation companies to contract with water users for pro-rating the supply in case of shortage. The qualification of the doctrine of prior appropriation by the idea of reasonable use, and

the application of the same idea to the riparian doctrine will undoubtedly bring these opposing doctrines much closer together in actual practice, and is likely in the end to cause a practical uniformity in the governing principles of all the irrigation States." [18]

When it is considered that rapid settlement on the one hand, and Federal withdrawal of lands on the other combine to prevent access to streams by any but the owners of bordering lands, the law of appropriation must inevitably feel the effect of this privilege of access which riparian owners have, even in jurisdictions denying the common law of waters; and this, together with the increasing tendency upon the foregoing lines to hold appropriators among themselves to correlative instead of exclusive rights, may in time bring the riparian and appropriative doctrines much together upon the line of reasonable use (in a relative sense of one toward the other), between all having natural access to the stream, with not much stress laid upon priority. In such case, the only substantial difference after full settlement would be that under the law of riparian rights the water users from a given stream would all lie within the same valley, while under the law of appropriation they will be a mixture of valley and nonvalley owners, the latter having acquired rights of way while the land was public. But priority will have been modified by equality upon correlative lines.

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§ 141. **Statement of the Doctrine of Appropriation.**—Before closing this chapter it might be well to present the summary of general principles given by Judge Hawley.[19] While not intended as a complete review of the doctrine, it sets forth fundamental principles that are of frequent application to-day:

"Under the principles of prior appropriation, the law is well settled that the right to water flowing in the public streams may be acquired by an actual appropriation of the water for a beneficial use; that, if it is used for irrigation, the appropriator is only entitled to the amount of water that is necessary to irrigate his land by making a reasonable use of the water; that the object had in view at the time of the appropriation and diversion of the water

[18] See *infra*, sec. 310 et seq., for the matter referred to.

[19] Hewitt v. Story, 64 Fed. 510, 12 C. C. A. 250, 30 L. R. A. 265, and repeated by him in Union etc. Min. Co. v. Dangberg (C. C. Nev.), 81 Fed. 73, and again repeated by the learned judge in Rodgers v. Pitt, 129 Fed. 932.

is to be considered in connection with the extent and right of appropriation; that if the capacity of the flume, ditch, canal, or other aqueduct, by means of which the water is conducted, is of greater capacity than is necessary to irrigate the lands of the appropriator, he will be restricted to the quantity of water needed for the purposes of irrigation, for watering his stock, and for domestic use; that the same rule applies to an appropriation made for any other beneficial use or purpose; that no person can, by virtue of his appropriation, acquire a right to any more water than is necessary for the purpose of his appropriation; that, if the water is used for the purpose of irrigating lands owned by the appropriator, the right is not confined to the amount of water used at the time the appropriation is made; that the appropriator is entitled not only to his needs and necessities at that time, but to such other and further amount of water, within the capacity of his ditch, as would be required for the future improvement and extended cultivation of his lands, if the right is otherwise kept up; that the intention of the appropriator, his object and purpose in making the appropriation, his acts and conduct in regard thereto, the quantity and character of land owned by him, his necessities, ability, and surroundings, must be considered by the courts, in connection with the extent of his actual appropriation and use, in determining and defining his rights; that the mere act of commencing the construction of a ditch with the avowed intention of appropriating a given quantity of water from a stream gives no right to the water unless this purpose and intention are carried out by the reasonable, diligent, and intelligent prosecution of the work to the final completion of the ditch, and diversion of the water to some beneficial use; that the rights acquired by the appropriator must be exercised with reference to the general condition of the country and the necessities of the community, and measured in its extent by the actual needs of the particular purpose for which the appropriation is made, and not for the purpose of obtaining a monopoly of the water, so as to prevent its use for a beneficial purpose by other persons; that the diversion of the water ripens into a valid appropriation only where it is utilized by the appropriator for a beneficial use; that the surplus or waste water of a stream may be appropriated, subject to the rights of prior appropriators, and such an appropriator is entitled to use all such waters; that, in controversies between prior and subsequent appropriators of

water, the question generally is whether the use and enjoyment of the water for the purposes to which the water is applied by the prior appropriator have been in any manner impaired by the acts of the subsequent appropriator.

"These principles are of universal application throughout the States and Territories of the Pacific Coast." [20]

(3d ed.)

§ 142. **Conclusion.**—In closing this chapter a word more may be said. The history it traces is in large part a history of the West, and especially of the body of Western law, not only of waters but of real estate generally. It has been here confined so far as possible to the water decisions and statutes, but a complete history of the Western law, and of the law of the public domain, if some day written, will take in the mining, land, timber and water law in one general review. This would require space beyond the limits of this book. Especially would it require a much fuller acquaintance with the mining, land, and timber decisions than the writer of this book possesses.[21]

20 Citing cases.

21 For a very much condensed outline of the history above traced, see the present writer's article in XLIII American Law Review, 481.

§§ *143 to 150. (Blank numbers.)*

CHAPTER 7.

UNITED STATES OR STATE—CALIFORNIA DOCTRINE.

§ 151. Introductory.
§ 152. The Federal title.
§ 153. Same.
§ 154. California doctrine based upon the Federal title.
§ 155. Appropriation as a grant from the United States under this system.
§ 156. Riparian rights a deduction from the Federal title.
§ 157. Power of Congress in the future under this theory.
§§ 158–166. (Blank numbers.)

(3d ed.)

§ 151. The United States has not hitherto exercised power over the law of innavigable waters directly, and consequently the Land Office ruled, in a case arising in California, that it will not pass upon water-right questions, but will leave them to the State.[1] And such is the prevailing view of the matter in daily practice.[2] (Our discussion here has nothing to do with navigable streams.)[3]

In working upon a theoretical basis, however, the courts of California have strongly asserted a Federal property right in waters upon public land.

[1] Silver etc. Co. v. City of Los Angeles, 37 Land Dec. 152. But see McMillan Reservoir Site, 37 Land Dec. 6.

[2] Before the Public Lands Committee of the United States Senate, Feb. 16, 1910, the following remarks, among others, were made:

Senator Smoot of Utah: "The government has already admitted that they have no right whatever to the waters of our State, because under the Secretary's [Mr. Garfield] own administration he filed papers for sites for the Indians." *Senator Newlands of Nevada:* "I think that nobody claims that the government has any ownership in the water itself."

This was generally the position of Mr. Garfield also, as, for example: *Senator Nelson of Minnesota:* "So that the government has nothing to lease except the water-power site?" *Mr. Garfield:* "That is all. It has certain definite property, namely, the land." But in other parts of the proceeding before the committee, Mr. Garfield quoted from the second edition of this book, and tentatively asserted a greater property right in the United States, as, for example: *Senator Jones of Washington:* "By the term 'public domain' you refer to the land separate from the water?" *Mr. Garfield:* "I do; but in some instances, of course, it applies to both, depending on conditions." *Senator Jones:* "But in the States you apply it simply to the land?" *Mr. Garfield:* "Simply to the land; but even that may sometimes be open to discussion." *Senator Jones:* "I am trying to get at what you understand by it." *Mr. Garfield:* "That is what I understand by it."

[3] See *infra*, sec. 898 et seq., as to navigable waters.

(3d ed.)

§ 152. The Federal Title.—Under the doctrine of the California courts, in speaking of the ultimate source of property in appropriative water-rights, by the term "governmental *proprietor*," is meant the owner of the public lands, to which the doctrine of appropriation alone applies in these jurisdictions, and this is usually the United States, as the public lands were, and still are, chiefly Federal lands. But it may also signify the State where (as in comparatively few cases) title to the public land is in the State instead of in the United States. The theory is laid down in the courts following the California doctrine that (although the State as sovereign has the regulative control over distribution of water to public uses), the appropriator of water on public land usually receives his property *title* or "water-right" from the United States as landowner of the public lands. The positions of the two governments as landowner and as lawmaker are kept distinct.

By the treaty of Guadalupe Hidalgo,[4] the United States, at the time the miners arrived in California, had succeeded to the Mexican title, and was the sole owner of the lands through which the streams wholly flowed, excepting only the few cases where Mexico had previously made grants of ranchos to private persons, which grants the United States respected. These lands were held by the United States, and since the admission of the State into the Union are now held (where not reserved or purchased for fortifications, etc.), as are held the lands of private persons, with the exception that they are not taxable.[5] An incident to this sole ownership of the land was, it is said, the right to the waters flowing through it. This right, it is said, was the same as that acquired by the United States in its acquisition of any land, whether in California or Missouri—a complete and unlimited proprietorship. It is laid down in California: "Since, if not before, the admission of California into the Union, the United States has been the owner of all innavigable streams on the public lands of the United States, within our borders, and of their banks and beds."[6]

4 9 Stats. at Large, 928.

5 After the admission of California, it is said: "Thenceforth the only interest of the United States in the public lands was that of a proprietor, like that of any other proprietor, except that the State, under the express terms upon which it was admitted, could pass no laws to interfere with their primary disposal, and they were not subject to taxation. In all other respects the United States stood upon the same footing as private owners of land." Woodruff v. North Bloomfield etc. Co., 18 Fed. Cas. 772, 9 Saw. 441.

6 Lux v. Haggin, 69 Cal. 255, at 336, 10 Pac. 674. The United States owns, as proprietor, hot springs on

The Federal title includes waters in California partly because such was the common law, which was in force in the State from its foundation, the unlimited Federal title being, the court later held in Lux v. Haggin, assimilated to the right of a sole riparian proprietor at common law.[7] But the manner in which an unlimited proprietorship in the waters came to the United States was never, in California, an open question. It was fixed on political grounds in pioneer days, and re-enforced under the influence of Federal anxiety at the time of the opening of the Civil War, by Judge Field (in its general lines), in 1861 in Moore v. Smaw.[8] While specifically dealing only with precious metals, he did, incidentally, mention water also; but irrespective of that fact, it was a declaration of principle. The point is that in California the acceptance of the Federal title came first, and the assimilation thereof to the common law in Lux v. Haggin merely followed to make the local law conform to the Federal title.

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§ 153. **Same.**—Consequently, the Federal government may make rules for the disposal of the waters on its lands, it is now declared, under the California theory, and no property rights therein can, in true law, it is said, be acquired without authority from Congress. Speaking generally, title to such waters is said to be "utterly beyond the power or control of State legislatures,"[9] except as sanctioned by Congress in the act of 1866 and other acts; and Congress is said to be the "supreme authority" over its disposal.[10] Being Federal property, the right of disposal (as distinguished from the political regulative power over the conduct of citizens after it is disposed of) is rested upon the disposal clause

public land in Arkansas. Hot Spring Cases, 92 U. S. 698, 23 L. Ed. 690; Van Lear v. Eisele, 126 Fed. 823.

[7] Lux v. Haggin reached this conclusion: First, because both were unlimited, and there was hence no substantial difference. Second, because the right of a sole proprietor under Mexican law (the only other possible law) would be substantially the same as at common law, supposing the title of the United States to depend on Mexican law; for under Mexican law no one without a right of access through ownership of riparian land (with a few exceptions) had a right to the water. Third, because if, by Mexican law, there was any right in the State as proprietor of waters, the adoption of the common law by the State was a surrender to riparian proprietors (to the United States, as to the vast preponderance of the lands) of those rights because inconsistent with the common law.

[8] 17 Cal. 199, 79 Am. Dec. 123, 12 Morr. Min. Rep. 418.

[9] Kendall v. Joyce, 48 Wash. 489, 93 Pac. 1091.

[10] Cottonwood D. Co. v. Thom (1909), 39 Mont. 115, 101 Pac. 825, 104 Pac. 281.

of the constitution of the United States as follows: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State." [11]

So, likewise, it is said: [12] "In the Eastern part of Montana the United States acquired its title to lands by virtue of what is called the 'Louisiana Purchase.' There cannot be one rule as to the right to the flow of water over its lands in Montana and another rule as to its lands in Iowa and Missouri. In these last-named States, there can be no doubt of the rule that the national government would be entitled to the water which is an incident to its land. As the United States then owns the waters which are an incident to its lands, it can dispose of them separate from its lands if it chooses." Another case: [13] "The water in an innavigable stream flowing over the public domain is a part thereof, and the national government can sell or grant the same, or the use thereof, separate from the rest of the estate, under such circumstances as may seem to it proper." Quite recently the United States circuit court of appeals, quoting the supreme court of the United States, said: "That the United States may, where the circumstances and conditions require it, reserve the waters of a river flowing through its public lands for a particular beneficial purpose was held by this court in Winters v. United States.[14] This decision was approved by the supreme court of the United States in Winters v. United States,[15] where the court said: 'The power of the government to reserve the waters and exempt them from appropriation under the State laws is not denied, and could not be.' [16] To the same effect was the decision of this court in Conrad Inv. Co. v. United States.[17] The authority of the United States to reserve the waters of its streams in the arid region for a beneficial purpose has been recently

11 Article 4, sec. 3.

12 Cruse v. McCauley, 96 Fed. 369. So Mr. Roosevelt, in an address in March, 1911, before the Commonwealth Club in San Francisco, took the position that the United States could do with the waters flowing over public lands whatever it could do with the lands themselves.

13 Howell v. Johnson, 89 Fed. 556 (C. C. Mont.), Knowles, J.

14 143 Fed. 740, 74 C. C. A. 666, and 148 Fed. 684, 78 C. C. A. 546.

15 207 U. S. 564, 577, 28 Sup. Ct. Rep. 207, 52 L. Ed. 340.

16 Citing United States v. Rio Grande Ditch etc. Co., 174 U. S. 690, 702, 19 Sup. Ct. Rep. 770, 43 L. Ed. 1136; United States v. Winans, 198 U. S. 371, 25 Sup. Ct. Rep. 662, 49 L. Ed. 1089.

17 161 Fed. 829, 831.

extended to the settlement of a long-standing controversy between the United States and Mexico respecting the use of the waters of the Rio Grande," etc.[18]

Incidentally, the unlimited right to the waters being in the United States when the stream is wholly on public land, the fact that it actually uses them for a reservation adds nothing new to the character of its right, which was complete whether actually using the water or not, under this doctrine.[19]

(3d ed.)

§ 154. California Doctrine Based upon the Federal Title.—With this conception of the underlying Federal title to waters on the public domain, the pioneer California court had no choice but to find some way *under the Federal title* (and the consequent assertion that the pioneers were trespassers) to nevertheless give some color of right to the pioneers. Had Congress declared itself, there would have been an end of the matter, but as is well known as a matter of history, Congress regarded California as almost an unknown region and for a long time did nothing at all, and the miners and "forty-niners" drifted along their own course respecting this public domain without hearing from Congress one way or the other. They appropriated to themselves the public land, its mines, its waters, and other incidents. This custom of appropriating Federal property had to be upheld by the State courts because the settlement of the whole State depended upon it, and it settled upon the theory of grant to the appropriator from the United States, deraigning the appropriator's title in the same way as mining titles, and upon an equal footing with any *later* patentee.

(3d ed.)

§ 155. Appropriation as a Grant from the United States Under This System.—Under this view it is generally considered in the decisions that an appropriation constitutes a grant from the United States to the appropriator of waters on the public lands; originally implied from the silent acquiescence of the United States,[20] now resting upon the act of 1866.[21]

[18] Burley v. United States (C. C. A., Idaho, 1910), 179 Fed. 1.

[19] Story v. Wolverton, 31 Mont. 346, 78 Pac. 589; United States v. Conrad Investment Co. (Or.), 156 Fed. 126. See *infra*, sec. 207, regarding waters on reservations.

[20] See *supra*, sec. 89.

[21] Secs. 2339, 2340, Revised Statutes of the United States. See Conger

The following will serve as examples of the way this theory is summarized by the courts: In Lux v. Haggin, the court says:[22] "Recognizing the United States as the owner of the lands and waters, and as therefore authorized to permit the occupation or diversion of the waters as distinct from the lands, the State courts have treated the prior appropriator of water on the public lands of the United States as having a better right than a subsequent appropriator, on the theory that the appropriation was *allowed or licensed by the United States.* It has never been held that the right to appropriate waters on the public lands of the United States was derived directly from the State of California as the owner of innavigable streams and their beds. And since the act of Congress *granting* or recognizing a property in the waters actually diverted and usefully applied on the public lands of the United States, such rights have always been claimed to be deraigned by private persons under the act of Congress, from the recognition accorded by the act, or from the acquiescence of the general government in previous appropriations made with its presumed sanction and approval." In a Nebraska case: "Practically all the lands in the semi-arid portions of the State at the time belonged to the government. It was the riparian proprietor, and authorized the appropriation and diversion of the water for agricultural, mining and manufacturing purposes."[23]

The title of the act of 1866 itself enunciates the theory of a grant from the United States: "An act *granting* the right of way to ditch and canal owners over the public lands and for other purposes."[24] In one California case,[25] for example, the court says: "We hold the *absolute property* in such cases to pass by appropriation *as it would by grant.*" In another case:[1] "An appropriator of water under these circumstances, and while the land which he subjects to his necessary uses continues to be a part of the public domain, is a licensee of the general government; but

v. Weaver, 6 Cal. 548, at 558, 65 Am. Dec. 528, 1 Morr. Min. Rep. 594; Kidd v. Laird, 15 Cal. 161, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571; Ortman v. Dixon, 13 Cal. 33; Osgood v. El Dorado Water Co., 56 Cal. 571, 5 Morr. Min. Rep. 37; Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Smith v. Hawkins, 110 Cal. 122, 42 Pac. 453; and many other cases.

[22] 69 Cal. 255, at 339, 10 Pac. 674.

[23] Crawford v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647, 93 N. W. 781, 60 L. R. A. 889. Compare Rasmussen v. Blust, 85 Neb. 198, 133 Am. St. Rep. 650, 122 N. W. 862.

[24] Approved July 26, 1866, Rev. Stats., sec. 2339; 14 Stat. 253, c. 263.

[25] Ortman v. Dixon, cited *supra.*

[1] Smith v. Hawkins, 110 Cal. 122, 42 Pac. 453.

when such part of the public domain passes into private ownership, it is burdened by the easement *granted* by the United States to the appropriator, who holds his rights against this land under *an express grant.*" In a Montana case[2] the court says: "Under the law of Congress a *grant* of the kind of property in question is presumed by the act of appropriation." In another:[3] "A water-right can, therefore, be acquired only by the *grant*, express or implied, of the owner of the land and water. The right acquired by appropriation and user of the water on the public domain is founded in grant from the United States government as the owner of the land and water. Such *grant* has been made by Congress."[4] Some other authorities are given in the note.[5]

As the law developed since 1866, actual documentary patents were issued by the United States to lands and to mines. This has never been done regarding water,[6] but the theory is as though it were. The appropriator's grant is of equal force with a later patent to a riparian owner, and is hence equivalent to and of equal dignity with a patent from the United States;[7] for, though no actual patent issues, yet a grant in an act of Congress is the highest possible muniment of title. The supreme court of the

[2] Barkley v. Tieleke, 2 Mont. 59, 4 Morr. Min. Rep. 666.

[3] Smith v. Denniff, 24 Mont. 20, 81 Am. St. Rep. 408, 60 Pac. 398, 50 L. R. A. 741.

[4] Citing Wood v. Etiwanda Water Co., 122 Cal. 152, 54 Pac. 726; Welch v. Garrett, 5 Idaho, 639, 51 Pac. 405, 19 Morr. Min. Rep. 193.

[5] "This act [the act of 1866] but legalized what were before trespasses on the public domain, and made lawful, as between the occupants and the United States, that which before was unlawful. It only provided for the sale of quartz mines and *granting* water-rights on the public lands, etc." Woodruff v. North Bloomfield, 18 Fed. 742, 9 Saw. 441. The act operated as a grant. Union Min. Co. v. Ferris, Fed. Cas. No. 14,372, 2 Saw. 176, 8 Morr. Min. Rep. 90; Farley v. Spring Valley Co., 58 Cal. 142. (But see Rasmussen v. Blust (Neb., 1909), 85 Neb. 198, 133 Am. St. Rep. 650, 122 N. W. 862, an opinion written without examination of the history of the subject; for it is more a matter of history than one to be reasoned out fresh to-day.)

Judge Lindley says: "A mining claim perfected since the act of 1866 has the effect of a *grant from the United States* of the present and exclusive possession of the lands located. The owner of such a location is entitled to the exclusive possession and enjoyment, against every one, *including the United States itself.*" Lindley on Mines, sec. 539.

Speaking of the water section of the act of 1866, a contemporary writer said: "The language of this act makes the right a confirmation *in praesenti* as to the claims included, without any preliminary proceeding to obtain a title, as in the case of a mining claim. A grant conferred by act of Congress is the highest source of title known to our laws." Yale on Mining Claims and Water Rights, p. 380.

See, also, *infra*, sec. 285, a freehold estate.

[6] Some approach to it is provided regarding rights of way and reservoir sites. A. C., March 31, 1891. See *infra*, sec. 434.

[7] *Supra*, secs. 96–98.

United States said the act of 1866 is an "unequivocal grant,"[8] and the supreme court of Montana recently said of it that "Such acknowledgment from so supreme authority amounts to a grant."[9] The grant is in the act itself, the highest kind of patent.

Further, the United States, as grantor, had power to impose conditions on the grant to the appropriator, and did so by recognizing the conditions imposed by the early customs of miners in California, especially the condition of beneficial use.

An appropriation of water is, then, under the California doctrine, a conditional grant on public land from the United States as grantor to the appropriator as grantee, and hence, because founded in grant, the limits of an appropriation must lie within the limits, whatever they may be, beyond which the United States had nothing to dispose of, never having owned, or having parted with. The system of appropriation could have effect only where the United States as landowner had power to permit it by grant. This must be insisted on because it is a fundamental principle to be carried through the subject. The conclusion to be drawn from this matter is that under the California doctrine an appropriator receives his rights from the owner of the public lands as landowner, not as lawmaker, and that this is usually the United States and not the State. The legislative power of the State extends to governing procedure in its courts,[10] and to matters within the police power such as the regulation of distribution to public uses, but is subject to the constitutional limitations against infringing on the primary disposal power of Congress, or interfering with the guaranty of vested rights.[11]

(3d ed.)

§ 156. Riparian Rights a Deduction from the Federal Title.— It is likewise as a deduction from the proprietary status of the United States that the California doctrine upholds the existence of riparian rights between private individuals. Accepting the Federal title to the waters while the land is public, then, when the

[8] Broder v. W. Co., 101 U. S. 274.

[9] Cottonwood D. Co. v. Thom (1909), 39 Mont. 115, 101 Pac. 825, 104 Pac. 281.

[10] Lux v. Haggin, 69 Cal. 255, at 377, 10 Pac. 674.

[11] The exception of matters within the *police power* is an exception of all political sovereign power other than taxation, or other than given to the United States expressly by the constitution. "The powers not delegated to the United States by the Constitution . . . . are reserved to the States respectively, or to the people." Amdt. X. See *infra*, secs. 1262 et seq., 1323 et seq., public service.

riparian land passed into private title *before* a diversion, all theretofore *unappropriated* water went with the Federal patent, equally as it was part of the government title before the patent. No other rule could stand with the opinion of Judge Field in Moore v. Smaw,[12] where, in 1861, long before Lux v. Haggin, he laid down the law (which, as to mines, excepting known lodes or existing valid locations, has since then been everywhere fundamental): "Such being the case, the question arises as to what passed by the patents to the Fernandez and to Fremont, and to this question there can be but one answer: all the interest of the United States, whatever it may have been, in everything connected with the soil, in everything forming any portion of its bed or fixed to its surface, in everything which is embraced within the signification of the term land; and that term, says Blackstone, 'includes not only the face of the earth, but everything under it or over it. And, therefore,' he continues, 'if a man grants all his lands, he grants thereby all his mines of metal, and other fossils, his woods, his *waters*, and his houses, as well as his fields and meadows.'[13] Such is the view universally entertained by the legal profession as to the effect of a patent from the general government."[14]

While the California doctrine is usually considered to have its chief exposition in the unfortunately lengthy opinion in Lux v. Haggin, it is pretty much contained in this terse passage by Judge Field in Moore v. Smaw. As subsequently laid down in Lux v. Haggin, the law is that if waters are actually appropriated prior to a Federal grant of land, they are granted to the appropriator by the United States, and are reserved by the United States out of the land grant, but otherwise the right to the waters passes as riparian right with the land grant. "A grant of public land of the United States carries with it the common-law rights to an innavigable stream thereon, unless the waters are expressly or impliedly reserved by the terms of the patent, or of the statute granting the land, or unless they are reserved by the congressional legislation authorizing the patent or other muniment of title."[15]

[12] 17 Cal. 200, at 224, 79 Am. Dec. 123, 12 Morr. Min. Rep. 418.

[13] Citing Book II, 19.

[14] The distinction between the *corpus* of water, and its right of flow and use or *usufruct*, elsewhere considered (*supra*, Part I), is wholly immaterial in this connection. Strictly speaking, it is the right of flow and use, and not the water itself, which passes by the patent, but that is immaterial here.

[15] Lux v. Haggin, 69 Cal. 255, 10 Pac. 674.

In a case showing much study of the question it is said, commenting on the law of Montana: "In that State the doctrine more generally known, perhaps, as the 'California doctrine' prevails. Stated briefly, that doctrine is that while a stream is situated on the public lands of the United States a person may, under the customs and laws of the State and the legislation of Congress, acquire by prior appropriation the right to use the waters thereof for mining, agricultural, and other beneficial purposes, and to construct and maintain ditches and reservoirs over and upon the public land; such right being good against all other private persons, and by statute good as against the United States and its subsequent grantees; but that, when a grantee of the United States obtains title to a tract of the public land bordering on a stream, the waters of which have not been hitherto appropriated, his patent is not subject to any possible appropriation *subsequently* made by another party without his consent." [16]

The term "appropriation of water" thus means, in California and the States following in historical doctrine, such a title (and only such) as, because acquired as a grant from the United States on public land under the Federal policy of free rights in the public domain, is valid against a riparian owner where (and only where) the riparian patent issued subsequent to the appropriation. If the land patent issued first, its riparian rights prevail over the appropriation. (To determine which was acquired first, the appropriation relates back to the beginning of work,[16a] while the patent relates back to the date of settlement.[16b]) The waters pass with the land less because such is the common law, than because they were assumed to belong to the United States before the patent, and the patent carried everything that had belonged to the United States. This feature of the California doctrine is variously expressed as being that the doctrine of appropriation of water applies only to waters on public land, or that appropriation is not valid against prior settlers or landowners, or that no appropriation can be made of waters on private land; or that nonriparian owners (aside from contract, prescription or condemnation) have no rights in streams except such as were acquired while the riparian lands were public—all of which forms express the same idea.

[16] Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210.

[16a] *Infra*, sec. 393 et seq.

[16b] *Infra*, sec. 261 et seq.

(3d ed.)

§ 157. The Power of Congress in the Future.—Under this historical theory there would seem to be a field for Federal legislation as to the yet undisposed of water upon public lands, provided it repeals or modifies the guaranty of appropriation of such waters (under local rules) contained in the act of 1866.

It is true that for numerous generations the United States adopted the policy of holding the public lands and their incidents as a trustee only, the trusteeship being to pass the lands and their incidents as rapidly as it could into private use and ownership, and allow the new States and their citizens to acquire them for their growth and prosperity. But, as the historical chapters have shown, that was a matter of tacit policy or statesmanship and not of actual law. When, for the first time, Congress, by the act of 1866, authorized State legislation for the disposal of waters on public lands, such legislation was considered subordinate to the will of Congress, and Congress may, under this theory, it would seem (subject to protection of rights already vested under the State legislation which Congress authorized), repeal this permission or enact rules of disposal of its own; just as in the mining law State legislation over mining titles is supplementary and subordinate to any action taken by Congress;[17] and just as with regard to the acquisition of rights of way over public lands;[18] and as is acknowledged respecting title to the public lands generally.[19]

It would be within the power of Congress to abrogate riparian rights, under this theory, as to the yet undisposed of waters on

[17] "In the act of 1872 Congress authorized the various States in which was situated public mineral domain of the United States to legislate in regard to mining. Such legislation is necessarily only supplemental to the Federal legislation," etc. Costigan on Mining Law, p. 21.

[18] *Infra*, sec. 430 et seq.

[19] "The general government doubtless has a power over its own property analogous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case. . . . . While we do not undertake to say that Congress has the unlimited power to legislate against nuisances within a State, which it would have within a Territory, we do not think the admission of a Territory as a State deprives it of the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power, so long as such power is directed solely to its own protection. A different rule would place the public domain of the United States completely at the mercy of State legislation." Camfield v. United States (1896), 167 U. S. 518, at 525, 526, 17 Sup. Ct. Rep. 864, 42 L. Ed. 260. See, also, Light v. United States (May 1, 1911), — U. S. —, and Grimaud v. United States (May 1, 1911), — U. S. —.

public lands, by providing that land patents shall not hereafter carry any water-rights. In California[20] the legislature at one time passed a joint resolution calling upon *Congress,* as to all waters on the *public domain,* to reserve all riparian rights out of land patents, and "that the same be granted and dedicated to the States and Territories where the same are situated," etc.[21] For the essence of the doctrine of the California courts in its history appears to be less the upholding of riparian rights than the upholding the disposal power of Congress and the necessity for congressional action. In fact, Oregon has given just this effect to the Desert Land Act,[22] but it cannot be said how far the other States will accept this construction of that act, unless Congress puts it more explicitly. Congress has explicitly so provided only regarding waters in the Black Hills;[23] that is, has provided that land patents shall not hereafter carry any riparian rights in the Black Hills of the Dakotas.

Likewise there would seem, under this historical view, a field for the passage of Federal statutes leading up to water patents, just as Congress has done in the mining law leading up to mine patents, or legislation regarding conservation.

The United States, until within the last year or two, has not moved to exercise the power which the foregoing historical theory accords. Now that Federal activity has arisen under the policy of conservation, it is being addressed to laws concerning rights of way and reservoir sites, and not to the waters themselves, even in the States whose courts recognize riparian water-rights in the United States; while recent statutes of the California legislature declare for State control and call waters the property of the people of the State.[24]

20 Stats. of 1877–78, p. 1070.

21 Caused, *semble,* by Van Sickle case.

22 Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1098, 102 Pac. 728.

23 A. C., June 11, 1906, 34 Stats. at Large, 234.

24 Assembly Joint Resolution No. 8, Session of 1911, dealing with Lake Tahoe; Stats. 1911, c. 406, for State control of the acquisition of water powers; and Stats. 1911, c. 407, declaring waters the "property of the people of the State."

§§ *158–166. (Blank numbers.)*

CHAPTER 8.

UNITED STATES OR STATE—COLORADO DOCTRINE.

A. STATEMENT OF THE COLORADO DOCTRINE.

§ 167. The State system.
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B. BASIS OF THE COLORADO DOCTRINE.

§ 175. Replies to the foregoing objections.
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§§ 188–196. (Blank numbers.)

A. STATEMENT OF THE COLORADO DOCTRINE.

(3d ed.)

§ 167. The State System.—In the States[1] following the "Colorado" doctrine (which, while hitherto opposed in the other jurisdictions by the courts, has been triumphing over the California doctrine in the supreme court of the United States and in the State legislatures, until to-day even the courts of the latter States in many cases seem to have been overruled by their legislatures),[2] the historical theory is not in force. The Federal proprietary title (and therewith, the common-law rights of riparian owners as Federal successors in interest) is denied, and instead there is an

[1] Enumerated in sec. 118, *supra*. [2] *Supra*, sec. 124.

extensive State organization which has absolute control over all natural water resources within their borders, whether on public or on private lands. All rights in waters are held to rest upon State sovereignty and State law.

The State law proceeds upon the ground that the common law was unsuited to Western conditions, and only such parts of the common law are brought by settlers into new communities as are suited to their conditions—a familiar doctrine. It rather denies that the United States as landowner was ever entitled to the rights of a riparian proprietor, because the law of the places where the lands lay never sanctioned riparian rights, and because the United States has no other rights than any other landowner in the State. Consequently no grantee of the United States can have riparian rights. Instead, appropriation is the sole law recognized. The appropriator looks for his rights to the State, and not the United States, these States usually having constitutional or statutory provisions expressly declaring that the ownership of all waters is in the State (or in the public, which is construed as meaning the State), and that the right to the use thereof can be obtained by appropriation, and in no other way. While the California courts started with a Federal title and deduced the law of riparian rights from that, the Colorado doctrine started from a rejection of riparian rights, and deduced a rejection of Federal title from that, since the United States holds its public land like other landowners in this respect.

(3d ed.)

§ 168. The Authorities Quoted.—In Willey v. Decker[3] the authorities in support of this view are presented in an opinion by Mr. Justice Potter. First setting forth the California view, the court says:

"Upon that theory the right acquired by prior appropriation on the public domain is held to be founded in grant from the United States government, as owner of the land and water, under the acts of Congress of 1866 and 1870.[4]

"In this State, on the other hand, the common-law doctrine concerning the rights of a riparian owner in the water of a natural

[3] 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210. Mr. Justice Potter's opinion in this case is one of the notable investigations contained in the reports.

[4] Citing U. S. Rev. Stats., secs. 2339, 2340; U. S. Comp. Stats. 1901, p. 1437.

stream has been held to be unsuited to our conditions; and this court has declared that the rule never obtained in this jurisdiction.[5] It was said in the opinion in that case that 'a different principle better adapted to the material condition of this region has been recognized. That principle, briefly stated, is that the right to the use of water for beneficial purposes depends upon a prior appropriation.' And, further, in explanation of the reasons for the existence of the new doctrine, it was said: 'It is the natural outgrowth of the conditions existing in this region of country. The climate is dry, the soil is arid and largely unproductive in the absence of irrigation, but when water is applied by that means it becomes capable of successful cultivation. The benefits accruing to land upon the banks of a stream without any physical application of the water are few; and while the land contiguous to water, and so favorably located as to naturally derive any sort of advantage therefrom, is comparatively small in area, the remainder, which comprises by far the greater proportion of our land otherwise susceptible of cultivation, must forever remain in their wild and unproductive condition unless they are reclaimed by irrigation. Irrigation and such reclamation cannot be accomplished with any degree of success or permanency without the right to divert and appropriate water of natural streams for that purpose and a security accorded to that right. Thus, the imperative and growing necessities of our conditions in this respect alone, to say nothing of the other beneficial uses, also important, has compelled the recognition rather than the adoption of the law of prior appropriation.'[6]

"In view of the contention in Colorado that until 1876 the common-law principles of riparian proprietorship prevailed in that State, and that the doctrine of priority of right to water by priority of appropriation was first recognized and adopted in the constitution, the supreme court of that State, by Mr. Justice Helm, concluded a discussion of the matter as follows: 'We conclude, then, that the common-law doctrine giving the riparian owner a right

[5] Citing Moyer v. Preston, 6 Wyo. 308, 71 Am. St. Rep. 914, 44 Pac. 845.

[6] In another Wyoming case it is said: "This use and the doctrine supporting it is founded upon the necessities growing out of natural conditions, and is absolutely essential to the development of the material resources of the country. Any other rule would offer an effectual obstacle to the settlement and growth of this region, and render the lands incapable of successful cultivation." Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 87 Am. St. Rep. 918, 61 Pac. 258, 50 L. R. A. 747.

to the flow of water in its natural channel upon and over his lands, even though he makes no beneficial use thereof, is inapplicable to Colorado. Imperative necessity, unknown to the countries which gave it birth, compels the recognition of another doctrine in conflict therewith. And we hold that, in the absence of express statutes to the contrary, the first appropriator of water from a natural stream for a beneficial purpose has, with the qualifications contained in the constitution, a prior right thereto, to the extent of such appropriation.' And it was further said that the latter doctrine has existed from the earliest appropriations of water within the boundaries of the State.[7]

"When the question was first considered in the State of Nevada, the court held that the patentee of the government succeeded to all of its rights, and among these was the right to have the water of a stream theretofore[8] diverted returned to its natural channel.[9] But that case was overruled in Jones v. Adams.[10] And in Reno Smelting etc. Works v. Stevenson,[11] it was unequivocally declared that the common-law doctrine of riparian rights was unsuited to the condition of that State. The court said: 'Here the soil is arid and unfit for cultivation unless irrigated by the waters of running streams. The general surface of the State is table-land, traversed by parallel mountain ranges. The great plains of the State afford natural advantages for conducting water, and lands otherwise waste and valueless become productive by artificial irrigation. The condition of the country, and the necessities of the situation, impelled settlers upon the public lands to resort to the diversion and use of waters. This fact of itself is a striking illustration and conclusive evidence of the inapplicability of the common-law rule.'[12]

"The leading case in Arizona is Clough v. Wing.[13] In that case it is said that the problem to be solved in the arid portions of the

7 Citing Coffin v. Left Hand Ditch Co., 6 Colo. 443.

8 Note the word "theretofore." In so holding (as it did) the early Nevada decision went to a length not to-day in force anywhere. The California doctrine says only "thereafter." The "theretofore" was overruled in Jones v. Adams. The "thereafter" was not involved until the Reno case. See *supra*, sec. 87.

9 Citing Van Sickle v. Haines, 7 Nev. 249, 15 Morr. Min. Rep. 201.

10 19 Nev. 78, 3 Am. St. Rep. 788, 6 Pac. 442.

11 20 Nev. 269, 19 Am. St. Rep. 364, 21 Pac. 317, 4 L. R. A. 60.

12 In another Nevada case it is said: "The doctrine of riparian rights is so unsuited to the conditions existing in the State of Nevada, and is so repugnant in its operation to the doctrine of appropriation, that it is not part of the law, and does not prevail here." Walsh v. Wallace, 26 Nev. 299, 99 Am. St. Rep. 692, 67 Pac. 914.

13 2 Ariz. 371, 17 Pac. 453.

earth has not been how best to drain the water off the land and get rid of it, but how to save it to be conducted upon land in aid of the husbandman. The learned judge who wrote the opinion refers to the antiquity of irrigation in that section of country and in other lands, and remarks: 'Thus we see that this is the oldest method of skilled husbandry, and probably a large number of the human race have ever depended upon artificial irrigation for their food products. The riparian rights of the common law could not exist under such systems; and a higher antiquity, a better reason, and more beneficent results have flowed from the doctrine that all right in water in non-navigable streams must be subservient to its use in tilling the soil.' And, further, it is said that the common law, so far as the same applies to the uses of water, 'has never been, and is not now, suited to conditions that exist here.'

"The supreme court of Utah say: 'Riparian rights have never been recognized in this Territory, or in any State or Territory where irrigation is necessary; for the appropriation of water for the purpose of irrigation is entirely and unavoidably in conflict with the common-law doctrine of riparian proprietorship. If that had been recognized and applied in this territory it would still be a desert; for a man owning ten acres of land on a stream of water capable of irrigating a thousand acres of land or more, near its mouth, could prevent the settlement of all the land above him. For at common law the riparian proprietor is entitled to have the water flow in quantity and quality past his land as it was wont to do when he acquired title thereto, and this right is utterly irreconcilable with the use of water for irrigation. The legislature of this territory has always ignored this claim of riparian proprietors, and the practice and usages of the inhabitants have never considered it applicable, and have never regarded it.'[14]

"In disposing of what the court calls the 'phantom of riparian rights,' and declaring that the maxim, 'First in time, first in right,' should be settled law in that jurisdiction, the supreme court of Idaho forcibly state the reasons for the new doctrine: 'Whether or not it is a beneficent rule, it is the lineal descendant of the law of necessity. When, from among the most energetic and enterprising classes of the East, that enormous tide of immigration poured into the West, this was found an arid land, which could be utilized as an agricultural country, or made valuable for its gold,

[14] Citing Stowell v. Johnson, 7 Utah, 215, 26 Pac. 290.

only by the use of its streams of water. The new inhabitants were without law, but they quickly recognized that each man should not be a law unto himself. Accustomed as they had been, to obedience to the laws they had helped make, as the settlements increased to such numbers as justified organization, they established their local customs and rules for their government in the use of water and land. They found a new condition of things. The use of water to which they had been accustomed, and the laws concerning it, had no application here. The demand for water they found greater than the supply, as is the unfortunate fact still all over this arid region. Instead of attempting to divide it among all, thus making it unprofitable to any, or instead of applying the common-law riparian doctrine to which they had been accustomed, they disregarded the traditions of the past, and established as the only rule suitable to their situation that of prior appropriation. This did not mean that the first appropriator could take what he pleased, but what he actually needed, and could properly use without waste. Thus was established the local custom, which pervaded the entire West, and became the basis of the laws we have to-day on that subject.' '' [15]

As to the effect of this inapplicability upon the common law, the statutes of Nevada adopted the common law of England in the following words: "The common law of England, so far as it is not repugnant to or in conflict with the constitution and laws of the United States, or the constitution and laws of this State, shall be the rule of decision in all the courts of this State." The supreme court of Nevada, in Reno Smelting etc. Co. v. Stevenson,[16] construing this statute in its application to riparian rights, said: "The statute is silent upon the subject of the applicability of the common law, and we think the term 'common law of England' was implied in the sense in which it is generally understood in this country, and that the intention of the legislature was to adopt only so much of it as was applicable to our condition." And Judge Hawley said in declaring the law of Nevada: [17] "Riparian rights are founded upon the ancient doctrine of the common law. If the law is a progressive science, courts should keep pace with the progress and advancement of the age, and constantly bear

[15] Citing Drake v. Earhart, 2 Idaho (716), 750, 23 Pac. 541.

[16] 20 Nev. 269, 19 Am. St. Rep. 364, 21 Pac. 317, 4 L. R. A. 60.

[17] Union Min. Co. v. Dangberg, 81 Fed. 73.

in mind the wants and necessities of the people and the peculiar conditions and surroundings of the country in which they live. In this connection it has been said to be one of the excellencies of the common law, that it admits of perpetual improvement, by accommodating itself to the circumstances of every age, and applies to all changes in the modes and habits of society, and in this respect it will never be outgrown by any refinements, and never out of fashion, while the ideality of human nature exists." In an Arizona case,[18] a concurring opinion: "Without further elaboration of my reasons, I state my belief that the utter incompatibility of the doctrine of riparian rights with the conditions of life in this territory is an all-sufficient reason, under the principles of the common law itself, to hold that that doctrine is not here in force."[19] In the same case on appeal to the supreme court of the United States, this was approved, saying of a statute adopting the common law in general terms: "It is far from meaning that the patentees of a ranch on the San Pedro are to have the same rights as owners of an estate on the Thames."[20]

Under the Colorado doctrine, the "grant" principle of the California theory is not recognized. "We had occasion recently to consider whether the right of a citizen to use water within the State for irrigation of lands is granted by the State or general government, and were unable to discover any principle of that kind."[21] A patent from the government to land through which water flows or percolates does not give color of title to the water.[22] That is, the land grant does not confer even color of title as a

[18] Boquillas etc. Co. v. Curtis, 11 Ariz. 128, 89 Pac. 504; affirmed in 213 U. S. 339, 29 Sup. Ct. Rep. 493, 53 L. Ed. 822.

[19] Compare what was said in an early California case concerning mining rights. Sanderson, C. J., in Morton v. Solambo Min. Co., 26 Cal. 527, 4 Morr. Min. Rep. 463, spoke against being "tied down to the treadmill of the common law" in regard to mining rights. And compare the opinion of Shaw, J., in Katz v. Walkinshaw, 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, concerning the law of percolating waters, and applying the same reasoning thereto.

[20] Boquillas L. & C. Co. v. Curtis (1909), 11 Ariz. 128, 213 U. S. 339, 29 Sup. Ct. Rep. 493, 53 L. Ed. 822. Cf. dissenting opinion of McBride, J., in Flinn v. Vaughn (Or.), 106 Pac. 643, urging the same argument for rejection of the common law of logging, saying: "There is no more good reason for applying common-law rules to riparian rights on our floatable streams than there is for applying the English custom of primogeniture, or conveyance by fine and recovery, to our system of land tenures."

[21] Hoge v. Eaton, 135 Fed. 411, citing Mohl v. Lamar Canal Co. (C. C.), 128 Fed. 776.

[22] Clark v. Ashley, 34 Colo. 285, 82 Pac. 588. See Cascade Co. v. Empire Co. (Colo.), 181 Fed. 1011.

grant of the water. It was held[23] that the legislature could not confer water-rights by grant. Possession and use of the water are necessary to create the right to its continued use. Says the supreme court of Utah: "To initiate and acquire a right in and to the use of unappropriated public water, whether on the public domain or within a reservation or elsewhere, is dependent upon the laws or customs of the State in which such water is found."[24] So it is ruled that the United States Reclamation Service must proceed under State law, and if it condemns land, does so only under the general State laws.[25]

(3d ed.)

§ 169. **Same.**—Perhaps no stronger exposition of this doctrine has been given than in a late Colorado case.[1] Plaintiff obtained a land patent in 1868, while Colorado was still a Territory, the stream naturally flowing therethrough. Many years after patent issued, a corporation organized to create light, heat and power, diverted the stream from his land. It was held that plaintiff has no cause of action; and Mr. Justice Campbell, delivering the opinion of the court, said: "We are entirely satisfied that the sole question argued and submitted to the trial court by counsel on both sides was whether the common-law doctrine of continuous flow under the facts disclosed by this record exists in Colorado. At this late day it would seem to us, as it evidently did to the trial court, idle to make such contention in this State. The matter has long ago been set at rest. The authorities relied upon by plaintiffs are those which sustain the so-called California doctrine, first clearly and definitely announced by the supreme court of California in Lux v. Haggin,[2] in which, *inter alia*, it was held that the common law as to riparian ownership was not abolished by any law of that State, but still existed there side by side with the doctrine of appropriation.[3] The supreme court of the United States in several cases has approved and indicated its satisfaction with

23 Platte Water Co. v. Northern Irr. Co., 12 Colo. 525, 21 Pac. 711.

24 Sowards v. Meagher (Utah), 108 Pac. 1113.

25 Burley v. United States, 179 Fed. 1.

1 Sternberger v. Seaton etc. Co. (1909), 45 Colo. 401, 102 Pac. 168. See, also, very recently, Hagerman Co. v. McMurray (N. M.), 113 Pac. 823.

2 69 Cal. 255, 4 Pac. 919, 10 Pac. 674.

3 Citing the first edition of this book, sections 16 and 17. See, also, sections 18 and 19 of the first edition; sections 22 and 23 of the second edition; and sections 117 and 118 of this, the third edition.

the decisions of the State courts which hold that the common-law doctrine has been abolished, and has said that each State, without interference by the Federal courts, may for itself, and as between rival individual claimants, determine which doctrine shall be therein enforced."[4] And later in the same opinion: "The doctrine in this State, that the common-law rule of continuous flow of natural streams is abolished, is so firmly established by our constitution, the statutes of the Territory, and the State, and by many decisions of this court, that we decline to reopen or reconsider it, however interesting discussion thereof might otherwise be, and notwithstanding its importance." And again, in the same opinion: "To uphold plaintiffs' cause of action as made by their complaint, and as tried and submitted below, would necessitate the reversal of an unbroken line of decisions of this court from the beginning to the present time, result in tearing up, root and branch, the statute law of the Territory and of the State, and the nullification of the provisions of the constitution itself on the subject of appropriation. . . . . This judgment, being in effect that the common-law doctrine of continuous flow of a natural stream is inapplicable to conditions in this State, and that by necessary construction of our local customs, statutes, and constitution it is abolished, is affirmed."[5]

(3d ed.)

§ 170. Water "the Property of the Public" or "of the State."

Accompanying this view that the law of appropriation rests upon the inapplicability of any other rule are statutes or constitutional provisions expressly declaring that the ownership of all waters is in the State (or in the public). "In this and other jurisdictions where the common law in respect to the use of water and the right thereto is altogether ignored, there has been established, either by judicial decision or statute, or both, as an essential principle, that the water of all natural streams is the property of the public or of the State."[6]

[4] Citing cases.

[5] In a recent Idaho case (Hutchinson v. Watson D. Co. (Idaho, 1909), 16 Idaho, 484, 133 Am. St. Rep. 125, 101 Pac. 1059) and a recent New Mexico case (Hagerman Co. v. McMurray (N. M.), 113 Pac. 823), are found other very late expressions. This Idaho case, however, upholds *some* right in the riparian owner, though inferior to appropriators. See *supra*, sec. 118, and *infra*, sec. 367.

[6] Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210.

All waters within the State are declared to be "the property of the public" (or to "belong to the public") in Arizona, Colorado, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, and Wyoming.[7] In the following, declared to be "the property of the State": Idaho, Nevada, North Dakota, Wyoming.[8] The California legislature in 1911 declared waters the "property of the people of the State."[8a]

In California, where the courts had refused to take this stand, and have considered title to the usufruct of waters upon public lands to be in the United States, the legislature at one time called upon *Congress* to abrogate riparian rights and to declare as to the waters "that the same be granted and dedicated to the States and Territories where the same are situated,"[9] and, whether influenced by this or not, I do not know, Congress in 1877 (the same year) passed the Desert Land Act, providing that all waters upon public lands should be and remain "free for the appropriation and use of the public," which, in the very important recent case of Hough v. Porter,[10] in Oregon, has been held to have constituted an irrevocable dedication to the people where the waters lay, and to constitute a source of local public ownership by gift from the United States. Following out this idea, Western members of Congress in 1910 introduced bills to grant power sites and rights

[7] *Arizona.*—Rev. Stats. 1901, sec. 4174 (running water is "declared public").

Colorado.—Const., art. 16, sec. 5.

Montana.—Civ. Code, sec. 1880. See Smith v. Denniff, 24 Mont. 20, 81 Am. St. Rep. 408, 60 Pac. 398, 50 L. R. A. 741. The section speaks of the waters "of this State," but does not expressly go further.

Nebraska.—Comp. Stats. 1903, sec. 6450; Cobbey's Stats. 6796; Laws 1895, p. 260.

Nevada.—Stats. 1903, p. 24, sec. 1.

New Mexico.—Stats. 1907, p. 71, sec. 1.

North Dakota.—Stats. 1905, c. 34, sec. 1; Rev. Codes (1905), sec. 7604.

Oregon.—Stats. 1909, c. 221, sec. 1.

South Dakota.—Stats. 1905, p. 201, sec. 1; Stats. 1907, p. 373, sec. 1.

Texas.—Sayles' Civ. Stats. 1900, art. 3115 et seq.

Utah.—Stats. 1905, c. 108, sec. 47, Stats. 1907, pp. 56, 248; Comp. Laws 1907, sec. 1288x18.

Wyoming.—Stats. 1886; Rev. Stats. 1887, sec. 1344.

[8] *Idaho.*—Civ. Code 1901, sec. 2625. See Speer v. Stephenson (Idaho, 1909), 16 Idaho, 707, 102 Pac. 365; Village of Twin Falls v. Stubbs (Idaho, 1908), 15 Idaho, 68, 96 Pac. 195. See, also, Const., art. 15, secs. 4 and 5; McLean's Rev. Codes, sec. 3240; Laws 1901, p. 191, sec. 9b.

Nevada.—Comp. Laws 1900, sec. 354; Stats. 1907, p. 30, sec. 1.

North Dakota.—Const., art. 17, sec. 210.

Wyoming.—Laws 1909, p. 112, c. 68, sec. 1; Const., art. 8, sec. 1. See, also, *Ibid.*, art. 1, sec. 31.

[8a] Cal. Stats. 1911, c. 407, amdg. Civ. Code, sec. 1410.

[9] Laws 1877–78, p. 1070.

[10] *Supra*, sec. 129.

of way upon public lands to the States, since Congress already had dedicated the waters themselves to the people of the State.[11]

(3d ed.)

§ 171. Sources from Which This Declaration is Derived.—State or local public proprietorship is thus derived in the alternative in the jurisdictions (now, by statute, nearly all the Western States) asserting it; that is, either as inherent in general law, or as having been created by the United States. Three considerations are to be noted as to this.

First, the proposition that State or local proprietorship is inherent law is a result of the change in the way of stating the idea of the "negative community."[12] As the theory of "negative community" had been applied in the early California days, the *corpus* of running water was held incapable of ownership, either by private individuals or by the State or by the United States,[13] and the *usufruct* or right to its flow and use belonged to the United States as landowner until it granted a use to private parties.[14] This negative idea that running water as such belonged to *no one* became changed in the younger States by substituting the positive expression that they belonged to the "State in trust for everyone"; a change from negative to positive expression similar to that which has taken place in the way of stating the law of the beds of navigable waters and the law regarding wild game. Thus, while the shores of the sea and beds of navigable waters are, in the civil law, in "the negative community" and "common" as distinguished from "public," the modern phrase is that they are owned by the State in trust for the people.[15] The same change is fairly well established regarding wild animals or game.[16] And so has come the change in the above States from the negative idea that running waters as a substance belong to no one, to the positive idea that they belong to the "State in trust for the people."

[11] A resolution just adopted by the California legislature concerning the waters of Lake Tahoe, protesting against a contract made between the United States Reclamation Service and private parties, declares that "The State of California *claims to own* the major portion of the waters of said lake and protests against the diversion of said waters, and will resist the diversion contemplated, as an invasion of the rights of the people of this State." Assembly Joint Resolution No. 8, Session of 1191. See, further, *supra*, p. 165, note 20.

[12] *Supra*, sec. 6.

[13] Kidd v. Laird, 15 Cal. 161, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571.

[14] *Supra*, sec. 82.

[15] *Supra*, sec. 6.

[16] *Supra*, sec. 33; *infra*, sec. 907.

Second, this change was facilitated by the policy of "free development" established by the United States from the earliest times for waters on its public lands. This policy was so firmly fixed by Congress by the act of 1866 [17] that it came to be regarded as inherent law, especially as the United States never has attempted theretofore or thereafter to exercise rights of ownership, but, on the contrary, reaffirmed its position in the Desert Land Act of 1877,[18] and because the people at large in the West have looked only to the State as a matter of fact.

Third has been the confusion between sovereignty and proprietorship. No lawyer denies that sovereignty or regulative power over public uses of waters under the police power resides in the States, and this has not been distinguished from ownership thereof.[19]

(3d ed.)

§ 172. Construction Given to the Declaration.—So far as the courts have considered the matter (there is little discussion in the reports), they have treated these as declarations of sovereignty of the State, rather than proprietorship. The declaration that the waters are "the property of the State" was undoubtedly intended by the legislatures as an assertion or declaration that the State owns the waters the same as a public building.[20] But the courts have tended to view the water itself much in the light of the original idea of the "negative community" as without any ownership at all (neither private, State, or national), except as to its flow and use or "usufruct," which rights of use are subject to State regulation in whomsoever they may reside.

The courts, in the first place, hold that declarations that the waters are "the property of the State" and "the property of the public" are synonymous. The Wyoming court says: "There is to be observed no appreciable distinction, under the doctrine of prior appropriation, between a declaration that the water is the property of the public, and that it is the property of the State," [21] and in three States above both expressions are used in the statutes.

17 *Supra*, sec. 94 et seq.

18 *Supra*, sec. 128.

19 *Infra*, sec. 1338 et seq.

20 "These provisions were founded on a principle new to American irrigation law. The State was declared to be the owner of the water, and rights to its use were to be acquired by grant or license from the State; . . . . the principle in mind when the laws were enacted was undoubtedly that the State was proprietor of the water and granted rights to its use. . . . ." Bulletin 168, U. S. Dept. Agric.

21 Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 87 Am. St. Rep. 918, 61 Pac. 258, 50 L. R. A. 747.

Then, as to the meaning of "property of the public," while in the law of distribution to public uses this is held to give consumers (as the public) rights of actual ownership in the natural resources in place of the distributing agencies,[22] yet in the present connection it is construed more as meaning the same as the phrase "*publici juris,*" an old phrase in the law;[23] that water is a wandering thing, whose *corpus* is incapable of ownership either by the State or the United States, the utmost right being usufructuary, a flow and use only, and may be used by any member of the public first applying subject to State police power regulation. "Under the rule permitting the acquisition of rights by appropriation the waters become perforce '*publici juris,*'"[24] and in a Colorado case[25] "the waters of flowing streams are *publici juris*—the gift of God to all His creatures."[1] The State's office is regulative, to see that those who use the water do not violate their duties to each other,[2] and hence acts in its sovereign capacity only—not as owner of the water; the State operates only under the police power.[3] "The obvious meaning and effect of the expression that the water is the property of the public is that it is the property of the people as a whole. Whatever title, therefore, is held in and to such water resides in the sovereign as representative of the people. The public ownership, if any distinction is material, is rather that of sovereign than proprietor. That ownership, however, is subject to a particular trust or use, specially defined in the statutes and in the constitution"

22 *Infra,* sec. 1338 et seq.

23 *Supra,* sec. 5; *infra,* sec. 688.

24 Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210.

25 Mohl v. Lamar Canal Co. (C. C. Colo.), 128 Fed. 776.

1 Quoting Blackstone, bk. II, p. 14, and saying such is the effect of the Colorado constitution, art. 16, sec. 5.

"We shall presently see that after appropriation the title to this water, save, perhaps, as to the limited quantity that may be actually flowing in the consumer's ditch or lateral, remains in the general public, while the paramount right to its use, unless forfeited, continues in the appropriator." Wheeler v. Northern Irr. Co., 10 Colo. 582, 587, 588, 3 Am. St. Rep. 603, 17 Pac. 487."

"I think the best opinion now is that running water is not a 'property' of the State but that it belongs to the public, a common necessity of human life, like air." Mr. Garfield, before the Senate Committee on Public Lands, Feb. 16, 1910.

2 In Speer v. Stephenson (Idaho, 1909), 16 Idaho, 707, 102 Pac. 365, it is said that the term "public waters" refers to all water running in the natural channel of the streams, and the State may by proper legislation regulate the appropriation and use thereof, and private rights authorized by the law were simply to the use of the public waters, and not an ownership in them, at least while they were flowing in the natural channel.

3 Robertson v. People ex rel. Soule, 40 Colo. 119, 90 Pac. 79, citing Farmers' etc. Co. v. Southworth, 13 Colo. 111, 21 Pac. 1028, 4 L. R. A. 767; White v. Farmers' etc. Co., 22 Colo. 191, 43 Pac. 1028, 31 L. R. A. 828; Lamson v. Vailes, 27 Colo. 201, 61 Pac. 231; Fort Lyon etc. Co. v. Chew, 33 Colo. 392, 81 Pac. 37.

(i. e., for use by appropriators).[4] "By either phrase, 'property of the public' or 'property of the State,' the State, as representative of the public or the people, is vested with jurisdiction and control in its sovereign capacity."[5] So in Kansas v. Colorado,[6] it was held that the State's regulative power was paramount, without intimation of an actual State ownership.

As the office of the State under this construction is only regulative and not one of actual ownership, the Idaho court considered a suit to determine existing rights purely one to settle private rights. It had been urged (as the legislature by the declaration of State and public ownership certainly intended) that it was primarily a determination concerning State property, but the court held otherwise, and held that a public official could not bring such a suit against all existing appropriators to show their rights. It was held a suit concerning private property and not State property.[7] And likewise it is held that an appropriation for use outside the State is permissible, and not an abstraction of State property.[8]

In North Dakota and Montana a declaration of State ownership is held not to prevent the existence of riparian rights.[9] But neither court went further into the matter than to refuse to give effect to the provision contrary to the conclusion upholding riparian rights arrived at in those cases. In the Montana case,[10] the court says that by such declaration the State assumed to itself the ownership of the waters "*sub modo*," which is indefinite, to say the least. In the North Dakota case it was said concerning the effect upon riparian rights of a declaration that water is the property of the State: "Such rights are under the protection of the fourteenth amendment to the Federal constitution, which protects property against all State action that does not constitute due process of law. It follows that section 210 of the State constitution would itself be unconstitutional in so far as it attempted to destroy those

4 Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210.

5 Farm. Inv. Co. v. Carpenter, 9 Wyo. 110, 87 Am. St. Rep. 918, 61 Pac. 258, 50 L. R. A. 747.

6 206 U. S. 46, 27 Sup. Ct. Rep. 655, 51 L. Ed. 956.

7 Bear Lake v. Budge, 9 Idaho, 703, 108 Am. St. Rep. 179, 75 Pac. 615.

8 Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210; Mohl v. Lamar Canal Co. (Colo.), 128 Fed. 776; Hoge v. Eaton, *supra;* Bean v. Morris, 159 Fed. 651, 86 C. C. A. 519.

9 Bigelow v. Draper, 6 N. D. 152, 69 N. W. 570; Smith v. Denniff, 24 Mont. 20, 81 Am. St. Rep. 408, 60 Pac. 398, 50 L. R. A. 741.

10 Smith v. Denniff, 24 Mont. 20, 81 Am. St. Rep. 408, 60 Pac. 398, 50 L. R. A. 741.

vested rights of property, if it should, by construction, be given a scope sufficiently wide to embrace such matters. For this reason we feel constrained to hold, despite its broad language, that section 210 was not framed to devest the rights of riparian owners in the waters and bed of all natural watercourses in the State." It was further said that the declaration of State ownership possibly would prevent private persons from totally diverting a watercourse, thus construing it in opposition to appropriation entirely.[11] Neither the North Dakota nor Montana decision lends much aid in arriving at the meaning of such phrases, although, if the declaration means that running waters are *"publici juris,"* they are correct in holding it not opposed to the riparian doctrine.[12]

Under the Colorado doctrine, then, it is denied that the United States has an interest in the waters on its lands as proprietor, and waters are either owned by the State in trust for the people, or are *"publici juris,"* owned by *no one* at all, but free for use by all under State police power regulation, which protects the first comer, the prior appropriator, to the extent of his beneficial use. As between the latter two ideas, the choice of expression has not yet become fixed; but for our present purpose it is enough to notice that both agree in denying proprietary title of any kind in the United States at the present day.[13] Under both the Colorado and California doctrines the State control over public uses is, in law, paramount; but while the California doctrine recognizes the United States as a riparian proprietor, the Colorado doctrine does not recognize the United States as a proprietor of waters in any sense.

[11] Bigelow v. Draper, 6 N. D. 152, 69 N. W. 570.

[12] *Supra*, sec. 2 et seq.; *infra*, sec. 684 et seq.

In a recent New York case it was held that the State has control over the Niagara River, but no property or ownership in its waters. Niagara etc. Co. v. College etc. Co., 111 App. Div. 770, 98 N. Y. Supp. 4. See, also, Auburn V. W. Co., 90 Me. 537, 38 Atl. 561, 38 L. R. A. 188.

In another New York case, it is said that while the State may regulate the use of percolating water, it does not own it as a proprietor. The attorney general may sue to enforce the regulation, but then only for the community of overlying or adjacent landowners as the proprietors, not the State at large. People v. New York etc. Co. (1910), 196 N. Y. 421, 90 N. E. 441, Cullen, C. J.

[13] "By the adoption of our State constitution, all of the unappropriated waters at that time were declared to be public waters, and it matters not through or over whose land they flow." Speer v. Stephenson (1909), 16 Idaho, 707, 102 Pac. 365.

"The bill refers to waters belonging to the government. I do not know what waters belong to the Federal government. I do not know that the Federal government owns the waters." Mr. Mondell of Wyoming, in the House of Representatives.

(3d ed.)

§ 173. Objections Raised on Behalf of the United States as Landowner.—By the courts following the California view, aside from the practical objection above adverted to, denying the inapplicability of the common law, legal objections are also urged against the Colorado doctrine as a matter of constitutional law. The first and most important objection is that the proprietary rights of the United States as landowner are either omitted or denied in the Colorado calculation. Regarding the system of appropriation as having force only by the permission of the United States as the original landowner of all this region, the California and similar courts have expressed difficulty in understanding the view of those States which, following the Colorado system, declare that the appropriator receives his rights from the State alone, disregarding the rights of the United States as original sole riparian owner, or the riparian rights of the grantees of its land.

Granting that those parts of the common law which are inapplicable are not brought in by settlers, yet the rights of the United States antedated the settlement of the States in question.

Some right in the United States to the waters must, it is said, have attached to the public land on its original acquisition by the United States under such treaties as the Louisiana Purchase or the treaty of Guadalupe Hidalgo. The difficulty is said to be that some right to the unused water flowing over the public lands of the United States was originally the property of the United States, and that a State cannot take the property from the United States or interfere with the primary disposal thereof without its consent, and that to take it from a grantee of the United States is a taking of property without due process of law, within the fourteenth amendment. That the original right of the United States before settlement of the land must have been that of sole riparian proprietor. That the United States, having been sole riparian owner before the settlement of the land, no State can, by a declaration of law after settlement, take those rights as riparian owner from the United States or prevent it from giving riparian rights to its grantee, or take them away from its grantee.

Such a refusal to recognize the rights of the United States, and such prevention of its granting riparian rights to the grantees of its land is said to be an interference with the primary disposal of the public land; infringes on the power of Congress. Article 4,

section 3, clause 2, of the constitution of the United States, reads as follows: "The Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property of the United States, and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State." In Lux v. Haggin,[14] after holding that the right to the water on public lands originally must have belonged to the United States, as to any landowner, as parcel thereof, or an incident thereto, the court says: "But when the State is prohibited from interfering with the primary disposal of the public lands of the United States, there is included a prohibition of any attempt on the part of the State to preclude the United States from transferring to its grantees its full and complete title to the land granted, with all its incidents." And further says, "But where one or both of the parties claim under a grant from the United States (the absolute owner, whose grant includes all the incidents of the land, and every part of it), it is difficult to see how a *policy* of the State, or a general practice, or rulings, of the State court with reference to adverse occupants on public lands, can be relied on as limiting the effect of grants of the United States, without asserting that the State, or people of the State, may interfere with 'the primary disposal of the public lands.' . . . . Of course the State cannot interfere with the primary disposition of such lands by their owner. September 9, 1850, the act of Congress[15] was approved admitting the State of California into the Union 'on an equal footing with the original States in all respects whatever,' with the condition that the State should never interfere with the primary disposal of the public lands within its limits."[16]

In a recent case it was said that the rights of an appropriator do not rest on the laws of a State (even in Wyoming, one of the arid States), but upon the laws of Congress, and the legislative enactment of a State (Wyoming) is only a condition which brings

[14] 69 Cal. 255, at 373, 10 Pac. 674.

[15] 9 Stats. at Large, 453.

[16] Such a clause is contained in all acts of admission. Compare N. D. Const., art. 16, sec. 203. See, also, Union Min. Co. v. Ferris, Fed. Cas. No. 14,371, 2 Saw. 176, 8 Morr. Min. Rep. 90.

"Would not a State law which, in advance of the grant, should attempt to take from the grantee the flow of the stream, acquired from or sought to be conveyed by the United States, and confer the waters on one who has acquired no right to them from the United States, be an interference with the primary disposal of the public lands?" Lux v. Haggin, 69 Cal. 255, at 372, 10 Pac. 674.

the law of Congress into force.[17] In another case [18] the court says: "In the Eastern part of Montana the United States acquired its title to lands by virtue of what is called the 'Louisiana Purchase.' There cannot be one rule as to the right to the flow of water over its lands in Montana and another rule as to its lands in Iowa and Missouri." "If a person receives a patent from the United States for land subject only to accrued water-rights, that is, existing water-rights, and as an incident to or part of this land, there is water flowing over the same or upon the same, he would have all the rights the United States had at that time. I do not think any State law or custom can take away such rights except for some public purpose."

As to the early "phantom" that, before the act of 1866, the pioneers were mere trespassers on public lands, it is forgotten; but the Colorado doctrine in effect denies that by asserting that the pioneers *had* rights under *State* law, without resorting to any theory of Federal action to elevate them from in fact being mere trespassers (as the California court had felt bound to do by presuming a Federal grant).

As to the early Colorado decisions usually referred to, they were only *dictum*, says Lux v. Haggin, as the actual decisions involved only land grants subsequent to the diversion. "In Coffin v. Left-Hand Co., ... the appropriation of the water was prior to the patent. . . . . There is nothing in that case which would give preference to an appropriation of water made, as in the case at bar, long after the grant of the land. . . . . It would seem clear, however, that the rights of parties who claimed title under grant from the United States of parts of the public domain must be determined by reference to laws of the United States relating to the disposition of its domain; and this fact is recognized by the supreme court of Colorado, which appeals to Broder v. Water Co. as supporting its interpretation of those laws." [19]

(3d ed.)

§ 174. Objections on Behalf of Private Landowners.—It is next objected that, as a State cannot prevent the United States giving riparian rights to its grantee, the Colorado law takes the private landowner's property from him without due process of

[17] Anderson v. Bossman, 140 Fed. 14, at 21.

[18] Cruse v. McCauley, 96 Fed. 369.

[19] Lux v. Haggin, 69 Cal. 255, 10 Pac. 674.

law, after it is given him by the United States, in permitting its diversion from him by subsequent appropriators. Lux v. Haggin says: "The right to the use of the water as part of the land once vested in its private grantee, the State has no power to devest him of the right except on due compensation. . . . . Aridity of the soil and air being made the test, the greater the aridity the greater the injury done to the riparian proprietors below by the entire diversion of the stream, and the greater the need of the riparian proprietor the stronger the reason for depriving him of the water. It would hardly be a satisfactory reason for depriving riparian lands of all benefit from the flow that they would thereby become utterly unfit for cultivation or pasturage, while much of the water diverted must necessarily be dissipated."[20] In Washington it was recently held[21] that an act of the legislature, authorizing a landowner to use all the spring water arising on his land, and thereby destroying the use of such water to the lower riparian owner, would be unconstitutional, as a taking or destroying of property without due process of law.[22]

Necessity has its limits as an argument, it is said. "While the argument *ab inconvenienti* should have its proper weight in ascertaining what the law is, there is no 'public policy' which can empower the courts to disregard the law, or, because of an asserted benefit to many persons (in itself doubtful), to overthrow the settled law. . . . . We know of no decisions which intimate that a difference in climatic or geographical conditions may operate to transfer a right of property from those in whom a right of property is vested by the common law."[23] And in another case: "But how it can be held that that which is an inseparable incident to the ownership of land in the Atlantic States and the Mississippi valley, is not such an incident in this or any other of the Pacific States, we are unable to comprehend. It certainly cannot be true that a difference in climatic conditions or geographical position can

[20] See, also, Rossmiller v. State, 114 Wis. 169, 91 Am. St. Rep. 910, 89 N. W. 839, 58 L. R. A. 93, where it was held, among other things, that the legislature could not declare that "ice formed upon meandered lakes of the State is the property of the State." In this connection the court said: "The legislature has no such arbitrary power, under our constitutional system, as that of changing the nature of the ownership of property by its mere fiat. It can no more accomplish that result in that way than it can change the laws of nature by legislative declaration."

[21] Nielson v. Sponer, 46 Wash. 14, 123 Am. St. Rep. 910, 89 Pac. 155.

[22] See, also, Hollett v. Davis (1909), 54 Wash. 326, 103 Pac. 423.

[23] Lux v. Haggin.

operate to deprive one of a right of property vested in him by a well-settled rule of common law. The mere fact that the appellants will not be able to occupy or cultivate their lands as they heretofore have done unless they can irrigate them with water taken from the Ahtanum River is no sufficient reason for depriving the respondents, who settled upon that stream in pursuance of the laws of the United States, of the natural rights incident to their more advantageous location. The necessities of one man, or of any number of men, cannot justify the taking of another's property without his consent, and without compensation. If it be true, as claimed by appellants, that, if the judgment of the court below is affirmed, their lands will again become a barren waste, and cease to 'blossom as the rose,' it is equally true that, if the waters of the river are diverted from its channel, the premises of the respondents will become unproductive and utterly worthless."[24] In Nebraska it is said:[25] "We do not feel justified in departing from a position so generally recognized and accepted as being correct, so well supported by reason and authority, and which, it is believed is in soundness impregnable. . . . . Not only should the inapplicability of a common-law rule be general, extending to the whole or the greater part of the State, or at least to an area capable of definite judicial ascertainment, to justify the courts in disregarding such rule, but we think, in view of the ease with which legislative alteration and amendment may be had, the power to declare established doctrines of the common law inapplicable should be used somewhat sparingly. In the whole course of decisions in Nebraska, from the territorial courts to the present, this power has been exercised but three times."[1]

In a late case the California court emphatically reaffirmed the stand taken in Lux v. Haggin, saying through Mr. Justice Sloss: "It is argued that unless appropriators are permitted to divert and store for future use water which would otherwise run into the

[24] Benton v. Johncox, 17 Wash. 277, 61 Am. St. Rep. 912, 49 Pac. 498, 39 L. R. A. 107.

Black, J., said in Wheatley v. Chrisman: "The necessities of one man's business cannot be the standard of another's right in a thing which belongs to both. . . . . If he needed more, he was bound to buy it. However laudable his enterprise might be, he cannot carry it on at the expense of his neighbor. One who desires to work a lead mine may require land and money as well as water, but he cannot have either unless he first makes it his own." 24 Pa. 302, 64 Am. Dec. 657, 11 Morr. Min. Rep. 24.

[25] Crawford Co. v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647, 93 N. W. 781, 60 L. R. A. 889.

[1] In a Texas case it is said: "It is difficult to see how the courts of this State can ignore the common law as a rule of decision where it is made so by statute." Diamond v. Harris, 33 Tex. 637.

sea and be wasted, there will be a failure to make the most beneficial use of the natural resources of the State, and that riparian owners should not be permitted to obstruct the development of these resources. It may be that if nonriparian owners are permitted to intercept the winter flow of streams in order to irrigate nonriparian lands or to develop power, the water so taken will permit the cultivation of more land and benefit a greater number of people than will be served if the flow continues in its accustomed course. But the riparian owners have a right to have the stream flow past their land in its usual course, and this right, so far as it is of regular occurrence and beneficial to their land is, as we have frequently said, a right of property, 'a parcel of the land itself.' *Neither a court nor the legislature* has the right to say that because such water may be more beneficially used by others it may be freely taken by them. Public policy is at best a vague and uncertain guide, and no consideration of policy can justify the taking of private property without compensation. If the higher interests of the public should be thought to require that the water usually flowing in streams of this State should be subject to appropriation in ways that will deprive the riparian proprietor of its benefit, the change sought must be accomplished by the use of the power of eminent domain. The argument that these waters are of great value for the purposes of storage by appropriators and of small value to the lower riparian owners defeats itself. If the right sought to be taken be of small worth, the burden of paying for it will not be great. If, on the other hand, great benefits are conferred upon the riparian lands by the flow, there is all the more reason why these advantages should not, without compensation, be taken from the owners of these lands and transferred to others."[2]

What is "public interest"?[2a] For example, the California court in one recent instance, admittedly treating a case as one of first impression, unbound by precedent in the specific case and seeking only for the public interest, unanimously applied the riparian doctrine as imperatively demanded by conditions in the Santa Clara Valley.[3] In a recent New Mexico case, under a statute demanding an inquiry into the public interest in a certain other water matter, the case went through four different tribunals all looking for the

[2a] Elsewhere, again, this question must be met. See *infra*, sec. 649.

[2] Opinion upon rehearing in Miller & Lux v. Madera etc. Co. (1909), 155 Cal. 59, 99 Pac. 502, 22 L. R. A., N. S., 391, italics inserted. Compare the similarity of this opinion to Silver Spring etc. Co. v. Waukuck etc. Co. (1882), 13 R. I. 611, 15 Rep. 94.

[3] Miller v. Bay Cities W. Co., 157 Cal. 256, 107 Pac. 117, 27 L. R. A., N. S., 772.

true public interest, and most of them disagreed as to what the public interest was.[4] Statesmen themselves from time immemorial have disagreed upon it.[5] There has always been some suggestion in the California reports looking to the adoption of the ground of "shaping the law by court decision to make it applicable to conditions" (the individual judges never, in the history of the State, being wholly unanimous upon the matter).[6] But the opinion of Mr. Justice Sloss just quoted represents the holding that has consistently prevailed in California in actual decision, because, for historical reasons, the law from pioneer days was cast into the mold given to it by the public land question and the riparian rights of the United States.[7]

There has been, in all the Western States, an adoption of the common law as the basis of their general system of laws, irrespective of the law of waters.[8]

[4] Young v. Hinderlider (N. M.), 110 Pac. 1045.

[5] It may become quite vague; for example, "The rule given in the Sermon on the Mount to distinguish between true and false prophets is the true test by which to determine what the common law is when applied to new conditions. This test is always applied by learned jurists to determine what is good law." (Argument of counsel for the appropriator in Lux v. Haggin, vol. 1093, Sup. Ct. Rec., p. 243.) Compare the statement of McBride, J., in Flinn v. Vaughn (Or.), 106 Pac. 643, that "The American courts substituted common sense for common law." If cases are to be decided upon a judge's native inspiration, where does the law come in? What would be the use of such expensive law schools, or even of legislatures?

[6] See the percolating water cases, *infra*, Part V, applying the "inapplicability" principle in favor of rejecting the common law of percolating waters, and adopting, to suit conditions, a system which, it can now be seen, is substantially the same as the law of riparian rights on streams. There the California court *brings in* the riparian principles *de novo* on the ground that they are imperatively required by conditions.

See, also, San Joaquin Co. v. Fresno Flume Co. (1910), 158 Cal. 626, 112 Pac. 182. Also cases cited *infra*, sec. 673, saying that the common law *between riparian owners* has been "modified" in California. Purely *obiter dictum*. See *infra*, sec. 827.

[7] *Supra*, cc. 5, 7. In the pioneer days, the "inapplicability" argument appeared only in the opinions of Chief Justice Murray. He at first opposed the recognition of the doctrine of appropriation at all, dissenting in Conger v. Weaver, 6 Cal. 548, 65 Am. Dec. 528, 1 Morr. Min. Rep. 594, and when overruled by the rest of the court, acquiesced only on this ground. (Hoffman v. Stone, 7 Cal. 46, 4 Morr. Min. Rep. 520; Crandall v. Woods, 8 Cal. 136, 1 Morr. Min. Rep. 604. See, also, Hill v. King, 8 Cal. 338, 4 Morr. Min. Rep. 533). With the single exception of Chief Justice Murray (whose early death soon removed even that), the California court from its first decisions disclaimed having acted upon that ground, for the reasons we have related, which were of pressing weight in pioneer times and are again to-day coming into prominence in connection with the Federal claim to control in pursuance of the policy of conservation.

Indeed, in the pioneer California cases, instead of claiming an abrogation or modification of the common law, there was some contention that the common law had not been departed from even for the public lands. *Supra*, sec. 79.

[8] United States v. Rio Grande etc. Co., 174 U. S. 706, 19 Sup. Ct. Rep.

B. BASIS OF THE COLORADO DOCTRINE.

(3d ed.)

§ 175. Replies to the Foregoing Objections.—In most decisions following the Colorado doctrine no answer to the foregoing objections is sought;[9] they are seldom noticed; and in the recent decisions of the supreme court of the United States, they are not mentioned.[10] The matter is usually rested upon the independent ground of State sovereignty, inherent in State rights. There is, however, some authority basing the Colorado doctrine on Federal as distinguished from State action, or simply upon Federal inaction, and we shall consider these first, and the State sovereignty basis last.

(3d ed.)

§ 176. Basis upon Federal Action.—As a direct answer, the Wyoming court has said[11] that the first Wyoming constitution contained provisions declaring the waters the property of the State, and rejecting riparian rights. This constitution was ratified by Congress on the admission of Wyoming into the Union; and thereby the United States consented to this system. A similar ratification is also claimed on behalf of Colorado in the briefs in Kansas v. Colorado. But it is said in Lux v. Haggin that this cannot cover the point in States having no such constitutional provisions,[12] nor in those where such provisions rest on subsequent amendment or legislation which never had the express ratification of Congress.

Again, it is said that the abrogation of the common law took place in the arid States from their first settlement while still Territories, and thereby was accomplished by the United States itself, since the territorial government is a mere agency of the United States.[13]

But when the basis for the Colorado doctrine is sought in Federal action, it is usually rested upon the act of 1866 and the Desert Land Act of 1877.[14] On behalf of the Colorado doctrine, it has been argued that the acts of 1866 and 1877 were an *irrevocable surrender* by the United States of its proprietorship in the waters

770, 43 L. Ed. 1136. (See 8 Cyc. 375; 6 Am. & Eng. Ency. of Law, 289.)

[9] See quotations above.

[10] *Infra*, sec. 180 et seq.

[11] Farm etc. Co. v. Carpenter, 9 Wyo. 110, 87 Am. St. Rep. 918, 61 Pac. 258, 50 L. R. A. 747.

[12] Lux v. Haggin, 69 Cal. 255, at 352, 10 Pac. 674.

[13] Boquillas etc. Co. v. Curtis, 11 Ariz. 128, 89 Pac. 505.

[14] For the history of these acts, see *supra*, chapters 5 and 6.

to the State. In a New Mexico case[15] it is said: "The riparian rights of the United States were surrendered in 1866. Rev. Stats., sec. 2339." And as to this: "It is claimed that this statute was a grant by the Federal government to the people of the State of the waters on the public domain."[16] It has, somewhat differently, been said that, whatever might be the relation of these acts to the proprietorship of the United States, yet it was a complete and irrevocable surrender of political *control* to the State. In United States v. Rio Grande Dam & Irr. Co.,[17] Mr. Justice Brewer, in speaking of the act of 1866, the Desert Land Act of 1877, and the Right of Way Act of March 3, 1891,[18] says:[19] "In reference to all these cases of purely local interest the obvious purpose of Congress was to give its assent, so far as the public lands were concerned, to any system, although in contravention to the common-law rule, which permitted the appropriation of those waters for legitimate industries." In a Wyoming case it is said:[20] "If any consent of the general government was primarily requisite to the inception of the rule of prior appropriation, that consent is to be found in several enactments by Congress, beginning with the act of July 26, 1866, and including the Desert Land Act of March 3, 1877. Those acts have been too often quoted and are too well understood to require a restatement at this time at the expense of unduly extending this opinion."

As in the case last quoted, the reference to these Federal statutes is usually made in the desert States, for a much broader purpose than that for which the California and similar courts refer to them. The purport of this new construction may be summed up as follows: That by the acts of 1866 and 1877 Congress irrevocably declared that rights in waters should be a matter of local law, for each jurisdiction to declare for itself, and that the public domain would be disposed of in subordination to such local system. If the local system ignore Federal proprietorship in the waters and ignore riparian rights, then such is the system sanctioned by the Federal government, and as such is consequently, by Federal action, binding on the government's grantees of land who would otherwise

[15] United States v. Rio Grande Dam & Irr. Co., 9 N. M. 303, 51 Pac. 674.

[16] Crawford v. Hathaway, 60 Neb. 754, 84 N. W. 273, denying the validity of the contention.

[17] 174 U. S. 690, 19 Sup. Ct. Rep. 770, 43 L. Ed. 1136.

[18] 26 Stat. 1101, sec. 18.

[19] At page 706.

[20] Farm etc. Co. v. Carpenter, 9 Wyo. 110, 87 Am. St. Rep. 918, 61 Pac. 258, 50 L. R. A. 747.

have riparian rights; and that this Federal position is confirmed by the subsequent congressional enactments.[21] A collection of Federal enactments in that regard is given in the collection of Federal statutes upon a later page.[22]

Again, irrespective of the rights of the United States itself, the Federal acts have been declared to be aimed directly against riparian rights of private parties, by Congress itself, and even as to private land patented before diversion by appropriators. A late case says: "*Congress itself* has by legislation, in effect, declared that the common-law doctrine does not apply to the waters of the non-navigable streams upon the public lands in the arid portions of the Western States and Territories," etc.[23] In one case, for example,[24] these statutes are referred to as a declaration on the part of the United States of its intention never (even if it has the power) to grant riparian rights to any person; but always to reserve the waters from the land grants.[25]

The Oregon court has recently, as a matter of construction of the Desert Land Act of 1877, departed from its previous rulings following the California doctrine, and adopted a rule very similar to that of Colorado, holding that as to all land titles acquired since that act, riparian rights are abolished *by Congress* by the proviso in the act that waters shall remain free for appropriation by the public; that the Federal government, for itself and its subsequent patentees, thereby surrendered its water-rights, an executed irrevocable dedication to those of the public who might thereafter appropriate the water; and this has been said by the supreme court of the United States to rest upon plausible grounds.[1] This construction of the Desert Land Act we have already considered elsewhere.[2] It meets the objection that the State cannot legislate for the disposal of the public lands, by saying that there is no necessity for

[21] See article by Judge Hunt of Montana, in 17 Yale Law Journal, 585.

[22] *Infra*, sec. 1429.

[23] Van Dyke v. Midnight Sun Co. (Alaska), 177 Fed. 90.

[24] Tynon v. Despain, 22 Colo. 240, 43 Pac. 1039.

[25] Referring to Tynon v. Despain, *supra*, the Washington court says: "But this, it seems to us, is an unnatural construction of sections 2339 and 2340." Atkinson v. Washington Irr. Co., 44 Wash. 75, 120 Am. St. Rep. 978, 86 Pac. 1123. See State ex rel. Liberty Lake etc. Co. v. Superior Court, 47 Wash. 310, 91 Pac. 968.

[1] Boquillas etc. Co. v. Curtis, 213 U. S. 339, 29 Sup. Ct. Rep. 494, 53 L. Ed. 822.

[2] *Supra*, secs. 128–130.

it to do so, as Congress already has taken the desired action.[3] It should be noted that this construction of the Desert Land Act has not been expressly taken until this case; and Congress has only in a limited instance expressly and explicitly enacted in words what the Oregon court infers. This instance is in an act of Congress[4] expressly reserving out of patents and denying to patentees any riparian rights on lands granted in the Black Hills Forest Reserves, which has not yet been under judicial consideration.

These arguments base the Colorado doctrine upon affirmative Federal action.

(3d ed.)

§ 177. Basis upon Absence of Federal Action.—There is, in a related branch of the law of waters, namely, the law of accretion and boundaries, a well-settled rule that, in the absence of express Federal provision as to the effect of patents bounding on streams, the local law governs as to whether the boundary carries to the middle of the stream, and as to whether it includes islands in the stream, or similar matters.[5] In a case involving title to an island in a stream in Nebraska, the supreme court of the United States said:[6] "The decision of the supreme court of the State was that the owner of lands bordering on a river owns to the center of the channel, and takes title to any small bodies of land on his side of the channel that have not been surveyed or sold by the government. It is the settled rule that the question of the title of a riparian owner is one of local law. In Hardin v. Jordan,[7] the matter was discussed at some length, the authorities cited, and the conclusion thus stated by Mr. Justice Bradley, delivering the opinion of the court:[8] 'In our judgment the grants of the governments for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the State in which the lands lie.' "

This is a well-settled rule of Federal conveyancing which, as a new matter, may be applicable here, although this line of author-

3 "True, it cannot by legislation determine for any State, after its admission, what the local laws relative to riparian rights shall be; but the general government, in dealing with its public lands, may provide for their transfer as might any other landed proprietor, and make such reservations therefrom by grant, dedication or otherwise as it may see fit." Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

4 A. C. June 11, 1906, 34 Stat. 234.

5 *Infra*, sec. 897 et seq.

6 Whitaker v. McBride, 197 U. S. 510, 25 Sup. Ct. Rep. 530, 49 L. Ed. 857.

7 140 U. S. 371, 11 Sup. Ct. Rep. 808, 838, 35 L. Ed. 428.

8 Page 384.

ities has never found its way into decision upon the present subject until, within the last year, it was brought in by a decision of the supreme court of the United States specifically applying it to diversions of water from a riparian proprietor.[9]

Such decision does not affect the rights of the land (if any) while in the United States; it allows the State to subtract the water only when it is passing from the United States to the patentee, the State acting as a kind of agent of the United States to specify the force of patents which themselves are silent. It would seem to say that the right to unappropriated waters on public lands, and ultimate control thereof, is in the United States; that the United States has not expressly reserved them out of land patents; that *until* Congress explicitly expresses a contrary intention in its patents, the local law governs the effect of the patent as concerns water-rights as well as everything else concerning the land. Besides being a departure from the historical view (in that it permits the local law to say that the pioneers were not trespassers and that they had rights against patentees by force of local law), it also has the unsatisfactory result that when, under it, the local law refuses riparian rights to patentees, rights in waters *on private patented land* remain, until appropriated, in the United States equally with waters on public lands; a kind of dual ownership of the private estate shared in by the United States.[10] It would result in a power in *Congress* to legislate in Colorado even for unused waters on *private* land, since they would, under this theory, be reserved to the United States as much as unappropriated water on public land.

(3d ed.)

§ 178. Basis upon State Sovereignty Alone.—But the prevailing attitude under the Colorado doctrine to-day wholly passes by any question of Federal proprietorship, authorization or consent, and

[9] Los Angeles etc. Co. v. Los Angeles (1910), 217 U. S. 217, 30 Sup. Ct. Rep. 452, 54 L. Ed. 736, affirming S. C., 152 Cal. 645, 93 Pac. 869, 1135, a case in which the supreme court of California had itself applied it to uphold the "pueblo right" of the city of Los Angeles, against a riparian owner. See *supra*, sec. 68.

See, also, Snyder v. Colorado etc. Co. (C. C. A., Colo.), 181 Fed. 62.

[10] "It has never been the policy of the United States to possess interests in land in connection with individuals." Moore v. Smaw, 17 Cal. 199, at 226, 79 Am. Dec. 123, 12 Morr. Min. Rep. 418, holding that there is (generally) no reservation to the United States of mines out of a patent.

regards all questions as resting wholly upon the sovereignty of the State as lawmaker, having power to declare or change the law within the State. The State decisions to this effect have already been referred to at length and need not be here repeated.[11]

In a recent case in the Federal court for Washington (whose State court rejects this doctrine) it was held that the government on admitting a State into the Union relinquishes its control of the disposition of the waters of the State, except in so far as the regulation of commerce is concerned, and it was said that if act of Congress interferes with State law, the act of Congress is invalid.[12] The Secretary of the Interior, Mr. Ballinger, in his report for 1909, said: "If the Federal government desires to exercise control or supervision over water-power development on the public domain, it can only do so by limitations imposed upon the disposal of power and reservoir sites upon the public lands, the waters of the streams being subject to State jurisdiction in their appropriation and beneficial use."[13]

Being approved by the supreme court of the United States as below considered, this must be taken as a permissible doctrine to-day.

(3d ed.)

§ 179. **Some Other Arguments.**—Incidentally, other arguments may be noticed. When the general adoption of the common law in all the Western States is referred to, it is replied that the adoption of the common law, if it included the sanction of riparian rights, is subject to an implied reservation to the legislature to revoke the recognition thereof.[14]

The "*argumentum ad hominem*" is also not lacking.[15] And in some quarters it is customary to-day to speak disparagingly

11 *Supra*, sec. 168 et seq.

12 United States v. Hanson (Wash. 1909), 167 Fed. 881. Likewise United States v. Burley (Idaho, 1909), 172 Fed. 615.

13 However, he then took the position that the United States should recapture jurisdiction by purchase from the citizen; that is, require the owner of water-rights under State law to convey them to the United States, so as to remove them from the State control. Still later the Interior Department threw out a suggestion that a withdrawal of waters of the Rio Grande River by treaty between the United States and Mexico may be "an appropriation by the highest authority." 39 Land Dec. 105, at 108.

14 Boquillas etc. Co. v. Curtis, 11 Ariz. 128, 89 Pac. 504.

15 "The California decisions cited for appellants may no longer be considered good law even in the State in which they were rendered. In the recent case of Kansas v. Colorado, before the supreme court of the United States, Congressman Needham testified . . . . that there has been a departure from the principles laid

of "the old argument that supports 'vested rights,'" even though the constitution so demands.

Finally, the stand is taken that the rule of the arid States is now one of property, upon which rights of the highest value have become established, and, right or wrong, must stand as a rule of property.[16] Correspondingly, the Washington court refused to reopen the correctness of its decisions following the California doctrine, also on this ground.[17] The Nevada court (in the case above cited) also suggested that the statute of limitations would long ago have run against the riparian claimants. The idea here is entirely similar to that "silent acquiescence" which was relied on in the original California cases establishing appropriation; such consent of the United States it being necessary to presume in order to protect private rights that have grown up to a great value; and so in Clark v. Nash,[18] it is said that on account of the large property interests that have grown up under the Colorado system, it must be upheld. A recent Colorado writer says:[19] "In all of the arid States following the 'Colorado system,' and sustaining the doctrine of appropriation as against the common-law doctrine of riparian rights, the law has become well settled, and litigants are not inclined to raise nor the courts to listen to any other contention. Its beneficent results have now been demonstrated by more than thirty years of continuous practice, and the property interests that have developed under it now amount in value to hundreds of millions of dollars."

(3d ed.)

§ 180. Views of the Supreme Court of the United States—First Period.—The decisions of the supreme court of the United States up to Sturr v. Beck had been based upon the California view, since that was the historical view, and the opinions were either given by Mr. Justice Field, who had been influential in shaping the law

down in Lux v. Haggin, because at that time the value of water was not realized; that the decision has been practically reversed by the same court on subsequent occasions." Twaddle v. Winters, 29 Nev. 88, 85 Pac. 280, 89 Pac. 289. The counsel who had asserted the California doctrine was adjudged in contempt of court in another case just prior to this decision for some expressions used. Concerning the statement made in the quotation, see *supra*, sec. 116.

[16] Twaddle v. Winters, 29 Neb. 88, 85 Pac. 280, 89 Pac. 289; Sternberger v. Seaton etc. Co. (1909), 45 Colo. 401, 102 Pac. 168.

[17] Nesalhous v. Walker, 45 Wash. 621, 88 Pac. 1032.

[18] 198 U. S. 361, 25 Sup. Ct. Rep. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1171.

[19] Mills' Irrigation Manual.

as Chief Justice of California, or were based by other justices on his opinions. They deraigned the rights of an appropriator from the proprietary rights of the United States as riparian proprietor of the public lands, under the Federal policy of "free development" *of the public domain.* In Atchison v. Peterson[20] in the course of the opinion it is observed that "the government being the *sole* proprietor of all the *public lands,* whether bordering on streams or otherwise, there was no occasion for the application of the common-law doctrine of riparian proprietorship in respect to the waters of *those* streams"—meaning the streams on the public lands, the waters of which were freely appropriated and used under the customs obtaining among miners sanctioned by Congress in the act of 1866, but which did not extend to waters on private land. In Basey v. Gallagher[21] the question, as stated by the court, was whether a right to running waters *on public land of the United States* for the purposes of irrigation could be acquired by prior appropriation, *as against parties not having the title of the government,* and the court held that it could. But the question of riparian rights was not in the case, and the court said that: "Neither party has any title from the United States. No question as to the rights of riparian proprietors can, therefore, arise. It will be time enough to consider those rights *when either of the parties has obtained a patent from the government.*" In Sturr v. Beck[22] the question as to the rights of the riparian proprietor as against an appropriator of the water did arise, and was determined by the court. In that case it appeared that the landowner had not diverted the water himself; but the court unanimously held that his patent (by relation back to the date of his homestead filing) prevailed over the water appropriation initiated subsequent to the filing upon the land. The Chief Justice, in delivering the opinion of the court, after referring to the act of Congress of July 26, 1866,[23] and the amendatory act of 1870, and quoting from the opinion in Atchison v. Peterson, *supra,* said: "When, however, the government ceases to be the sole proprietor, the right of the riparian owner attaches, and cannot be subsequently invaded. As the riparian owner has the right to have the water flow *ut currere solebat,* undiminished except by reasonable consumption of upper pro-

[20] 87 U. S. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583.

[21] 20 Wall. (87 U. S.) 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683.

[22] 133 U. S. 541, 10 Sup. Ct. Rep. 350, 33 L. Ed. 761.

[23] Rev. Stats., sec. 2339.

prietors, and no subsequent attempt to take the water only can override the prior appropriation of both land and water, it would seem reasonable that lawful riparian occupancy with intent to appropriate the land should have the same effect." And after quoting certain sections of the Civil Code of Dakota, enacting the law of appropriation in the usual form, and setting out the local custom of diverting and appropriating the waters on public land for the purpose of irrigation, he concluded that the question was "whether, as against Sturr [the appropriator], his [the landowner's] lawful occupancy under settlement and entry was not a prior appropriation, which Sturr could not displace. We have no doubt it was, and agree with the brief and comprehensive opinion of the supreme court to that effect."[24]

This line of decisions deraigns the rights of the appropriator from the United States, and its theory is based upon the proprietary rights of the United States as landowner of the public lands and of its land grantees as its successor in interest. We have set forth this line of decisions, or the "public domain" stage, in the first historical chapter.

(3d ed.)

§ 181. **Same—Second Period.**—But the decisions since Sturr v. Beck have shown a clear determination to uphold the Colorado doctrine in States that have adopted it. The first step in this direction was based upon the new construction, above stated, of the early Federal statutes. From United States v. Rio Grande etc. Co.[1] we have already quoted to this effect. But a limitation was at the same time stated, which points to the California doctrine. "Although this power of changing the common-law rule as to streams within its dominion undoubtedly belongs to each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a State cannot by its legislation destroy *the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters*"; adding at least as far as may be necessary for the beneficial uses of the government property, and adding a second limitation where the State change of the common law interferes with the navi-

[24] See Benton v. Johncox, 17 Wash. 277, 61 Am. St. Rep. 912, 49 Pac. 498, 39 L. R. A. 107, discussing this line of the decisions.

[1] 174 U. S. 690, 19 Sup. Ct. Rep. 770, 43 L. Ed. 1136.

gability of a navigable stream. In Gutierres v. Albuquerque etc. Co.[2] the same view, resting on construction of the early Federal statutes, was taken. Counsel for appellant had, in their brief, brought up the question of the relation of appropriators to the State or to the United States, quoting Lux v. Haggin, and in this connection the following passage may be of importance. The court said: "The contentions urged upon our notice substantially resolve themselves into two general propositions: First, that the territorial act was invalid, because it assumed to dispose of property of the United States without its consent; and, second, that said statute, in so far, at least, as it authorized the formation of corporations of the character of the complainant, was inconsistent with the legislation of Congress, and therefore void. These propositions naturally admit of consideration together. The argument in support of the first proposition proceeds upon the hypothesis that the waters affected by the statute are public waters, the property, not of the Territory or of private individuals, but of the United States; that by the statute private individuals, or corporations, for their mere pecuniary profit, are permitted to acquire the unappropriated portion of such public waters, in violation of the right of the United States to control and dispose of its own property wheresoever situated. Assuming that the appellants are entitled to urge the objection referred to, we think, in view of the legislation of Congress on the subject of the appropriation of water on the public domain, particularly referred to in the opinion of this court in United States v. Rio Grande Dam & Irr. Co.,[3] the objection is devoid of merit. As stated in the opinion just referred to, by the act of July 26, 1866,[4] Congress recognized, as respects the public domain, 'so far as the United States are concerned, the validity of the local customs, laws, and decisions of courts in respect to the appropriation of water.'"

But in this case the court takes pains to point out that the rights of riparian proprietors were not involved, and again place a limit on its decision which resembles the California doctrine. This passage is quoted in the note,[5] and seems an express reservation that

[2] 188 U. S. 545, 23 Sup. Ct. Rep. 338, 47 L. Ed. 588.

[3] 174 U. S. 704–706, 19 Sup. Ct. Rep. 770, 43 L. Ed. 1142, 1143.

[4] 14 Stats. at Large, 253, c. 262, sec. 9; Rev. Stats. 2339; U. S. Comp. Stats. 1901, p. 1437.

[5] The court says: "Of course, as held in the Rio Grande case, even a State, as respects streams within its borders, in the absence of specific authority from Congress, 'cannot, by its legislation, destroy the right of the United States, as the owner of lands

the decision shall not affect the question of riparian rights, and it reasserts the proprietary rights of the United States, at least so far as concerns government reservations, which exception has been actually enforced with regard to waters flowing through an Indian reservation.[6]

There are two other decisions of the supreme court of the United States also basing the Colorado view on a construction of the early Federal statutes. Referring to these statutes it is said: "The *government enacts* that anyone may go upon its public lands for the purpose of procuring water, digging ditches for canals, etc., and when rights have become vested and accrued which are recognized and acknowledged by the local customs, laws, and decisions of courts, such rights are acknowledged and confirmed,"[7] and that hence the validity of appropriation is by these Federal statutes made a question of State law.[8]

These decisions, consequently, still recognize the proprietary rights of the United States as involved in determining the rights of an appropriator; but consider that Congress itself has legislated inimically to riparian rights. They also either uphold a latent power in Congress to-day, or one previously existing at the basis of the subject.

bordering on a stream, to the continued flow of its waters; so far, at least, as may be necessary for the beneficial uses of the government property'; and the power of a State over navigable streams and their tributaries is further limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. Necessarily, these limitations are equally applicable in restraint of the legislative branch of a territorial government, controlled, as is such body, by Congress. *If we assume that a restriction on the power of a Territory similar to that first stated prevails in favor of private owners of lands along a running stream,* the act in question clearly is not violative of such rights, for *the same does not attempt to authorize an infringement of them.* The water which it is provided may be appropriated is 'surplus' water, of any stream, lake, or spring, and it is specifically provided in subdivision 4 of section 17 of the act 'That no water shall be diverted, *if it will interfere with the reasonable requirements of any person or persons using or requiring the same when so diverted.*' So, also, in section 25, it is declared 'that no incorporation of any company or companies shall interfere with the water-rights of any individual or company acquired prior to the passage of this act.' *The finding of the court below that 'surplus' water existed negates the idea that any legitimate appropriation of water which can be made by the appellee can in any wise violate the rights of others.*"

[6] Winters v. United States, 207 U. S. 564, 28 Sup. Ct. Rep. 208, 52 L. Ed. 340. *Infra,* sec. 207.

[7] Bear Lake etc. Co. v. Garland, 164 U. S. 1, 17 Sup. Ct. Rep. 7, 41 L. Ed. 327. Italics ours.

[8] Telluride etc. Co. v. Rio Grande etc. Co., 175 U. S. 639, 20 Sup. Ct. Rep. 245, 44 L. Ed. 305, 187 U. S. 579, 23 Sup. Ct. Rep. 178, 47 L. Ed. 307.

(3d ed.)

§ 182. Same—Third Period.—The latest cases in this highest tribunal look to the support of the Colorado doctrine, not as a matter of construction of the Federal statutes (as in the foregoing decisions), but adopting the full contention of the cases at large in the arid States, passing by these statutes and the question of Federal proprietorship, and regarding State control over the law of waters as a power inherent in its sovereignty, whether the waters now or in the past flowed over public lands or not. To this effect is Clark v. Nash, saying (by way of *dictum* only, since a point in the law of eminent domain alone was decided): "The rights of a riparian owner in and to the use of the water flowing by his land are not the same in the arid and mountainous States of the West that they are in the States of the East. These rights have been altered by many of the Western States by their constitutions and laws, because of the totally different circumstances in which their inhabitants are placed, from those that exist in the States of the East, and such alterations have been made for the very purpose of thereby contributing to the growth and prosperity of those States, arising from mining and the cultivation of an otherwise valueless soil, by means of irrigation. This court must recognize the difference of climate and soil, which render necessary these different laws of the States so situated."[9]

To the same effect, treating the question as one of sovereignty of the State as lawmaker and passing by any consideration of the position of the United States as landowner; regarding the question, in other words, as one of sovereignty and not of proprietorship, is the opinion in Kansas v. Colorado.[10] This very important decision was given May 13, 1907, Mr. Justice Brewer writing the opinion. In actual decision it held against the Federal claims set up in behalf of the Reclamation Service, holding that the rights of sovereignty of the United States with respect to the public domain within States are subordinate to State sovereignty with respect to the law of waters, and rejected the Federal claim as one of sovereignty not delegated to it expressly by the Federal constitution, and the Federal government is one of enumerated powers only. Federal rights were considered entirely from the view of sov-

[9] Clark v. Nash, 198 U. S. 361, 25 Sup. Ct. Rep. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1171.

[10] 206 U. S. 46, 27 Sup. Ct. Rep. 655, 51 L. Ed. 956.

ereignty and as such recognized as to Territories but denied as to States.

No reference whatever was made to Federal rights on the ground of *proprietorship;* Federal rights based on proprietorship aside from sovereignty were given no consideration; or rather, the distinction at the bottom of Lux v. Haggin, between the United States as landowner on one hand, and lawmaker on the other, was not made a part of the opinion. Viewing the rights of the United States solely from the point of view of sovereignty it was held: "But it is useless to pursue the inquiry further in this direction. It is enough for the purpose of this case that each State has full jurisdiction over the lands within its borders, including the beds of streams and other waters. . . . . It may determine for itself whether the common-law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West, of the appropriation of waters for the purposes of irrigation, shall control. Congress cannot enforce either rule upon any State." Adding that the power of the State to legislate upon waters was an incident to the full sovereignty with which it was admitted into the Union, and that the Federal legislation, after all, was merely a recognition of this lack of jurisdiction.[11]

There are, upon related questions, decisions of the supreme court of the United States to the same general effect as Kansas v. Colorado. They had not been before applied to this subject, because they were upon matters having a different history, unconnected with the development of the law of the public domain in California up to the act of 1866.[12]

[11] Referring specially to the proviso in the National Irrigation Act. See especially the provisos quoted *infra*, sec. 1429.

[12] Such are the cases following Pollard v. Hagan (*infra*, sec. 898 et seq.) regarding the title to the beds of streams, and their improvement. For example, a frequently cited case is Withers v. Buckley, 61 U. S. (20 How.) 84, 15 L. Ed. 816, saying: "Clearly Congress could exact of the new State the surrender of no attribute inherent in her character as a sovereign independent State or indispensable to her equality with her sister States, necessarily implied and guaranteed by the very nature of the federal compact. Obviously, and it may be said, primarily, among the incidents of that equality is the right to make improvements in the rivers, watercourses and highways situated within the State."

Such, also, are the cases regarding the regulation of wild game. In Ward v. Race Horse, 163 U. S. 504, 16 Sup. Ct. Rep. 1076, 41 L. Ed. 244, holding that Wyoming's right to regulate hunting upon the public lands prevails over a treaty between the Indians and the United States, even though the treaty was made before Wyoming's admission, it was said: "The power of all the States to regulate the killing of game within their borders will not be gainsaid; yet if the treaty applies to the unoccupied

of the fact that the riparian owner claimed under a Mexican grant and not under a United States patent, and the court in both cases held that this made it unnecessary to pass upon the rights of Federal patentees. In that regard, Sturr v. Beck[19] was cited but not overruled.[20] Moreover, one recent case expressly declined to pass upon whether riparian rights exist in Montana;[21] and the Boquillas case carefully avoided saying how far a State statute could abrogate the common law of waters if once in force (having only held that in Arizona it was never in force).

They further leave some uncertainty in the question of the rights of the United States as riparian landowner. The Boquillas case, while saying that the State law alone determines the law of waters, yet says that the Oregon case of Hough v. Porter, above considered, was decided "on plausible grounds," which grounds were that riparian rights had been abrogated by *Congress* and not by the State.[22] Then again, the Los Angeles Milling case, holding the question of private riparian rights to be merely one of construction of Federal patents when they are silent as to the water, might, it would seem, impose no obligation on the United States to remain silent in the future. Moreover, Kansas v. Colorado itself, although the language of the opinion is very strong in upholding the view of the plenary legislative power of a State over waters, as an incident of sovereignty, without resort to (in fact, if need be, in spite of) any Federal statutes, or Federal consent, yet in final decision did not pass upon the effect of the Colorado laws, but left that open to later litigation if Kansas could hereafter show sufficient damage. It is not conclusive because it considered the matter as an original one, without historical consideration of its origin and development, and because in Winters v. United States[23] the supreme court of the United States, while hold-

[19] 133 U. S. 541, 10 Sup. Ct. Rep. 350, 33 L. Ed. 761.

[20] In Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1089, 102 Pac. 729, it is said: "This opinion [in Kansas v. Colorado] was written by Mr. Justice Brewer, who was not a member of the court when the case of Sturr v. Beck was argued and submitted, for which reason, although a member of the court when the opinion in the latter case was filed, he took no part in the decision," and it is said that the Kansas-Colorado case in effect "brushes aside" Sturr v. Beck. But these later cases seem to show that the court reserves the question regarding Sturr v. Beck. It must be remembered that Kansas v. Colorado did not refer to Sturr v. Beck, nor to any of the earlier decisions of that period.

[21] Winters v. United States, 207 U. S. 564, 28 Sup. Ct. Rep. 208, 52 L. Ed. 340.

[22] *Supra*, secs. 129, 130.

[23] 207 U. S. 564, 28 Sup. Ct. Rep. 208, 52 L. Ed. 340. See, also, United States v. Burley (C. C. A., Idaho, 1910), 179 Fed. 1.

ing it unnecessary to decide whether riparian rights exist in Montana, again returned to the reasoning of the California doctrine denying the plenary power of the State. "The power of the government to reserve the waters and exempt them from appropriation under the State laws is not denied, and could not be." To this Mr. Justice Brewer, who wrote the opinion in Kansas v. Colorado, was, of course, forced to dissent. And in actual decision this and other recent cases uphold water-rights similar to common-law riparian rights, in the United States, as to waters on Indian reservations.[24]

In view of these cases, the attitude of the supreme court of the United States is to uphold the Colorado view in any State that has so far adopted it; but these decisions are not yet reconciled with the early ones up to Sturr v. Beck; and the theory of the law in Lux v. Haggin still remains unanswered. The test will probably come with regard to States which have gone over from one doctrine to the other recently, or which do so hereafter; or in regard to the enforcement of the policy of "conservation of natural resources," should Congress attempt to legislate upon waters in connection with that subject.[25]

(3d ed.)

§ 185. Some Inconsistencies and Variations.—There are some *dicta* in the arid States following the California view so far as it holds appropriation to rest in grant from the United States,[1] though

[24] *Infra*, sec. 207. Judge Simeon E. Baldwin (now governor of Connecticut) finds considerable occasion to criticise Kansas v. Colorado in an article in 18 Yale Law Journal, 8. It does not appear that Mr. Justice White or Mr. Justice McKenna concurred in the opinion in Kansas v. Colorado; and it appears (page 118) that Mr. Justice Moody did not wholly concur.

[25] The opinion in Kansas v. Colorado was intended to lay down the position of the supreme court of the United States toward Mr. Roosevelt's "New Nationalism," which was then just making its beginning in such matters as his advocacy of Federal control of insurance, railways, forests and (in Kansas v. Colorado) waters; his attempt to exercise State functions indirectly by the Federal treaty-making power, coercing California in the conduct of her public schools with regard to the admission of Japanese therein. The supreme court (and Mr. Justice Brewer especially) was thought to be out of sympathy with the President's centralization principles, and the Kansas-Colorado decision is meant to be in favor of "State rights." So far as title questions involve other considerations of proprietorship aside from sovereignty, it may be that the historical ground takes the water question (so far as it is viewed as purely a legal one) out of the "State rights" discussion; although when Federal control of distribution of water or power to public uses is brought in, that separation cannot be contended for.

[1] E. g., Welch v. Garrett, 5 Idaho, 639, 51 Pac. 405, 19 Morr. Min. Rep. 193; Le Quime v. Chambers (1908), 15 Idaho, 405, 98 Pac. 415.

usually it is seen that this leads to difficulty under the Colorado view. Again, there are a few decisions in these jurisdictions applying the California view and enforcing riparian rights.[2]

Under a very recent case in Idaho, riparian proprietors have common-law rights of continuous flow which the courts will enforce against a "mere interloper" or diverter who has not complied with the legal requirements for securing a valid appropriation, or who is only wasting the water.[3]

In Colorado, as hereinafter discussed in considering "preferences and pro-rating," it seems to be the law of the State court that the common law of riparian rights governs so far as the use of water for domestic purposes is concerned.[4] Again, the very earliest statutes of several of these States contained a provision that all landowners on the banks of a stream have a right to the use of the water. This was probably intended as declaratory of riparian rights, to the same end as the California provision, "The rights

[2] Thus, Schwab v. Beam, elsewhere quoted (secs. 366, 367), in the Federal court for Colorado, and the following in the Supreme Court of Utah, saying that after an entry of land by plaintiff's grantors "there could be no appropriation of the water or right of way for the ditch across plaintiff's land without his consent or that of his grantors. The entry of the land by plaintiff was an appropriation of not only the land, but of the water; and any person entering upon the land thereafter became a trespasser." Stalling v. Ferrin, 7 Utah, 477, 27 Pac. 686 (citing Sturr v. Beck, 133 U. S. 541, 10 Sup. Ct. Rep. 350, 33 L. Ed. 761). See, also, Willow Creek Co. v. Michaelson, 21 Utah, 248, 81 Am. St. Rep. 687, 60 Pac. 943, 51 L. R. A. 280.

[3] Hutchinson v. Watson D. Co. (1909), 16 Idaho, 484, 133 Am. St. Rep. 125, 101 Pac. 1059 (granting relief). See, also, Sternberger v. Seaton etc. Co. (1909), 45 Colo. 401, 102 Pac. 168, *dictum*, but refusing relief.

The Idaho case says: "This court has on several occasions recognized some of the incidental common-law rights of riparian ownership in cases where those rights do not come in conflict with the rights of appropriators. This was the case in Small v. Harrington, 10 Idaho, 499, 79 Pac. 461, and Powell v. Springston Lumber Co., 12 Idaho, 723, 88 Pac. 97, wherein we recognized and sustained the rights of riparian proprietors to employ such means as might be necessary to obtain ingress and egress to and from the waters of navigable streams. In Shephard v. Cœur d'Alene Lumber Co. (1909), 16 Idaho, 293, 101 Pac. 591, it was held that the right of ingress and egress to and from the lands of a riparian owner is a property right, and must be respected, and for the protection of which the courts will afford a remedy. . . . . But a riparian owner still retains such right to have the waters flow in the natural stream through or by his premises as he may protect in the courts as against persons interfering with the natural flow, or who attempted to divert or cut off the same wrongfully and arbitrarily, and without doing so under any right of location, appropriation, diversion or use, and who do not rest their right to do so upon any right of use or appropriation. In other words, a stranger to the use and right of use of such waters for the time being cannot interfere, and, if he does, the riparian owner has his remedy to restrain and enjoin such interference." Hutchinson v. Watson D. Co. (1909), 16 Idaho, 484, 133 Am. St. Rep. 125, 101 Pac. 1059.

[4] See *infra*, sec. 308.

of riparian proprietors are not affected by the provisions of this title." Such a statute existed in other States, where it is construed as only declaratory of riparian rights, and is held to force the court to follow the California doctrine.[5]

On the other hand, the California court has recently used expressions similar to those of the Colorado court as to the question being one of sovereignty, irrespective of public land law,[6] and similar inconsistencies appear occasionally in decisions of the Federal courts in jurisdictions whose State courts have followed the California or historical rule.[7] Moreover, the California legislature this year has declared waters the property of the people of the *State*.

The Oregon court has recently, after able consideration, departed from the California rule and taken a stand intermediate between the two doctrines.[8]

And, finally, the decisions of the supreme court of the United States have not yet, in all points, chosen between the two theories, although strongly predominating in favor of State power and against common-law riparian rights.

(3d ed.)

§ 186. **Conclusion.**—The Western States are divided into two classes, one basing its theories on the proprietorship of the United States in the public domain, deraigning the right of the appropriator as a grant from the United States, confining appropriation to waters upon public lands, and recognizing the common law of riparian rights for waters flowing over lands that have become private before a diversion; the other deriving the rights of the appropriator from the State, and recognizing no law of waters

[5] *Supra*, sec. 119.

[6] See Duckworth v. Watsonville W. Co., 150 Cal. 520, 89 Pac. 338; Katz v. Walkinshaw, 141 Cal. 116; Los Angeles v. Los Angeles etc. Co., 152 Cal. 645, 93 Pac. 869, 1135, the last saying the whole question of the rights of riparian owners is one of local law. Affirmed in 217 U. S. 217 (1910). 30 Sup. Ct. Rep. 452, 54 L. Ed. 736.

[7] Appropriator derives his rights from the State of California (*dictum*). San Diego Co. v. National City, 74 Fed. 79. In this connection there should also be noted the early California tendency to the same effect until the contrary was settled by Judge Field in Moore v. Smaw (*supra*, sec. 82). Likewise, in Washington, while the State court says waters on Federal lands are "utterly beyond the power and control of State legislatures" (*supra*, secs. 152–154), on the other hand the Federal court for Washington has recently held that the Federal government, on admitting a State into the Union, relinquishes its control over the disposition of waters to the State. United States v. Hanson (Wash. 1909), 167 Fed. 881.

[8] *Supra*, sec. 129.

but that of prior appropriation. The former, the California and historical doctrine, is in force in California, Kansas, Montana, Nebraska (partially), North Dakota, Oklahoma (possibly), Oregon (partially), South Dakota, Texas (partially), and Washington. The latter, the Colorado doctrine, is in force in Alaska, Arizona, Colorado, Idaho, Nebraska (partially), Nevada, New Mexico, Oregon (partially), Texas (partially), Utah, and Wyoming.[9]

The doctrine of the latter States is that the question is one of local law, becoming such by a construction of the Federal statutes which departs from the history of those statutes but is otherwise possible; or becoming a matter of local law as inhering in State sovereignty regardless of Federal statutes, a position which the courts following the California doctrine have attacked as open to constitutional objections, but which (without considering the objections) finds favor in the most recent decisions of the supreme court of the United States and is found in some recent expressions of the California court itself. The recent decisions of the supreme court of the United States, the great value of property in the arid States relying upon the Colorado doctrine, and the State administrative systems which have become established, leave no doubt that the system has come to stay, so far as it concerns rights between private persons, in any State that has to-day adopted it; but a certain qualified reservation of Federal proprietary rights, so far at least as is necessary to the beneficial uses of government property, and for Indian reservations, is still steadily asserted in the United States supreme court's decisions, and the recent discussion of the policy of conservation has revived the assertion of Federal proprietary right.

It is hazardous to express an opinion where the authorities are in such conflict. Three things, however, the writer ventures to say with some confidence:

One is that Lux v. Haggin could not have been decided other than it was, without a breach of continuity in the California law. The California doctrine was contained in the principles laid down long before, by Judge Field in Moore v. Smaw and Boggs v. Merced, that the public lands with all accustomed incidents belong to the United States; that the freedom of the public domain is a matter

[9] This classification is based upon the decisions of the courts, but in most of the former States the popular view, and recent legislation, tend to a contrary direction.

resting with Congress, and is for the public domain alone; that the rights of private land, once the land passes out of the public domain, are the same and as secure in California as in any other State of the Union. To Judge Field more than anyone else is this attitude of the California law due.

The second is that which of the two theories one shall regard as the correct formula is a matter of the difference between the "historical" and the "logical" methods of legal investigation. The California law is a consistent evolution from the political conditions before the Civil War, when the Federal title was the starting point, and the citizen but a trespasser upon that title; and from that beginning it makes a continuous history. The Colorado law, on the other hand, not bound by such a history to a past generation, holds the law open to logical deduction anew from general rules, and does not find a Federal title nor riparian rights in such rules if the State law to-day denies them. So the difference lies between which road one travels in his investigation; the "historical method" will bring him to the Federal title and common-law riparian rights; the "logical method" will leave him instead where both are a matter of local law for each State to declare for itself. It is the latter method which the supreme court of the United States to-day applies, and against it the historical method can only say that it has departed from historical precedent.

The third is that the Western law of waters is in a state of evolution in which legal formulas, whichever of the two one may adopt as theoretically the right one, are not of greatest importance; for the law will eventually work itself out according to the attitude of the people, whatever way that may finally become settled hereafter. While we have endeavored to treat the matter purely as a legal one, yet in reality it is, and always has been, largely shaped by political forces, accommodating itself much to the thought of the times.

(3d ed.)

§ 187. **Same.**—Aside from this difference in the present derivation of the rights of the appropriator, and in the consequent attitude toward riparian rights, the substantive law of appropriation itself is much the same in those jurisdictions which confine it to the public lands as in those that do not. Its characteristics, extent

of right, loss of right, and similar matters, are founded upon the early California decisions made for waters on the public domain; California being the spring from which this peculiar feature of Western law has come. The decisions of that court in the earlier days seldom failed to be quoted in the other Western States in this connection, and its early cases had everywhere a persuasive force that closely approached authority. The substantive law of appropriation is largely the same under both systems, although in some States—chiefly, the desert States—recent statutory codes of administrative law have been added that are absent in some of the rest (although now existing in most of them, also).

§§ *188–196. (Blank numbers.)*

CHAPTER 9.

APPROPRIATIONS ON PUBLIC LAND.

A. UNRESERVED PUBLIC LAND.

§ 197. Extent of public land area.
§ 198. The first appropriations were all on public land.
§ 199. State lands.
§ 200. Presumption that lands are public.
§ 201. Abandoned or forfeited claims to public land.
§ 202. Rights of way and reservoir sites on unreserved public land.
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B. RESERVED PUBLIC LAND.

§ 204. New governmental policy.
§ 205. Extent of the reserved domain.
§ 206. Authority to make withdrawals.
§ 207. Military and Indian reservations—Waters on.
§ 208. Rights of way over military and Indian reservations.
§ 209. Forest domain—Extent of.
§ 210. Waters upon forest reserves.
§ 211. Rights of way and reservoir sites upon forest reserves.
§§ 212-220. (Blank numbers.)

A. UNRESERVED PUBLIC LAND.

(3d ed.)

§ 197. **Extent of the Public Land Area.**—By the Louisiana Purchase, Gadsden Purchase, the Treaty of Guadalupe Hidalgo and others, the United States, by purchase or conquest, became the owner of the land constituting that part of the country now known as the Western States.[1]

Public land still constitutes about one-third of the geographical area of the country,[1a] being the greater part of the Western area extending from the one hundredth meridian to the Pacific Ocean. Its area is coextensive with States. Arizona, Idaho, Nevada, Utah, Wyoming, for example, are mostly public land. California is the most settled, and remains one-half public land (mostly nonagricultural). Following are given tables, not wholly complete, from lack of figures for reserved land other than forest. With all included, the average public land area will probably figure between

[1] *Supra*, sec. 66 et seq.

[1a] Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210.

fifty and fifty-five per cent of the area of the States and Territories in the list.

Area of Public Land in Percentage of State or Territory.

	Unreserved.	Forest Reserves.	Total.
Alaska	97%	7%	about 99.9%
Arizona	57%	21%	78%
California	24%	28%	52%
Colorado	33%	23%	56%
Idaho	46%	37%	83%
Kansas	.3%	.6%	.9%
Montana	38%	21%	59%
Nebraska	4%	1%	5%
Nevada	80%	7%	87%
New Mexico	46%	14%	60%
North Dakota	3%	.03%	3.03%
Oklahoma	.01%	.1%	.11%
Oregon	28%	26%	54%
South Dakota	9%	3%	12%
Utah	66%	14%	80%
Washington	7%	27%	34%
Wyoming	55%	14%	69%

The following shows the areas in acres, giving, first, the area of the State or Territory; second, the unreserved and unappropriated land thereof, and third, the forest reserve area thereof: Alaska, 378,165,760, 368,014,735, 26,761,626; Arizona, 72,931,840, 41,491,369, 15,214,745; California, 101,310,080, 24,864,884, 27,968,510; Colorado, 66,526,720, 21,726,192, 15,491,791; Idaho, 53,960,320, 24,743,804, 19,963,171; Kansas, 52,581,120, 137,180, 302,387; Montana, 93,806,080, 36,015,943, 19,474,696; Nebraska, 49,612,800, 1,879,486, 556,072; Nevada, 70,841,600, 56,474,688, 5,109,415; New Mexico, 78,485,760, 36,454,692, 11,140,123; North Dakota, 45,335,680, 1,410,225, 13,940; Oklahoma, 44,836,480, 5,007, 60,800; Oregon, 61,887,360, 17,580,573, 15,920,822; South Dakota, 49,673,600, 4,562,804, 1,294,440; Utah, 54,393,600, 35,955,554, 7,411,157; Washington, 44,241,280, 3,196,059, 12,007,340; Wyoming, 62,664,960, 34,575,159, 8,941,681. These areas are from official sources, and the percentage table is figured from the areas. Only States and Territories covered by this book are given.[2]

2 These acreage figures are from the report for 1910 of the Commissioner of the General Land Office. The Alaska areas for unreserved land and forest reserves probably were figured at different dates, and probably a deduction should be made of a few million acres from the unreserved area, representing transfers to forest reserves, since, as the figures stand, the total of the last two columns would exceed the area of the territory given in the first column.

The percentages are figured from the acreage table. As to the Alaska percentage, the same thing applies as noted under the acreage table. The amount of private land in Alaska is in any event of insignificant extent.

In addition to the foregoing figures there are extensive areas in Indian, military and similar reservations (especially in Oklahoma and the Dakotas), and in power-site and conservation withdrawals. On July 1, 1909, the total unreserved and un-

The theory of the law has been that the Federal government's duty was that of a trustee to dispose of these lands for the upbuilding of the States constituted upon them.[3] The laws were framed to secure development and ownership by the citizens, to accomplish the growth of the States. Upon this idea were based the preemption, homestead, mining, and water laws, under which most of the advance of the West has been made.

The land laws are beyond the scope of this book, and are here mentioned to show that the same idea founds them as has founded the water law of the public domain.

(3d ed.)

§ 196. The First Appropriations were All on Public Land.— When the miners arrived in California, but little of the land composing the State had passed into private hands. When the mines were located and the early customs established, title to the land had passed to the United States, by treaty, from Mexico. The license from the United States to enter thereon and appropriate water was first presumed from acquiescence therein.[4] It is now expressly granted by the act of 1866 (sections 2339 and 2340 of the Revised Statutes of the United States).[5] "For a long period the general government stood silently by and allowed its citizens to occupy a great part of its public domain in California, and to locate and hold mining claims, water-rights, etc., according to such rules as could be made applicable to the peculiar situation; and

appropriated public land was 781,854,081 acres: the total forest reserves on December 31, 1909, were 194,496,594 acres, and in 1906 there were 838,088 acres in military reservations; a total of 881,688,763 acres of public land, exclusive of Indian, reclamation, and other special reservations. On June 30, 1910, there were 1,500,000 acres in 149 power-site reserves.

Mr. Philip P. Wells, counsel for the National Conservation Association, gives the following information:

Unfortunately there does not appear to be any single publication where statistics of all public land areas have been brought together. The appendix to the Report of the Public Lands Commission, transmitted to Congress March 2, 1905 (58th Cong., 3d Sess. S. D. 189), page 189 (table 1), gives the area of the original public domain by States; page 284 (table 25), gives the national parks by States; page 284 (table 26) gives the United States naval, military, light-house and other reservations, all but seven of them being lumped and estimated; pages 285–307 (table 27) give the Indian Reservations by States; pages 308–359 (table 28) give unappropriated and unreserved lands by States and counties; table 29 summarizes the disposal of the public domain exclusive of Alaska. But these figures are of the year 1905, and it would require a search of the various annual departmental reports to bring the lists down to date. The report of the Secretary of the Interior for the year ending June 30, 1910, gives statistics of unappropriated and unreserved lands (page 11); Carey Act segregations (page 34); national parks and national monuments (pages 56, 64, 98); enlarged homestead designations (page 93); coal land withdrawals and classifications (page 94); oil land, phosphate and power-site withdrawals (pages 94, 95, 96); and of bird reserves (page 99).

[3] "The grantor of the public lands, the national government, was to hold these lands in trust for the public, to be acquired by any qualified citizen thereof on compliance with the rules prescribed." Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

[4] *Supra*, sec. 89.

[5] *Supra*, secs. 94, 155.

when there were contests between hostile claimants, the courts were compelled to decide them without reference to the ownership of the government, as it was not urged or presented. In this way—from 1849 to 1866—a system had grown up under which the rights of locators on the public domain, as between themselves, were determined, which left out of view the paramount title of the government. The acts of 1866 and 1870 were intended merely to expressly recognize and ratify the system."[6] It was for many years assumed that the appropriator always seeks to make an appropriation on public lands only. Until the recent policy of conservation, no question was any longer raised to his right to do so.[7]

Appropriation of water on desert lands under the act of 1877[8] is upon condition[9] that "all lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed *desert lands,* within the meaning of this act, which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated." It

[6] Cave v. Tyler, 133 Cal. 566, 65 Pac. 1089; similarly, Broder v. Natoma Water Co., 101 U. S. 274, 25 L. Ed. 790, 5 Morr. Min. Rep. 33; Osgood v. Eldorado Water Co., 56 Cal. 571, 5 Morr. Min. Rep. 37.

[7] The provisions of the statutes of 1866 and 1870 referred to are those now incorporated in sections 2339 and 2340, Revised Statutes, and are as follows:

Revised Statutes, section 2339: "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage, shall be liable to the party injured for such injury or damages."

Revised Statutes, section 2340: "All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water-rights, or rights to ditches and reservoirs used in connection with such water-rights, as may have been acquired under or recognized by the preceding section."

"From the beginning, in the arid regions of the Western States and Territories, it has been the custom of the people to divert from their natural channels the waters of the streams upon the public lands, and appropriate the same to the purposes of mining, agriculture, and other useful and beneficial uses." Van Dyke v. Midnight Sun Co. (Alaska), 177 Fed. 90. See, also, Sowards v. Meagher (Utah), 108 Pac. 1113.

Preventing persons from entering upon public lands to which the party so preventing entry has no right is a misdemeanor in California. Pen. Code, sec. 420.

[8] A. C. March 3, 1877, 19 Stat. 377, c. 107; U. S. Comp. Stats. 1901, p. 1548.

[9] See *supra,* sec. 129.

has been held that where a person files on lands under the Desert Land Act, and makes an affidavit that they are desert in character and unreclaimed, he cannot assert a right to water for irrigation as initiated before such entry.[10] Regarding the Desert Land Act, reference is made to a preceding section.[11]

(3d ed.)

§ 199. **State Lands.**—Of certain lands the State is the owner and the State has likewise made the law of appropriation apply to them in California.[12] In other States under similar statutes, the law has been declared to be the same.[13] Similar statutory provisions exist in most of the other States for rights of way, reservoir sites, and water appropriations on State lands.[14]

Swamp lands, an important class of State lands, are dealt with by special statutes.[15]

(3d ed.)

§ 200. **Presumption That Lands are Public.**—Formerly this preponderance of public lands in fact gave rise to a presumption of law that lands were public, and the party claiming that the lands in suit were private had the burden of proof.[16] But there is no such presumption to-day for an appropriator to rely on.[17]

[10] Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

[11] *Supra*, sec. 128.

[12] Civ. Code, secs. 1410–1422; Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; affirmed in Wood v. Etiwanda etc. Co., 122 Cal. 152, 158, 54 Pac. 726; Pomeroy on Riparian Rights, sec. 29.

[13] Smith v. Denniff, 24 Mont. 20, 81 Am. St. Rep. 408, 60 Pac. 398, 50 L. R. A. 741; Carson v. Gentner, 33 Or. 512, 52 Pac. 506, 43 L. R. A. 130; Parkersville etc. Dist. v. Wattier, 48 Or. 332, 86 Pac. 775. See Ison v. Nelson Min. Co., 47 Fed. 199.

[14] *Colorado.*—Rev. Stats. 1908, sec. 3499 et seq.

Idaho.—Laws 1907, p. 526; McLean's Revised Codes, secs. 1635–1638.

Montana.—Laws 1911, c. 118, p. 254; Laws 1911, c. 123, p. 338.

Nebraska.—Comp. Laws 1903, sec. 6448; Stats. 1907, p. 437.

New Mexico.—Laws 1907, p. 71.

North Dakota.—Laws 1905, c. 34, sec. 60.

South Dakota.—Laws 1907, c. 180, sec. 58.

Oregon.—B. & C. Comp., sec. 3338.

Washington.—Pierce's Codes 1905, sec. 5904. In the Statute of 1907, page 353, the right of way for irrigators over State lands is granted, upon filing map and field-notes with the board of state land commissioners, and paying not less than ten dollars per acre for the land irrigated. "Nothing in this act shall be deemed to in any way conflict with any existing law of this State relating to the method of acquiring rights of way for irrigation districts." In the Statute of 1907, page 233, the right is granted to overflow State lands for reservoirs. See Stats. 1911, c. 109.

The foregoing list is not complete.

[15] *Infra*, sec. 350.

[16] Burdge v. Smith, 14 Cal. 380, 12 Morr. Min. Rep. 448; Smith v. Doe, 15 Cal. 100, 5 Morr. Min. Rep. 218; Lytle Creek Co. v. Perdew (Cal.), 2 Pac. 732. See Pomeroy on Riparian Rights, sec. 93.

[17] Santa Cruz v. Enright, 95 Cal. 105, 30 Pac. 197; Cave v. Tyler, 133 Cal. 566, 65 Pac. 1089. But see Na-

To-day the larger part of the *agricultural* lands in California and much of it also in other States is no longer public, but has passed into private hands.[18]

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§ 201. **Abandoned or Forfeited Claims to Public Land.**—Such lands, however, as are privately held under possessory rights, such as unpatented mining locations, or conditional railway grants, may be forfeited or abandoned; they then again become part of the public domain, as vacant public land, and appropriations of water may be made thereon.[19] When an Indian reservation is thrown open to settlement, it becomes vacant public land for this purpose.[20]

When the land is thus again public, its public character relates back to the date when the abandoned or forfeited claim or other withdrawal originated; so that an appropriation of water made (on a homestead entry) by a stranger to the entryman relates back, if the entry is thereafter canceled, and becomes an appropriation as on public land before the homestead entry was made.[21] A forfeited homestead entry is as though never segregated from the public domain. An appropriator of water thereon between the entry and the forfeiture prevails against a rival entryman claiming the same land under a different contemporaneous homestead entry.[22] "When land included in a railroad grant reverts to the government, a subsequent patentee under the homestead laws takes the title subject to the right of way for a ditch or canal over it which was acquired prior to his entry; and it is immaterial whether the appropriation was made prior or subsequent to the time the government was reinvested with title."[23]

toma etc. Co. v. Hancock, 101 Cal. 42, 53, 31 Pac. 112, 35 Pac. 334; and People v. Truckee etc. Co., 116 Cal. 397, 400, 58 Am. St. Rep. 183, 48 Pac. 374, 39 L. R. A. 581.

[18] One-half of California's area remains public, but it is mostly mountain or desert land.

[19] San Jose W. Co. v. San Jose Land Co., 189 U. S. 177, 23 Sup. Ct. Rep. 487, 47 L. Ed. 765, S. C., 129 Cal. 673, 62 Pac. 269; San Dimas etc. Co. v. San Jose etc. Co., 142 Cal. 583, 76 Pac. 1128.

[20] Morris v. Bean (Mont.), 146 Fed. 432; Bean v. Morris, 159 Fed. 651, 86 C. C. A. 519. See, also, Nevada D. Co. v. Bennett, 30 Or. 59, 60 Am. St. Rep. 777, 45 Pac. 472; Story v. Wolverton, 31 Mont. 346, 78 Pac. 589; Sowards v. Meagher (Utah, 1910), 108 Pac. 1113. See *infra*, sec. 207.

[21] San Jose W. Co. v. San Jose R. Co., 129 Cal. 673, 62 Pac. 269.

[22] Le Quime v. Chambers (1908), 15 Idaho, 405, 98 Pac. 415, 21 L. R. A., N. S., 76.

[23] Maffett v. Quine (C. C.), 93 Fed. 347. In a Nebraska case it was first held that where a homestead claimant grants a right of way to plaintiff for

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§ 202. Rights of Way and Reservoir Sites on Unreserved Public Land.—Rules and regulations for appropriation of rights of way and reservoir sites upon public lands were left by Congress to State and local action by the act of 1866,[24] and pursuant thereto, a body of local law arose as set forth in another chapter.[25] Recognizing the essential nature of the right of access to the streams in any system of water law,[1] the act of 1866, in making a continuing offer of grant of water-rights on public land subject to compliance with local law, joined therewith a like continuing offer of grant of reservoir sites and rights of way upon terms to be set by local law, saying: "And the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed," including, in the amendment of 1870, reservoir sites;[2] the act of 1866 being entitled, "An act granting the right of way to ditch and canal owners through the public lands, and for other purposes." As elsewhere quoted, these acts amounted to "an unequivocal grant" from the United States to the appropriator, equally as to waters and rights of way and reservoir sites, when the local law was complied with. No documentary evidence of this grant was given to the appropriator, but the theory is as though patent issued, since a grant by act of Congress is the highest possible muniment of title.[3]

Under the act of 1866, the appropriator might not only build ditches but might change the point of diversion from one place to another on the public land; likewise the place of use, the means of use or the purpose of use. For all these things the United States gave the greatest freedom as respects the public domain, and, so long as private rights existing at the time were not interfered with, the appropriator (subject, now, to the control of the State Engineer) might make these changes freely without in any way derogating from his original right.[4] This is the system of local law for rights of way over the public domain built up under the act of 1866. "The government, *by act of Congress,* invites persons to enter

a ditch and then abandons his homestead, plaintiff has no right of way against a later homestead entry by a third person, and cannot enter to clean out his ditch. Rasmussen v. Blust, 83 Neb. 678, 120 N. W. 184. This overlooked the act of 1866, and was accordingly reversed on rehearing, and the plaintiff was protected. 85 Neb. 198, 133 Am. St. Rep. 650, 122 N. W. 862.

24 *Supra,* sec. 92 et seq.

25 *Infra,* sec. 361, how an appropriation is made.

1 *Supra,* sec. 54.

2 U. S. Rev. Stats., secs. 2339, 2340.

3 *Supra,* sec. 155.

4 *Infra,* sec. 496 et seq.

upon the public domain for the purpose of locating, appropriating, and diverting any waters thereon found, for such useful and beneficial purposes as are recognized by the laws of the State or jurisdiction within which the lands are located."[5]

(3d ed.)

§ 203. **Federal Right of Way Acts on Unreserved Public Land.** The grant in the act of 1866 was never carried into documentary form with regard to *waters*, because, in time, the Federal title in that regard faded away, leaving the States in sole control, now usually claiming as a matter of right, without the need of Federal grant. The States, as a rule, now patent the waters.[6] But in this waters and rights of way became separated, the latter retaining their Federal derivation. With the growing importance of irrigation and other enterprises, special new Right of Way Acts were passed by Congress.

These acts are chiefly the act of March 3, 1891,[7] confined to irrigation; the act of February 15, 1901,[8] applying to all purposes; the act of February 1, 1905,[9] applying to municipal or mining purposes; and the act of February 13, 1897,[10] applying to reservoirs for livestock, and other less important ones given in the Federal statutes collected in a later part of this book. There is an additional provision in an act of March 4, 1911.

These acts are considered more at length in another place.[11]

B. RESERVED PUBLIC LAND.

(3d ed.)

§ 204. **New Governmental Policy.**—The law of reserved public land, and of water and rights of way thereon, is now in the making, and but little can be done further than to state the meager authority which exists regarding it, premising that any conclusions drawn are tentative and that the field is more one of new governmental policy than of established law.

(3d ed.)

§ 205. **Extent of the Reserved Domain.**—The area now placed in reservation is somewhere about two hundred million acres, most

5 Le Quime v. Chambers, 15 Idaho, 405, 98 Pac. 415, 21 L. R. A., N. S., 76.

6 *Infra*, sec. 408 et seq.

7 26 Stat. 1095, c. 561; 1 Supp. Rev. Stats. (1891) 942, 946.

8 31 Stat. 790.

9 33 Stat. 628.

10 29 Stat. 484.

11 *Infra*, c. 19, how an appropriation is made—Federal method.

of which compose the forests and grazing lands, the remainder being reserved for reclamation, Indian and military reservations, coal and phosphate lands, power sites, and conservation generally. It constitutes about one-third of the area of the Western States (exclusive of Alaska),[12] the figures for each jurisdiction being given in a preceding note.[13] In the East, a bill passed Congress in 1911 to buy the White Mountains in New England, and part of the Appalachian region, for Eastern forest reserves.[13a]

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§ 206. Authority to Make Withdrawals.—General authority to increase the reserved domain was conferred upon the President by the act of 1910.[14] Regarding the validity of withdrawals made previous to this act, other than by specific authority of Congress (much was withdrawn without such specific authority), there has been much discussion. The argument in favor of their validity rested upon the contention that "in the President are vested those powers which in England at that time [the date of the adoption of our constitution] were vested in the English Chief Executive, namely, George III."[15] The argument to the contrary stated by Senator Borah of Idaho is that withdrawals revoke acts of Congress, since the homestead, mining, and other laws directed that the lands shall be disposed of; that the President cannot exercise such power over acts of Congress.[16] Much citation of authority on both sides will be found in the Congressional Record for 1909–10.

By the enabling acts for the admission of New Mexico and Arizona into the Union, title to power sites upon public lands was reserved to the United States.[17] By an act of Congress in 1910 the Secretary of the Interior was given general power to withdraw power sites and irrigation sites in Indian reservations.[18]

[12] Alaska being mostly unreserved public land.

[13] *Supra*, sec. 197.

[13a] See A. C. March 1, 1911 (Pub. No. 435), appointing a commission to co-operate with States, etc.

[14] Quoted in a later part of this book, devoted to Federal statutes. *Infra*, sec. 1428. Congress may confer such power. Light v. United States (May, 1, 1911), — U. S. —; Grimaud v. United States (May 1, 1911), — U. S. —.

[15] "The Outlook," for August 6, 1910, p. 765. See, also, Attorney General Bonaparte's opinion in 22 Op. Atty. Gen. 13.

[16] 45 Cong. Rec. 6342.

[17] Session Laws 61st Cong. (1910), 2d Session, c. 310, secs. 10 and 28. See the new Ariz. Const., art. 10, sec. 6, authorizing the United States to withdraw power sites within five years.

[18] Sess. Laws, 61st Cong. (1910), 2d Session, c. 431, secs. 13, 14.

(3d ed.)

§ 207. Military and Indian Reservations—Waters on.—Confining ourselves to a statement of the authorities, we find divergent theories regarding the law of waters (as distinguished from rights of way) on military and Indian reservations.

Under the law declared in Kansas v. Colorado,[19] State law (usually the law of appropriation to actual use) governs waters upon a Federal reservation as in any other part of the State. Water-rights thereon inhere in the United States only to the extent of actual use, beyond which private parties may appropriate the water wherever they can obtain lawful access to it. "An appropriation made of such waters will be protected even as against the government of the United States," it is said in a recent Utah case, ruling that acquisition of the right to use unappropriated public waters, whether on the public domain, within a reservation, or elsewhere, is controlled by the laws and customs of the State in which the water is found.[20] In a case in the Federal courts—Krall v. United States—arising in Idaho where appropriation is the sole law of waters, it was held that the right of a military reservation was similar to that of a private appropriator and extended only to the water in actual use at the time a private party diverts the water. The court assimilated the extent of reservation to an appropriation, and allowed subsequent appropriations of the surplus beyond actual use at the time. The court said: "The creation of the reservation for military post purposes did not destroy or in any way affect the doctrine of appropriation thus established by the government in respect to the waters of the non-navigable streams upon the public lands. They continued subject to appropriation for any

[19] 206 U. S. 46, 27 Sup. Ct. Rep. 655, 51 L. Ed. 956.

[20] Sowards v. Meagher (Utah, 1910), 108 Pac. 1113. In this case defendant filed with the State Engineer an application to appropriate water on an Indian reservation for irrigation of lands therein after proclamation by the United States for opening the lands, but before actual opening. Plaintiff thereafter filed application for the same water and purpose on the very day of the land opening. The State Engineer approved the first application. It was held that he properly did so, for, though the land to be irrigated was not then open to settlement, yet it was proclaimed so for the future, and this was enough; an appropriation may be made for future use, if the delay in accomplishment is not unreasonably long. The court further says: "We have no doubt that unappropriated public water on a reservation or on the public domain is subject to appropriation, and may be appropriated for a beneficial purpose, though the appropriator has not, when his application is filed with the State Engineer, a present right in or to the lands along the stream from which the water is proposed to be diverted, or in or to the lands proposed to be irrigated by him."

useful purpose. The appropriation of a part of those waters for uses of the military post secured it in the use of the portion so appropriated, but it did not take from others the right to make such appropriation above the reservation as would not interfere with its prior appropriation."[21] It has, likewise, been said that when the United States makes an appropriation of water for the Reclamation Service, it does so under the same terms as a private party and is bound just as much by the State law.[22] The National Irrigation Act, the act creating forest reserves, the Right of Way Act of March 3, 1891, and almost all acts of Congress which mention the matter since the act of 1866, expressly declare that the law of waters shall be a matter of State law.[22a]

But the general tendency of the Federal courts in dealing with waters on or use by military or Indian reservations is to consider the law of appropriation on public land to rest upon the act of 1866 (as in California) rather than upon State law; to tacitly assume that the creation of the reservation impliedly repealed the act of 1866 as to waters thereon; and to restore the proprietary rights of the United States, which the California law gives as a riparian proprietor, not limited to the amount of water in actual use at any specific time. The supreme court of the United States says in Winters v. United States[23] that the right of the reservation to water flowing through it, even in the absence of actual use thereon (if necessary for use in the future), cannot be destroyed by private appropriators who first put it to use under local law so permitting, even in States following the Colorado doctrine which ignore the proprietary rights of the United States as riparian proprietor in other aspects.[24] This holding (though expressly leaving open the question whether riparian rights exist in Montana) is rather to the effect that the reservation stands as a riparian pro-

[21] Krall v. United States, 79 Fed. 241, 24 C. C. A. 543. Judge Gilbert, dissenting, believed there was a reservation analogous rather to the rights of a riparian proprietor under a land grant under the California theory, in which case actual use at the time is not alone the test, but must be considered with possible uses thereafter, which seems the effect also of Winters v. United States below referred to.

[22] United States v. Burley (Idaho, 1909), 172 Fed. 615; Burley v. United States (C. C. A.), 179 Fed. 1.

[22a] *Supra*, sec. 176; *infra*, sec. 1429.

[23] 207 U. S. 564, 28 Sup. Ct. Rep. 207, 52 L. Ed. 340.

[24] See, also, United States v. Rio Grande etc. Co., 184 U. S. 416, 22 Sup. Ct. Rep. 428, 46 L. Ed. 619; Gutierres v. Albuquerque etc. Co., 188 U. S. 555, 23 Sup. Ct. Rep. 338, 47 L. Ed. 588; United States v. Conrad Inv. Co., 156 Fed. 130; also 161 Fed. 829, 88 C. C. A. 647; Winters v. United States, 207 U. S. 564, 28 Sup. Ct. Rep. 208, 52 L. Ed. 340.

prietor would under the California doctrine (having arisen in Montana, where the State law in fact upholds riparian rights),[25] in contrast to Krall v. United States, which (being decided in Idaho where riparian rights are rejected)[1] considered the right of the reservation to be analogous rather to that of an appropriator, extending only to the amount actually used at the time of a private hostile diversion.[2] In a similar case arising in Montana it was also held by the United States circuit court of appeals: "The lands within these [Indian] reservations are dry and arid, and require the diversion of waters from the streams to make them productive and suitable for agricultural, stock-raising and domestic purposes. What amount of water will be required for these purposes may not be determined with absolute accuracy at this time, but the policy of the government to reserve whatever water of Birch Creek may be reasonably necessary, *not only for present uses, but for future requirements,* is clearly within the terms of the treaties as construed by the supreme court in the Winters case."[3] It is held "it [the government] has only to come into its own when its needs may require," and all persons seeking appropriations must take subject to this paramount right, though in nonuse, and only surplus water over and above all possible needs (though not now used) even in the future of the Indian reservation is subject to appropriation.[4]

The matter is in much confusion because of the differing views as to whether local law governs; and if it does, the two different views of what the local law is—whether the common law or appropriation. Taking the above rulings as a whole, however, the view of the Federal courts seems to be that in States recognizing riparian rights, the rights incident to a military or Indian reservation seem similar to those of a riparian owner, not limited to the amount

25 *Supra,* sec. 117.

1 *Supra,* sec. 118.

2 See United States v. Winans, 198 U. S. 371, 25 Sup. Ct. Rep. 662, 49 L. Ed. 1089.

3 Decree of circuit court affirmed in Conrad Inv. Co. v. United States (Mont. 1908), 161 Fed. 829, 88 C. C. A. 647. So it has been held that, since the government's use under this view is not one by "appropriation," therefore when the government abandons the reservation and sells the land to private parties, no appropriation of water passes to the purchaser as an appurtenance; the effect is simply to again throw open the waters to appropriation. Nevada etc. Co. v. Bennett, 30 Or. 59, 60 Am. St. Rep. 777, 45 Pac. 472; Story v. Wolverton, 31 Mont. 346, 78 Pac. 589. See, also, Morris v. Bean (Mont.), 146 Fed. 432; Bean v. Morris, 159 Fed. 651, 86 C. C. A. 519.

4 United States v. Conrad Inv. Co., 156 Fed. 123, affirmed in Conrad Inv. Co. v. United States, 161 Fed. 829, 88 C. C. A. 647.

in use by the reservation by actual appropriation at any specific time, and the Federal courts in their opinions do not expressly distinguish between classes of States, but seem to lay down the above rule for all States. On the whole, in dealing with waters on, or use by, military or Indian reservations, the Federal courts resort to the California theory of the proprietary rights of the United States in the public domain, rather than to the Colorado theory that State law alone governs. (And if the proprietary rights of the United States are recognized beyond actual use, it can only be because the common law of riparian rights is regarded as in force in all jurisdictions as to the United States itself, at least.)

Military and Indian reservations are in exclusive government occupancy, wherein they may possibly differ from the forest and other reserved areas, which are intended to be open to the people.

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§ 208. Rights of Way Over Military and Indian Reservations. Because of the position of the United States as an actual occupant, the question in the law-books regarding military and Indian reservations has been chiefly as to its water-rights. On the other hand, the act creating the forest reserves expressly declares that rights to water in forest reserves shall be governed by State law, so that questions of water-rights are there eliminated, and the question has instead been made chiefly one of rights of way. Consequently questions of rights of way upon military and Indian reservations are borrowing their law from that being developed in the forest reserves, as hereafter considered.[5]

It has been held that rights of way over military and Indian reservations can be obtained only under the "Right of Way Acts,"[6] implying a repeal of the act of 1866 so far as concerns such reservations, in exclusive government occupation.[7]

(3d ed.)

§ 209. Forest Domain—Extent of.—The act of March 3, 1891, authorized the President to establish forest reserves, now called

[5] *Infra*, sec. 430 et seq., how an appropriation is made—Federal system.

[6] United States v. Conrad Inv. Co., 156 Fed. 131, affirmed in 161 Fed. 829, 88 C. C. A. 647. Accord, 33 Land Dec. 564; 27 Land Dec. 421; 35 Land Dec. 550. Kern River Co., 38 Land Dec. 302.

[7] Regarding irrigation works built by the United States for use of Indians on reservations, see Session Laws, 61st Congress, 2d Session (1910), c. 140, and c. 431, sec. 17.

National Forests. The first created was the Yellowstone Park Timber Land Reserve proclaimed by President Harrison in 1891. The matter remained much in abeyance until February, 1897, when President Cleveland reserved twenty-one million acres. In June of that year the Forest Service was created under the Interior Department, being by act of February 1, 1905, transferred to the Department of Agriculture. The reservation of timber land increased rapidly by executive order, allowed in the act of Congress of March 3, 1891, under which practically all of the existing National Forests have been created during the administrations of President Roosevelt. In an act of March 4, 1907, it is provided that "hereafter no forest reserve shall be created, nor shall any addition be made to one heretofore created within the limits of the States of Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by act of Congress." The power of the President to create or enlarge National Forests in other States and in the Territories is unimpaired. In 1910 the area in the forest domain comprised about two hundred million acres. It covers in most Western States a large portion [such as in California one-fourth] of the State's area.[8]

The law of forest reserves is almost wholly in the making, and anyone dealing with rights therein should acquaint himself with the views of the Forest Service by direct communication with its officers.

(3d ed.)

§ 210. **Waters upon Forest Reserves.**—The Right of Way Acts usually provide that waters, as distinguished from rights of way, shall remain governed by State law.[8a] Thus the act of March 3, 1891,[9] provides that it "shall not be construed to interfere with the control of water for irrigation and other purposes under the authority of the respective States and Territories," and the act of February 26, 1897,[10] provides, "All reservoir sites reserved or

[8] *Supra*, sec. 197.

The Territorial Engineer of New Mexico said in Bulletin 215, O. E. S., United States Dept. of Agriculture: "The eleven national forests in the Territory cover some 8,500,000 acres of the best timber sections. Of this amount 500,000 acres are made up of fine timber and 1,000,000 acres of dry-farming land, 100,000 acres are capable of irrigation, 6,500,000 acres are good for grazing, and 400,000 acres are waste land." Within the last year there has been some re-adjustment to eliminate nonforest land from the forest reserves.

[8a] *Supra*, sec. 176.

[9] 26 Stat., c. 561, p. 1095, sec. 18.

[10] 29 Stat. 599, c. 335.

to be reserved shall be open to use and occupation under the Right of Way Act of March third, eighteen hundred and ninety-one."

The act creating the Forest Service declares: "All waters on such reservations may be used for domestic, mining, milling or irrigation purposes, under the laws of the States wherein such forest reservations are situated, *or under the laws of the United States and the rules and regulations established thereunder.*" [11] The Service has not availed itself of this last clause, but takes the position, as yet, that the States shall control the waters. The Service has, however, secured enactment by Congress directly affecting waters upon the Black Hills Forest Reserve, expressly denying to private patentees of land thereafter granted in the reserve any riparian rights in streams flowing over such land.[12]

In view of the position hitherto taken by the Forest Service, that it has no jurisdiction over waters, questions which concern us have arisen in regard to rights of way and reservoir sites. It would seem, however, that the right of access is a determinative factor in water law, and that control of access to streams is in fact control of the streams themselves.[13]

(3d ed.)

§ 211. Rights of Way and Reservoir Sites upon Forest Reserves.—The Forest Service rules and regulations lay down a system of law for rights of way and reservoir sites, considered at length in a later chapter.[14]

[11] A. C. June 4, 1897, 30 Stat, 11.

[12] A. C. June 11, 1906, 34 Stat. 234.

[13] *Supra*, sec. 54; *infra*, secs. 225, 692, access to waters.

[14] *Infra*, sec. 430 et seq.

§§ 212–220. (Blank numbers.)

CHAPTER 10.

APPROPRIATIONS ON PRIVATE LAND.

A. RIGHTS OF WAY CANNOT BE APPROPRIATED OVER PRIVATE LAND.

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§ 224. Yunker v. Nichols no longer followed.
§ 225. Access to the stream a determinative factor in the law of water-courses.
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B. WATER ON PRIVATE LAND.

§ 227. Difference in California and Colorado as to water on private land.
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§ 230. Water partly on public and partly on private land in California.
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§§ 234–242. (Blank numbers.)

A. RIGHTS OF WAY CANNOT BE APPROPRIATED OVER PRIVATE LAND.

(3d ed.)

§ 221. General Protection of Private Land Against Ditch-building.—Despite any difference under the Colorado and California doctrines as to rights in water, both agree to-day that an appropriator must have lawful access to the stream before he can exercise water-rights. Upon public land the United States is to-day enforcing this principle by withdrawing the land, as set forth in the preceding chapter; as to private land the principle is to-day equally clear from the decisions, which now in all jurisdictions hold that an entry upon private land to build ditches or dams or other structures or work is a plain trespass and unlawful, like any trespass upon private property. An appropriation cannot be initiated unlawfully by a trespass upon private land, and no rights can be obtained thereby against the landowner whose land is

trespassed upon, in any jurisdiction.[1] The supreme court of the United States held that an appropriator could not build a ditch

[1] *Arizona.*—Boquillas etc. Co. v. Curtis (Ariz., 1909), 213 U. S. 339, 29 Sup. Ct. Rep. 493, 53 L. Ed. 822. Compare Biggs v. Utah etc. Co., 7 Ariz. 331, 64 Pac. 494.

California.—Vestal v. Young, 147 Cal. 715, 721, 82 Pac. 381, 383; Lux v. Haggin, 69 Cal. 255, 336, 344, 368, 10 Pac. 674; Weimar v. Lowery, 11 Cal. 104, 4 Morr. Min. Rep. 543; Correa v. Frietas, 42 Cal. 339, 2 Morr. Min. Rep. 336; Titcomb v. Kirk, 51 Cal. 288, 5 Morr. Min. Rep. 10; Last Chance etc. Co. v. Heilbron, 86 Cal. 1, 26 Pac. 523; Walker v. Emerson, 89 Cal. 456, 26 Pac. 968; Ball v. Kehl, 95 Cal. 606, 30 Pac. 780; Taylor v. Abbott, 103 Cal. 421, 37 Pac. 408; McGuire v. Brown, 106 Cal. 660, 670, 39 Pac. 1060, 30 L. R. A. 384; Los Angeles v. Pomeroy, 125 Cal. 420, 58 Pac. 69; Davis v. Martin, 157 Cal. 657, 108 Pac. 866.

Colorado.—Stewart v. Stevens, 10 Colo. 445, 15 Pac. 786; Crisman v. Heiderer, 5 Colo. 596; Tripp v. Overacker, 7 Colo. 75, 1 Pac. 695; Downing v. More, 12 Colo. 318, 20 Pac. 766; Boglino v. Giorgetta, 20 Colo. App. 338, 78 Pac. 612; Nippel v. Forker, 9 Colo. App. 106, 47 Pac. 766, affirmed in 26 Colo. 74, 56 Pac. 577; Blake v. Boye, 33 Colo. 55, 88 Pac. 470, 8 L. R. A., N. S., 418; Baldridge v. Leon etc. Co., 20 Colo. App. 518, 80 Pac. 477; Sternberger v. Seaton etc. Co. (1909), 45 Colo. 401, 102 Pac. 168; Welty v. Gibson, 42 Colo. 18, 93 Pac. 1093; United States etc. Co. v. Gallegos, 89 Fed. 770, 32 C. C. A. 470; Snyder v. Colorado etc. Co. (Colo. C. C. A.), 181 Fed. 62.

Idaho.—Le Quime v. Chambers, 15 Idaho, 405, 98 Pac. 415, 21 L. R. A., N. S., 76; Swank v. Sweetwater Irr. Co., 15 Idaho, 353, 98 Pac. 297. See Stats. 1911, c. 230 (lakes).

Montana.—Noteware v. Stearns, 1 Mont. 311, 4 Morr. Min. Rep. 650; Smith v. Denniff, 24 Mont. 20, 81 Am. St. Rep. 408, 60 Pac. 398, 50 L. R. A. 741; Prentice v. McKay, 38 Mont. 114, 98 Pac. 1081.

New Mexico.—Vanderwork v. Hewes (N. M.), 110 Pac. 567.

Nebraska.—Rasmussen v. Blust, 83 Neb. 678, 120 N. W. 184, S. C., 85 Neb. 198, 133 Am. St. Rep. 650, 122 N. W. 862. Injunction is the proper remedy for preventing one without authority so to do from crossing the canal of an irrigation company with a lateral for the purpose of carrying water to his land from another canal. Castle Rock Irr. Co. v. Jurisch, 67 Neb. 377, 93 N. W. 690.

Texas.—See Toyaho etc. Co. v. Hutchins, 21 Tex. Civ. App. 274, 52 S. W. 101.

Utah.—Willow etc. Co. v. Michaelson, 21 Utah, 248, 81 Am. St. Rep. 687, 60 Pac. 943, 51 L. R. A. 280; Stalling v. Ferrin, 7 Utah, 477, 27 Pac. 686.

Washington.—Weidensteiner v. Mally, 55 Wash. 79, 104 Pac. 143; Atkinson v. Washington Irr. Co., 44 Wash. 75, 120 Am. St. Rep. 978, 86 Pac. 1123.

Wyoming.—Sterritt v. Young, 14 Wyo. 146, 116 Am. St. Rep. 994, 82 Pac. 946, 4 L. R. A., N. S., 169; McPhail v. Forney, 4 Wyo. 556, 33 Pac. 773; Healy v. Smith, 14 Wyo. 263, 116 Am. St. Rep. 1004, 83 Pac. 583. Compare McIlquhoun v. Anthony etc. Co. (Wyo.), 104 Pac. 20.

United States Supreme Court.—In Boquillas etc. Co. v. Curtis, 213 U. S. 339, 29 Sup. Ct. Rep., at page 495, 53 L. Ed. 822, a case upholding, in Arizona, the rejection of the common law of riparian rights, the court recognizes the principle, though the facts of the case did not involve it. Mr. Justice Holmes said: "A final objection urged is that the plaintiff's *land* is taken without compensation. It would seem that this is merely technical in this case. There does not appear to have been any discussion of the point below, and it is probable that the water is the only thing that has substantial value or really is cared for. But the plaintiff is authorized to have his damages assessed if he desire by chapter 55, section 4 (now Rev. Stats., sec. 3202), as we have mentioned. We think that it would be unjust to disturb the decree on this ground, although in other circumstances the objection might be grave." See, also, Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240, 4 Morr. Min. Rep. 504; Sturr v. Beck, 133 U.

over a prior located mining claim, or, if he does, the hydraulic miner may wash it away.[2]

This applies equally to changes in point of diversion, place of use, means of use, or purpose of use, where land that was public at the time of creating the appropriation has passed into private hands at the time of the change. While the appropriator may change his place of diversion, manner, means, place and purpose of use at will upon public land, yet if in any way this injures rights already in private hands (and a change is *per se* an injury on private land),[3] it cannot be done at all;[4] and a change of a ditch originally built upon public land to another place on the land, or an enlargement of it after the land has passed into private hands, is absolutely prohibited.[5]

A permit from the Secretary of the Interior or from the State Engineer is of no avail.[6]

Rights of way over private land may, of course, be obtained by condemnation for public use, and under a recent decision of the supreme court of the United States, this applies, under certain circumstances, to a ditch built for one's private irrigation alone; as considered at length in the chapter upon eminent domain.[7]

(3d ed.)

§ 222. **Consistently the California Law.**—The general principle was early established in California that the law of possessory rights (that is, the law of appropriation) applied only to vacant, unoccupied public domain, and must infringe nothing to which private rights had already attached at the time of the appropriation. Miners could not appropriate water already claimed by other private parties, even though not miners; no mines could be located for mineral upon lands owned by private parties;[8] no water could

S. 541, 10 Sup. Ct. Rep. 350, 33 L. Ed. 761.

See, also, cases *infra*, sec. 259 et seq., "prior settlers," and *infra*, secs. 498, 499, 502, 505, "change of ditch or point of diversion."

2 Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240, 4 Morr. Min. Rep. 504; Miocene etc. Co. v. Jacobson, 2 Alaska, 573.

3 Vestal v. Young, *infra*.

4 *Infra*, sec. 498.et seq.

5 *Ibid.* See, especially, McGuire v. Brown, 106 Cal. 660, 39 Pac. 1060, 30 L. R. A. 384; Vestal v. Young, 147 Cal. 715, 82 Pac. 381; Vestal v. Young, 147 Cal. 721, 82 Pac. 383; Weidensteiner v. Mally (1909), 55 Wash. 79, 104 Pac. 143; Welty v. Gibson, 42 Colo. 18, 93 Pac. 1093; Snyder v. Colorado etc. Co. (C. C. A. Colo.), 181 Fed. 62.

6 Baldridge v. Leon etc. Co., 20 Colo. App. 518, 80 Pac. 477; Vanderwork v. Hewes (N. M.), 110 Pac. 567. See *infra*, secs. 1193, 1194, authority of State Engineer; vested rights protected.

7 *Infra*, sec. 607 et seq.

8 Boggs v. Merced M. Co., 14 Cal. 279, 10 Morr. Min. Rep. 334.

be diverted from private land over which it flowed.[9] The California court always guarded against the extension to private land of the peculiar character of rights on the public domain lest "its practical application would result in a system of judicial condemnation of the property of one citizen to answer an assumed paramount necessity or convenience of another citizen."[10]

The act of Congress of 1866, upon which the law of appropriation in California rests, expressly declares that the doctrine shall not apply to allow entries on private land, for it says: "But whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler upon the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage,"[11] and, though it has been contended to be a permission to enter on payment of damages, like the early California Possessory and Indemnity Acts,[12] the contention failed, as did those early California acts, and the provision instead was held to prohibit entries on private land (even possessory agricultural claims) absolutely, so far as it lay with Congress.[13]

The landowner need show no actual damage against the trespasser; it is enough that his land is being entered upon; the rule of *injuria sine damno* applies.[14]

(3d ed.)

§ 223. Early Conflict in the Colorado Law—Yunker v. Nichols.—But the early law of the younger States, under the lead of Colorado, diverged widely from this. Instead of appropriators, as trespassers on public land, having, as in early California, to defend themselves against the "legitimate" title of land patents, the question arose in Colorado only after that protection was given by

9 Crandall v. Woods, 8 Cal. 136, 1 Morr. Min. Rep. 604.

10 Gregory v. Nelson, 41 Cal. 278, at 290, 12 Morr. Min. Rep. 124.

11 U. S. Rev. Stats., sec. 2339.

12 *Supra*, sec. 85.

13 Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240, 4 Morr. Min. Rep. 504; McGuire v. Brown, 106 Cal. 668, 39 Pac. 1060, 30 L. R. A. 384. See, also, as to this proviso, Titcomb v. Kirk, 51 Cal. 288, 5 Morr. Min. Rep. 10; Jacob v. Lorenz, 98 Cal. 335, 33 Pac. 119; Woodruff v. North Bloomfield Co., 18 Fed. 753, 9 Saw. 441.

The same proviso appears in the Right of Way Act of March 3, 1891 (A. C. 26 Stats. 1095), providing, "Whenever any person or corporation in the construction of any canal, ditch, or reservoir injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

14 Vestal v. Young, 147 Cal. 715, 82 Pac. 381, and Vestal v. Young, 147 Cal. 721, 82 Pac. 383, and *infra*, sec. 642.

See, generally, the historical chapter, *supra*, c. 5.

the act of 1866, and then private landowners or patentees were, in the younger States, hard put to it to defend themselves against appropriators; for the law in these younger States proceeded to raise appropriators over the landowners in all respects.

Early cases in Colorado had held that an appropriation could always be made on private land, even against the will of the landowner. The first case in Colorado upon waters involved this point of violating private land by irrigators, the case of Yunker v. Nichols.[15] In this case the three judges gave separate opinions, as follows: "But here the law has made provision for this necessity by withholding from the landowner the absolute dominion of his estate, which would enable him to deny the right of others to enter upon it for the purpose of obtaining needed supplies of water. . . . . It may be said that all lands are held in subordination to the dominant right of others, who must necessarily pass over them to obtain a supply of water to irrigate their own lands, and this servitude arises, not by grant, but by operation of law." Per Judge Hallett, who seems to have thought that a certain statute[16] allowed this without condemnation. But Belford, J., places the decision on the ground that on the facts there was a license to build the ditch, which, being acted upon, was irrevocable in equity, and this was a proper treatment of the case. He adds, however, some words similar to those above quoted from Judge Hallett, but in a vein that indicates that he thought it was in some analogy to eminent domain proceedings: "The construction of a ditch for irrigating purposes seems to me to rest on principles analogous to those which sustain the right of a private way over the land of another," but thinks that condemnation procedure may be waived by the acts of the parties, and says it was so in this case; but then again adds that he justifies his decision on the ground of necessity, though "I am fully aware that courts should be slow to justify their decisions on the ground of necessity." Wells, J., says that the decision should be placed solely on the ground that each landowner has a right of way of necessity across the land of another to water. (Similar decisions were made in other early cases.)[17] Statutes have been passed to the same effect.[18]

[15] 1 Colo. 551, 8 Morr. Min. Rep. 64.

[16] Laws of 1861, page 67, Revised Statutes, 363. This act is more particularly considered *supra*, sec. 119.

[17] Schilling v. Rominger, 4 Colo. 104, 109; Branagan v. Dulaney, 8 Colo. 413, 8 Pac. 669.

[18] *Statutes enacting the principle of Yunker v. Nichols, that is, of gen-*

Another ground on which this universal right of entry on private land to divert streams for irrigation was given [19] as being that the United States, by sanctioning the law of appropriation, not only reserved from its land grants existing appropriations and diversions, but also a right of entry for any member of the public in the future to make appropriations thereafter.

(3d ed.)

§ 224. Yunker v. Nichols No Longer Followed.—The weight of authority in Colorado and similar jurisdictions now clearly declares that the foregoing is no longer the law.

In Crisman v. Heiderer [20] it was held that the decision in Yunker v. Nichols should be confined "to the narrowest limits"; adding, "it has been well said that the necessity of one man's business cannot be made the standard of another man's right." And since the adoption of the constitution this is recognized in Colorado as a taking of property that can be done only by condemnation on eminent domain proceedings, now specially provided for such cases.[21] In a case construing the law of Colorado, the United States circuit court of appeals says: "The appellant owns all the land on both banks of this river. Regardless of its right to the water, it has the undoubted right to the undisturbed and exclusive possession of its land; and the appellees can divert no water without entering upon and leading it across this land and committing a continuing trespass upon it." Injunction granted,[22] adding that

eral free right of entry on private land to build irrigation works or to change or enlarge existing works without consent or compensation:

Arizona.—Const., art. 1, sec. 17, is similar in this to that of Colorado.

Colorado.—M. A. S., secs. 2256, 2257, 2261, 2263, 3158; Const., art. 2, sec. 14. But see Const., art. 2, sec. 15; art. 16, sec. 7; M. A. S., secs. 2256, 3158.

Idaho.—McLean's Idaho Rev. Codes, secs. 3300, 3305; Rev. Stats. 1887, sec. 3181; Civil Code, sec. 2549 et seq.; 11 Terr. Sess. (1881) 269; Laws 1889, p. 380, sec. 10.

Montana.—Comp. Stats. 1887, sec. 1240. But see Prentice v. McKay, 38 Mont. 114, 98 Pac. 1081.

North Dakota.—Comp. Laws 1887, sec. 2030.

Oklahoma.—Const. 1907, art. 2, sec. 23.

South Dakota.—Rev. Codes, Pol. Code, sec. 2564.

Washington.—Pierce's Codes, sec. 5124 et seq.

Wyoming.—See Sterritt v. Young, 14 Wyo. 146, 116 Am. St. Rep. 994, 82 Pac. 946, 4 L. R. A., N. S., 169.

This list is probably not complete.

Compare the statutes *infra*, enacting the principle of Clark v. Nash, extending the power of *eminent domain* to private ditch building, making compensation. *Infra*, sec. 609.

19 Tynon v. Despain, 22 Colo. 240, 43 Pac. 1039.

20 5 Colo. 596.

21 Stewart v. Stevens, 10 Colo. 445, 15 Pac. 786.

22 United States etc. Co. v. Gallegos, 89 Fed. 770, 32 C. C. A. 470. Accord, Snyder v. Colorado etc. Co. (Colo. C. C. A.), 181 Fed. 62.

nothing in the constitution or statutes of Colorado gives one the right to make an appropriation against a landowner by trespassing on his land; and the State courts of Colorado now also so hold.[23] In one recent case[24] it was held that even an act of Congress[25] gives no right over private land, even though filings were approved by the Secretary of the Interior. Yunker v. Nichols is confined to the point of executed parol license, which is all it really decided.[1]

The case above referred to as asserting a reserved right of entry as a matter of construction of Federal land grants was explained away,[2] as being decided upon the fact of priority of the ditch to the time of vesting of the land grant, and not as permitting an entry subsequent to such vesting, or as declaring private lands subject to indiscriminate irrigation ditches in the future.[3]

In a recent Colorado case it was strongly said that the right to build a ditch over another's private lands is an entirely different question from that of riparian right to water; and that if defendant has taken plaintiff's land for a right of way for a ditch, plaintiff may obtain appropriate relief in court, irrespective of any question of plaintiff's right to the water.[4] Another recent ruling in the Federal court for Colorado is that if a ditch is wrongfully built upon private land, it is entitled to no protection against tunneling by the landowner, causing seepage from the ditch.[5] In Idaho it was recently likewise said: "If the land on which this spring was located had already been patented before the location by appellants, then a different question would arise, because appellants would have been trespassers in entering upon the land for the purpose of locating, appropriating, and diverting the water unless they first had acquired a license or easement so to do."[6]

[23] Cases cited at the beginning of this chapter.

[24] Baldridge v. Leon etc. Co., 20 Colo. App. 518, 80 Pac. 477.

[25] Of March 3, 1891.

[1] Morrison's Mining Rights, 12th ed., p. 185; Mills on Irrigation, p. 273, note 17. As to executed parol license, see *infra*, sec. 556.

[2] Tynon v. Despain as construed in Blake v. Boye, 38 Colo. 55, 88 Pac. 470, 8 L. R. A., N. S., 418. See, also, Atkinson v. Washington Irr. Co., 44 Wash. 75, 120 Am. St. Rep. 978, 86 Pac. 1123.

[3] M. A. S. (Colo.), sec. 3158, prohibits building a ditch over a mining claim without condemnation.

[4] Sternberger v. Seaton etc. Co. (1909), 45 Colo. 401, 102 Pac. 168.

[5] Snyder v. Colo. etc. Co. (C. C. A.), 181 Fed. 62.

[6] Le Quime v. Chambers, 15 Idaho, 405, 98 Pac. 415, 21 L. R. A., N. S., 76. In another late Idaho case it was held that the fact that a party has located a water-right and filed his notice thereof in accordance with law does not give him any right to build ditches and canals across the lands of others until he has acquired the easement and right of way therefor either by purchase or condemnation. The ownership of a water-right does not necessarily imply that the ownership of the ditch through which the water

This applies to enlarging an existing ditch upon private land, as well as to building a new one there.[7]

That an appropriation cannot be made by hostile entry upon private land is also held in Utah,[8] and in other States generally, as cited at the beginning of this chapter.[9]

A recent case in Montana says: "The United States and the State of Montana have recognized the right of an individual to acquire the use of water by appropriation;[10] but neither has authorized, nor, indeed, could authorize, one person to go upon the private property of another for the purpose of making an appropriation, except by condemnation proceedings. The general government has merely authorized the prospective appropriator to go upon the public domain for the purpose of making his appropriation, and the statutes of this State only apply to appropriations made on the public lands of the United States or of the State, and to such as are made by individuals who have riparian rights either as owners of riparian lands or through grants from such owners. This is the doctrine announced in Smith v. Denniff,[11] where the court further said: 'A trespasser on riparian land cannot lawfully exercise there any right to such water or acquire any right therein by virtue of section 1880 et seq. of the Civil Code of 1895.'[12] In the same opinion this court also said: 'One may not acquire a

flows is vested in the same person. Swank v. Sweetwater Irr. Co., 15 Idaho, 353, 98 Pac. 297, the court saying: "The fact that a party has a water-right gives him no right to enter the lands of others for the purpose of constructing ditches and canals across them, except over public lands of the United States. He must obtain that easement and right of way either by purchase or condemnation."

[7] Welty v. Gibson, 42 Colo. 18, 93 Pac. 1093; Snyder v. Colorado etc. Co. (C. C. A. Colo.), 181 Fed. 62. *Infra*, sec. 496 et seq., "changes."

[8] Section 2780, Compiled Laws of Utah of 1888, provided that a "natural stream or other natural source of supply" could be appropriated. The court construed this to mean one "flowing or situated upon lands over which the sovereignty has domain, or which forms a part of the public domain, and not to streams or springs or other waters rising through percolation upon land after it has been segregated from the public domain and the title thereto has passed into private ownership." Willow Creek etc. Co. v. Michaelson, 21 Utah, 248, 81 Am. St. Rep. 687, 60 Pac. 943, 51 L. R. A. 280. See, also, Stalling v. Ferrin, 7 Utah, 477, quoted *supra*, sec. 185.

[9] Compare the Wyoming case of McIlquhoun v. Anthony etc. Co. (Wyo. 1909), 104 Pac. 20, where it was claimed that public policy gave cattle and sheep men a right of way over private land in Wyoming to reach grazing lands on the public domain; but the court held to the contrary.

[10] Citing, *inter alia*, U. S. Rev. Stats., secs. 2339, 2340 (U. S. Comp. Stats. 1901, p. 1437); Mont. Rev. Codes, sec. 4840 et seq.

[11] 24 Mont. 22, 81 Am. St. Rep. 408, 60 Pac. 398, 50 L. R. A. 741.

[12] Citing section 4840 et seq., Rev. Codes. Alta Land Co. v. Hancock, 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. 645.

water-right on the land of another without acquiring an easement in such land.' '' [13]

Such, also, was the civil law,[14] and the early New Mexico law based thereon.[15]

(3d ed.)

§ 225. Access to the Stream a Determinative Factor in the Law of Watercourses.—Concerning the principle of Yunker v. Nichols, which does not now seem in force anywhere, it is said [16] to have placed a grievous burden upon the ownership of valley lands because of "the liability to which his land is exposed of having ditches or canals constructed across it without his consent, for the purpose of conducting water from the stream to more distant lands." Commenting upon a statute enacting the principle the same writer says—that it "is invalid seems hardly to admit of doubt." [17] Such attempted reservation from land titles in favor of indiscriminate irrigation ditch building in the future is similar to the attempted reservation in the early California Possessory Act in favor of miners; and the refusal of the Colorado court to adhere to it is like the refusal of the California court to give full force to the Possessory Act.[18] It was rather a socialistic doctrine, for-

[13] Prentice v. McKay, 38 Mont. 114, 198 Pac. 1081.

[14] "If the *acequia* shall cross the land of another, or the crown lands, or the land common to the inhabitants of the pueblo, a license from the private owner, or from the king, or from the town council, is indispensable." Escriche, "*Acequia*"—quoted in Lux v. Haggin, 69 Cal. 255, 10 Pac. 674.

The Spanish Philippine Code contained in articles 407 to 425 the usual civil-law provisions concerning waters. Article 414 provided: "No one may enter private property in search of waters, or make use of them without permission from their owners."

[15] In New Mexico Compiled Laws, section 17 (enacted in 1874), it was provided that "all of the inhabitants of the Territory of New Mexico shall have the right to construct either private or common *acequias*, and to take the water for said *acequias* from wherever they can, with the distinct understanding to pay the owner through whose land said *acequias* have to pass a just compensation for the land used," evidently meaning eminent domain condemnation.

[16] Black's Pomeroy on Water Rights, p. 222.

[17] *Ibid.*, p. 207.

Substituting in the following the word "appropriatable" for "navigable," a succinct statement of the rule is deduced. "But as these so-called navigable ('appropriatable') waters are wholly surrounded by the lands of plaintiff, and as it is not asserted and indeed it would require much rashness and temerity to assert, that the public has a right to invade and cross private lands to reach navigable ('appropriatable') waters, a lawful mode of ingress and approach to these navigable ('appropriatable') waters became necessary." Mr. Justice Henshaw, in Bolsa etc. v. Burdick, 151 Cal. 254, 90 Pac. 532, 12 L. R. A., N. S., 275.

[18] *Supra*, sec. 85.

"What value would there be to a title in one man, with a right of invasion in the whole world?" Judge Field asked in Boggs v. Merced Min. Co., 14 Cal., at 379, 10 Morr. Min. Rep. 334.

getting that we have constitutions guaranteeing private property rights, to say that if you want another man's property badly enough you have only to take it, or that a court will listen to an argument that you have a greater desire or necessity to possess my property than I have. If it is for a public purpose and you pay for it, yes; and that the law allows to-day.[19]

The right to be protected in the use of water as an incident to the land (the riparian right) is, as in the next section set forth, refused recognition in Colorado; but the right to be protected against trespass as an incident to the ownership of land, while at first cast off with the riparian right, is now restored to the landowner. It would be a taking of land without due process of law to permit others to seize rights of way over it; the California doctrine merely carries this also to seizing the use of water that is incident to the land.

Indeed, it is the fact of access to the stream without trespass, which forms the basis of the law of riparian rights both at civil law and common law, for only riparian owners have *natural* access to the stream as a fact.[20] So long as the bordering lands are public and unreserved, there is free access to the stream; but when the lands become settled up, and nonriparian owners have no access to the stream, the Colorado doctrine must provide some elaborate system for condemnation of rights of way. As settlement advances, nonriparian owners will be forced to resort to condemnation against riparian owners just as where the law of riparian rights prevails, excepting only that damages need not be paid for the water but only for the right of way. It resolves itself into the ultimate fact that, after all, riparian owners have certain natural rights, owing to their position with relation to the stream as a natural resource, that are rooted in nature and are of too deep an import to be wholly disregarded under any system of law. Say what one will about modifying the water law to meet necessities, in the end we find that it is the fact of nature which governs, and will not modify by court decree.

When the riparian lands are well settled, the lack of access to the stream (except by condemning under the riparian owner) will exclude nonriparian owners from the stream under the law of appropriation as well as under the law of riparian rights; the differ-

[19] *Infra*, c. 26.

[20] *Supra*, sec. 54; *infra*, sec. 692 et seq.

ence being that the common law seeks to preserve equality among all who have natural access (the riparian owners) while the law of appropriation, because of its origin in an unsettled region, holds to the principle of exclusive right by priority, or "first come first served."[21] As settlement advances, the law of appropriation must necessarily retreat with the public lands; and as public lands bordering on streams are withdrawn by settlement, or by Federal withdrawal from entry, the law of appropriation will feel the effect of the determinative force of the right of access upon any system of water law.

(3d ed.)

§ 226. Exception in Favor of Government Ditches.—As applicable throughout the West it may be noted that an act of Congress[22] has the effect of reserving a perpetual easement and right of way to the government for ditches and canals that might thereafter be constructed by authority of the government over lands which have been entered and patented subsequent to the passage of the act or that shall be patented hereafter. In other words, all private lands, hereafter patented, or patented since 1890, have been held to be subject to government ditch building.[23]

A California statute is to the same effect regarding ditch building by the United States upon State lands hereafter patented.[24]

[21] For settled regions the law of prior appropriation resolves itself into a system of *priority between riparian owners*, where the common law seeks equality between them. See *supra*, sec. 51 et seq., "the law confined to natural resources."

[22] August 30, 1890, 26 Stat. 391; 6 Fed. Stats. Ann. 508; U. S. Comp. Stats. 1901, p. 1570.

[23] Green v. Wilhite, 160 Fed. 755; Same v. Same, 14 Idaho, 238, 93 Pac. 971. The act, a proviso found in the sundry Civil Appropriation Act of Congress of August 30, 1890 (26 Stat. 391, c. 837; 6 Fed. Stats. Ann. 508 (U. S. Comp. Stats. 1901, p. 1570), reads as follows: "That in all patents for lands hereafter taken up under any of the land laws of the United States, or on entries or claims validated by this act, west of the one hundredth meridian, it shall be expressed that there is reserved from the land in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States."

The land office has ruled that this applies also to allowing the United States to build a reclamation ditch over a railroad located since 1890. 36 Land Dec. 482. But the Idaho court held that the land office was in error. Minidoka etc. Co. v. Weymouth (Idaho), 113 Pac. 455.

[24] Cal. Stats. 1907, p. 848. See Cal. Stats. 1911, c. 426, regarding rights of way for municipalities.

B. WATER ON PRIVATE LAND.

(3d ed.)

§ 227. Difference in California and Colorado as to Water on Private Land.—While all jurisdictions to-day join in prohibiting hostile entry upon private land to appropriate water, they are divided into two classes, already considered, with regard to drawing water out of another's private land by going elsewhere for the purpose. The California doctrine, recognizing in the private landowner riparian rights, prohibits diversion of water from the private land by nonriparian owners or for nonriparian use, even if entry upon the stream is made upon other land above the complaining landowner. The law of appropriation is wholly confined in California to entry upon and waters flowing over public land. On the other hand, in Colorado the law of prior appropriation applies to all waters, whether flowing over public or private land, so long as an actual trespass is not made upon the land itself of the complaining landowner.

(3d ed.)

§ 228. Water Flowing Over or by Private Land cannot be Appropriated in California.—Congress, by the act of 1866, confirmed and granted to the pioneers their rights, and held the public lands open to free appropriation of water, subject to local rules, which local rules in California are enacted, under the act of Congress, for the public domain in the Civil Code (sections 1410–1422); but the United States did this only for its own lands—the public lands. The California law of appropriation of water is in this the same as the mining law in nature and history, and the system does not sanction free appropriation as a perpetual right regarding waters on private land any more than the mining statutes confer any right to minerals there. Under the California doctrine, the private landowner has the right of a riparian proprietor to have the stream (so far as it is or may be beneficial to his land) remain flowing by his land, whether using it or not, against all the world excepting only other riparian owners also owning land along the same stream and taking water for the use thereof (and excepting also diversions made while his land was public, and before title passed into private hands). It is the essence of the California doctrine that, as a general principle, no appropriation, properly speaking, can be made of water flowing over or by private land,

even though diverted upon an upper part of the stream without actual entry upon the complaining party's private land itself.[25]

(3d ed.)

§ 229. **Authorities Quoted.**—In the first case upholding appropriation [1] it was said: "It must be premised that it is admitted on all sides that the mining claims in controversy, and the lands through which the stream runs and through which the canal passes, are a part of the public domain, to which there is no claim of private proprietorship"; and in another very early case: "It results from the consideration we have given the case that the right to mine for the precious metals can only be exercised upon public land; that although it carries with it the incidents to the right, *such as the use of wood and water,* those incidents *must also be of the public domain in like manner as the lands.*" [2] And so in subsequent cases. In Lux v. Haggin:[3] "Recognizing the United States as the owner of the lands and waters, and as therefore authorized to permit the occupation or diversion of the waters as distinct from the lands, the State courts have treated the prior appropriator of water *on the public lands* of the United States as having a better right than a subsequent appropriator, on the theory that the appropriation was allowed or *licensed by the United States.* And since the act of Congress *granting* or *recognizing* a property in the waters actually diverted and usefully applied *on the public lands* of the United States, such rights have always been claimed to be deraigned by private persons *under the act of Congress* from the recognition accorded by the act, or from the acquiescence of the general government in previous appropriations made with its presumed sanction and approval." In Lux v. Haggin even the dissenting opinion of Judge Ross concedes, "The doctrine is expressly limited to the waters upon what are known as the public lands." In another case: "It does not appear whether the lands through

[25] See *supra,* sec. 117, list of cases following the California doctrine; *infra,* sec. 259, prior settlers; and *infra,* sec. 515 et seq., protection of the riparian right against nonriparian owners.

We state this here in this general way, as a question between public and private land, the former raising questions outside the common law. When examined within the common law, irrespective of public land law, we would not say that this statement, as to what the riparian right consists of, may not be somewhat narrowed (*infra,* c. 35). But that has no bearing here, while considering the distinction between public and private land law.

[1] Irwin v. Phillips, 5 Cal. 140, 63 Am. Dec. 113, 15 Morr. Min. Rep. 178.

[2] Tartar v. Spring Creek etc. Co., 5 Cal. 396, 14 Morr. Min. Rep. 371, quoted and approved by Field, C. J., in Biddle Boggs v. Merced Min. Co., 14 Cal. 377, 10 Morr. Min. Rep. 334.

[3] 69 Cal. 255, 10 Pac. 674.

which the stream ran at the time defendant claims to have acquired his right of appropriation were private or public property. If they were public lands of the United States at that time, we think *it devolved upon the defendant to show that fact.*"[4] In Cave v. Tyler[5] it was said: "In all the cases to which we have referred, the diversion was upon the public domain," and held that the law requires it to be so.[6]

The same is laid down in the other courts following the historical theory. The United States circuit court of appeals says in a case arising in Montana: "The law is well settled that the doctrine of appropriation under said statute [Desert Land Act of 1877], which is recognized and protected by section 2339 of the Revised Statutes, applies only to public lands and waters of the United States."[7] And in Nebraska: "In this way the rule of appropriation became established in the Pacific States, in opposition to the common law, with reference to streams or bodies of water which wholly ran through or were situated *upon the public lands of the United States.*"[8] "These rules, however, were confined to the public lands, and are so confined at the present time in California, Oregon and Washington."[9] And in Washington: "Moreover, the doctrine of appropriation applies only to public lands, and when such lands cease to be public and become private property, it is no longer applicable."[10] Likewise in another State: "In other words,

[4] City of Santa Cruz v. Enright, 95 Cal. 105, 30 Pac. 197.

"The rancho Temescal was never public land within the meaning of the United States statutes affecting appropriations of water. The riparian rights of the owners of private land are fully protected by section 1422 of the Civil Code. One who bases his right solely upon appropriation made of waters flowing over land which at the time of the appropriation was part of the public domain acquires thereby no right superior to or in derogation of those attaching to lands riparian to the same stream which at the time of the appropriation were held in private ownership." Hargrave v. Cook, 108 Cal. 72, 41 Pac. 18, 30 L. R. A. 390, per Mr. Justice Henshaw.

[5] 133 Cal. 566, 65 Pac. 1089.

[6] Compare Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. 338, saying *(dictum)*: "The right to appropriate water under the provisions of the Civil Code is not confined to streams running over public lands of the United States," the court using the expression "common-law appropriation." This case is considered in a subsequent section, *infra*, sec. 246.

[7] Winters v. United States, 143 Fed. 740, 74 C. C. A. 666. See, also, S. C., 28 Sup. Ct. Rep. 207, 28 Sup. Ct. Rep. 208, 52 L. Ed. 340.

[8] Crawford v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647, 93 N. W. 781, 60 L. R. A. 889.

[9] Meng v. Coffee, 67 Neb. 500, 108 Am. St. Rep. 697, 93 N. W. 715, 60 L. R. A. 910.

[10] Benton v. Johncox, 17 Wash. 277, 61 Am. St. Rep. 912, 49 Pac. 498, 39 L. R. A. 107. See, also, Sanders v. Wilson, 34 Wash. 659, 76 Pac. 281; Mason v. Yearwood (Wash., 1910), 108 Pac. 608.

it is held under that doctrine that the rules of prior appropriation, founded upon local customs and laws, and ratified by congressional legislation, are confined in their operation to the public domain of the United States."[11]

(3d ed.)

§ 230. Water Partly on Public and Partly on Private Land in California.—Where the course of a stream is partly on public and partly on private land, there would seem an argument on principle that some residuum of right therein remains in the United States by virtue of such dual position of the stream, which could be reached by appropriation. Assuming that there was such a residuum, we made some extended argument on this ground in the previous editions of this book, and perhaps the law *might* have taken that course. But it seems settled now in California by authority that no such residuum exists so far as concerns nonriparian appropriation against the riparian rights of the private landowner;[12] that a single private riparian land-holding upon a stream withdraws it (so far as it is, or may be in the future, beneficial to that land) completely from obtaining a permanent exclusive

[11] Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210.

The Code Napoleon likewise excepts streams on the public domain. "The waters mentioned in articles 644 and 645 [of the Code Napoleon affirmative of riparian rights] are, to the exclusion of all others, the natural streams that do not form dependencies of the public domain." Droit Civile Francais, by Aubrey & Rau, 4th ed., vol. III, p. 46.

"But if the water was not so appropriated when it flowed over the public domain, it was not subject to appropriation after the land over which it flowed became private property." Cruse v. McCauley (Mont.), 96 Fed. 374.

In Texas, the act of March 10, 1875, providing that any canal company "shall have the free use of the waters and streams of the State," does not apply to waters running through private lands, so as to affect the vested rights of riparian owners, and hence, if defendants, as the owners of land along a stream, have the right to use the water for purposes of irrigating their lands, that right remained unaffected by the incorporation of plaintiff company and by the legislation passed for the encouragement of irrigation. Mud Creek Irr. Agr. & Mfg. Co. v. Vivian, 74 Tex. 170, 11 S. W. 1078.

See likewise Prentice v. McKay, 38 Mont. 114, 98 Pac. 1081; Lytle Creek Co. v. Perdew (Cal.), 2 Pac. 732; Lindley on Mines, 2d ed., p. 1526, sec. 841. See, also, cases cited, *supra*, secs. 117, 156.

The recent Oregon modification of this rule (which heretofore applied as much in Oregon as in other jurisdictions following the California doctrine) is elsewhere set forth. *Supra*, sec. 129.

[12] The argument, though raised on the briefs in Lux v. Haggin, received no attention from the court; and in a later case where it was raised the court said: "We see nothing in the suggestion that defendant is presumably the licensee of the United States, and that the United States, being an upper riparian proprietor, could take a reasonable quantity of water as against the lower riparian owner. A riparian owner may not

nonriparian right by appropriation until that riparian right is nullified by grant, condemnation or prescription.[13]

(3d ed.)

§ 231. The Law of Appropriation of Diminishing Importance in California.—In the light of this history, the status of the California Civil Code, sections 1410 to 1422, as applicable only to public lands, and waters thereon, is clear. They declare in general terms that the right to a stream can be acquired by prior appropriation on posting a notice and actual diversion; but section 1422, upon the original enactment of these sections, provided that the rights of riparian proprietors should not be affected, which, together with the history, shows these code sections to have been passed as public land law. It is like the mining statute just passed in California,[14] which declares that any person may locate a mining claim by posting and recording a notice, these mining sections wholly failing to use the words "public lands"; yet everyone knows them to be confined thereto. Moreover, the water sections provide for posting of notices, building of ditches, and changes of mode of use, changes of ditches, changes of point of diversion, none of which, it is most emphatically held in California, can be done after the land has passed into private hands.[15] The intrinsic evidence of the sections, together with their history, shows them to be purely public land law.

The result seems to be that, since the public domain has been passing in California, and the *agricultural* lands are now mostly in private hands, the logical end is approaching, and the system of prior appropriation is becoming little applicable to the streams of the State. The common law of riparian rights is becoming the general law. Nothing could be more emphatic than the opinion of Mr. Justice Sloss in a late California decision denying any right in a nonriparian owner to divert water flowing through private land which is or may be beneficial to the land, against the owner of that land;[16] so that the California Civil Code sections[17] upon the system of appropriation are approaching a condition where

authorize, as against a lower proprietor, a company to take water from the stream, to be conducted at a distance and sold." Heilbron v. Canal Co., 75 Cal. 426, at 432, 7 Am. St. Rep. 183, 17 Pac. 535.

[13] *Infra*, sec. 815 et seq.; especially sec. 817.

[14] Cal. Civ. Code, sec. 1426 et seq.

[15] *Supra*, sec. 221, and *infra*, secs. 261, 498, 502, 505.

[16] Miller v. Madera etc. Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A., N. S., 391.

[17] 1410–1422.

they will be *functus officio*. As the public domain is passing, they, enacted under the act of Congress to govern rights in the public domain, are passing with it, especially as the United States is substituting new rules for the public lands under the policy of conservation. The chief remaining applicability of the code sections is to diversions now in use, acquired in the public domain days, and, to some extent, to Sierra streams which in considerable part still flow over public land (the forest reserves).[18]

(3d ed.)

§ 232. Water on Private Land in Colorado.—As already set forth,[19] rights in *water* as incident to private land title (riparian rights as distinguished from rights of way or ditch building) are not at all recognized in the States following the Colorado doctrine; a principle starting, like that just discussed, with Yunker v. Nichols. In *this* respect not only was the early case not departed from, but, on the contrary, it was so strongly intensified that the law of appropriation is now the sole law upon the subject of waters in Colorado. So long as the appropriator does not trespass upon the private land itself,—that is, so long as he goes upon a point on the stream above the private boundary,—the entire stream may be diverted from the private riparian landowner if he has not, at the time, himself put it to use; and this though the stream be the sole element of value of the land (or rather, would have been the sole element of value in jurisdictions recognizing riparian rights).[20] As said in a late Idaho case: "It matters not through or over whose land they flow."[21]

(3d ed.)

§ 233. Conclusions.—The following conclusions seem clearly correct as a general statement:

(a) An appropriation of water may be made in all jurisdictions (so far as local law governs) of waters flowing wholly over public land.

(b) In no jurisdiction can rights of way be appropriated over private land against the landowner's protest (except by grant, condemnation or prescription).

18 See *supra*, sec. 197.

19 *Supra*, secs. 118, 167 et seq.

20 Sternberger v. Seaton etc. Co., 45 Colo. 401, 102 Pac. 168, citing this book.

21 Idaho etc. Co. v. Stephenson (1909), 16 Idaho, 418, 101 Pac. 821. An exception elsewhere considered has recently been made in Idaho (*supra*, sec. 185).

(c) Under the Colorado doctrine an appropriation can be made of water flowing over private land, if not requiring entry upon that land itself; but not under the California doctrine. In California private land is protected against appropriation of water as much as against appropriation of rights of way, whereas in Colorado the protection is only against appropriation of rights of way.

§§ 234–242. *(Blank numbers.)*

CHAPTER 11.

APPROPRIATIONS ON PRIVATE LAND (CONTINUED).

§ 243. Introductory.
§ 244. By the landowner himself on his own land.
§ 245. By grant, condemnation, or prescription.
§ 246. By disseisin—Wrongful appropriations—Duckworth v. Watsonville Co.
§ 247. Same.
§ 248. Conclusions.
§§ 249–255. (Blank numbers.)

(3d ed.)

§ 243. There are some matters, not properly part of the law of appropriation, which may nevertheless be mentioned because of the confusion in the previous editions of this book from having failed to distinguish them. That is, the prohibited acts upon private land considered in the preceding chapter may be done on his own land by the landowner himself, or by his privies through grant, condemnation or prescription; likewise there is the rule of procedure that the landowner must be a party to the controversy before his rights can be adjudged.

(3d ed.)

§ 244. **By the Landowner Himself on His Own Land.**—Where a landowner diverts water upon his own land, it is obvious that the fact that the point of diversion then lies upon private land (his own) is nothing against him. In California, if the water comes from or flows to public land, it is to that extent a good public land appropriation (in Colorado it matters not whence or whereto the water flows so long as it be unused); referring, in California, to the case of a pioneer settler on a stream obtaining, while the remaining riparian land is public, rights against subsequent riparian settlers greater than the common law alone would give him after the settlements of others have been made.[1]

One on his own land may appropriate and get an exclusive right to the whole stream where the rest of the land is public. The appropriation in one case was made on the land of a party, and

[1] *Infra*, secs. 322, 323, appropriations by riparian owners.

not on public land. The court said: "For, so far as appears, they were at that time the sole occupants of the lands bordering the stream; and the lands through which it flowed after leaving the lands of Kewen belonged to the United States. Such being the case, they had a right to appropriate the entire stream for any beneficial purpose."[2] In Washington[3] it is said: "The fact appearing that respondent first diverted water from the stream where it ran through his own premises does not militate against his appropriation." In Montana:[4] "Now, being the owner of riparian land, he can, as has been shown, legally exercise this privilege on his own land; and, when he has perfected such inchoate right by fulfilling the requirements of the statute, the legal title to such water-rights becomes vested in him, ... by reason of statutory grant." In Oregon:[5] "The right of prior appropriation is limited to the use of water by the pioneer settler before any adverse claims or riparian proprietors attach to the stream from which the water is taken, and not to the point of diversion, which may be either within or beyond the boundaries of the tracts selected by such settler." Adding that to make him go above his boundary to divert might be so expensive as to be prohibitive and so retard settlement. In a more recent case the same court says: "An appropriation of water is a grant by the general government to the settler of the right to its use from a non-navigable stream, to the injury of all public land above [and, it may be added, below] the point of diversion, which may be within or beyond the boundaries of the settler's claim."[6]

Likewise as to the water on his land, as well as a ditch on it. The fact that the water is flowing over private land (his own land) cannot militate against him where that is the only ground for disputing his diversion. Private land, it is true, has riparian rights under the California doctrine, but where those are his own rights alone, this does not prevent the pioneer settler from making his appropriation of water coming from or flowing to public land like anyone else. In Healy v. Woodruff,[7] an owner of a water-right on public land later bought up part of the lower riparian land

[2] Alhambra etc. Co. v. Mayberry, 88 Cal. 74, 25 Pac. 1101.

[3] Offield v. Ish, 21 Wash. 277, 57 Pac. 809.

[4] Smith v. Denniff, 24 Mont. 20, 81 Am. St. Rep. 408, 60 Pac. 398, 50 L. R. A. 741.

[5] Brown v. Baker, 39 Or. 66, 65 Pac. 799, 66 Pac. 193.

[6] Morgan v. Shaw, 47 Or. 333, 83 Pac. 534.

[7] 97 Cal. 464, 32 Pac. 529.

Usually this is regarded to-day, in the law of real estate, as a subordinate matter of procedure, to the effect that controversies must be decided between the parties litigant.[12] The ancient common law had erected an elaborate system of tenure by disseisin upon it, to the effect that the first wrongdoer (or "disseisor"), because of his right to hold off a second wrongdoer, had a sort of tenure by possession until the true owner (or "disseisee") undertook to oust both of them by a "writ of novel disseisin." There is a recent revival of the doctrine as concerns water law in the case of Duckworth v. Watsonville Co. in California; calling disseisin an "appropriation," and the wrongdoer an "appropriator."[13]

Some comments in the following section may serve to put the matter before the reader.

(3d ed.)

§ 247. **Same.**—At common law, prior possession gives a *right* only as to those things which previously had no owner, such as wild animals, fish, and other things in the "negative community."[14] But of things having an owner, naked possession by another is no source of *title* at common law,[15] and since streams on private land

to the owner thereof, while the stream above flowed entirely through public land. Defendant, also a stranger to the lower private landowner, later acquired title to the upper land from the United States, and interfered with the water. Referring to the rule of the California law that the doctrine of appropriation applies only to public land, it was held that the plaintiff had no redress because his point of diversion was on private land. But as the landowner on whose land the point of diversion lay was not a party to the controversy in Cave v. Tyler, it may be that it should have been enough (against the upper owner alone) that the *upper* land was public at the time of the diversion.

12 *Infra*, sec. 625 et seq.

13 In this case the court says, upon the basis of a disseisor's diversion (calling it "common-law appropriation") on a third person's private land or water: "The right to appropriate water under the provisions of the Civil Code is not confined to streams running over public lands of the United States." Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. 339. But upon the second appeal the learned justice who had written this said in a concurring opinion, "All that was said on this subject on the previous appeal is inapplicable to the present case," and the justice who wrote the court's opinion upon the second appeal said that it would be a "mere device" to entitle such trespasses upon private rights as "appropriations." Duckworth v. Watsonville Co. (1910), 158 Cal. 206, 110 Pac. 927. Rehearing denied September 24, 1910.

Some other California opinions have said, upon the same basis, that the law of appropriation applies to percolating waters, though holding that no exclusive appropriation thereof can be made against the rights (though unused) of the landowner in whose land the percolating water exists; and the California court has expressly said that such so-called trespasser's "appropriations," or appropriations by disseisin, are "radically different" from *vested* rights in percolating water. *Infra*, secs. 824, 1158.

14 *Supra*, c. 3.

15 See Holmes on the Common Law, treating of "possession."

have (in the sense of usufructuary right) owners, viz., the riparian community along it, naked possession thereof by a nonriparian owner is no common-law source of title. But there is a difference between "title" and "possession." Prior possession without title has a right of protection between two trespassers themselves. Neither wrongdoer's position is permanent, being terminable, at any time before prescription has arisen, by the action of the riparian landowner; yet the first trespasser may hold off the second in the meantime, even though both are trespassers.

It can hardly be that such trespassers' possession on private water-rights or land of a third person can be called "appropriations" in California to-day without causing confusion. It is true that some centuries ago there was a tendency to build the common law of watercourses upon this idea; but it soon passed to a very subordinate position.[16] It is also true that the pioneer California water law of the public domain was rested upon it, but there also it has long since passed away.[17] The law of possessory rights on public land was never amalgamated with the law of mere trespassers on private rights any more than was the law of mining. Just as to water, the first trespasser (or disseisor) digging for gold on a private farm is a prior "appropriator" as to another mere trespasser who seeks to oust him; the first possession is good enough against the later. Yet in such a case the details of the mining law would not apply, nor require that the first trespasser (on, for example, a Santa Clara orchard) has staked out a claim of the statutory length, had recorded a certificate of location, done the statutory assessment work and the like. There is no difference in saying that the mining law applies to private land in California, and that the law of appropriation of water does.

[16] *Infra*, sec. 668.

[17] The assertion that the pioneers were trespassers subject to the paramount title of the United States (or of its later patentees if the lands on which appropriations were made should later pass to patent) became a source of alarm, which caused the early California court to declare an appropriation of water *on public land* to be a freehold right good against the world by grant from the United States, which the supreme court of the United States approved, and in which Congress joined by the act of 1866. The law of appropriation, as a rule of disposal of rights in the public domain, thus arose when the region was undeveloped, and all energies were turned to induce settlement and encourage entries thereon. It was built up for the encouragement of the pioneers, who, though they refused to admit it, were in fact all mere trespassers; a system for the encouragement of trespass. But this encouragement (and this system of rights by "disseisin") was never, in California, of importance on private land. *Supra*, cc. 5 and 6.

To say, upon the doctrine of disseisin, that there is now a system of appropriating streams wholly on private land in California, which upholds the common law of riparian rights with respect to such lands, is the same as saying there is such a system in England. The doctrine of disseisin is as operative in England and the East as in California; yet to say on that account that the law of appropriation of water is in force in England would not be attempted. As is said in a leading English case, "In this, as in other cases of real property, possession is a good title against a wrongdoer," but adding that this is a "very different question" from the law of prior appropriation of water.[18] Such claims may, perhaps, be "honor among thieves"; both rivals are stealing the true owner's water or his land for a ditch. The first thief can keep off the second one until prescription has given him a vested right by outlawing his own theft; but until then neither thief has any "*right*" at all, and it is difficult to call the possession of either a "*right* by prior appropriation." They are wrongs, not rights.

To speak of disseisors' possessions as "appropriations" is to speak about "rights" that are admittedly no rights at all. Only one California case undertook to actually apply the doctrine of disseisin of private rights under the form of calling it "appropriation," and upon a second appeal itself spoke of it as "a mere device," wholly inapplicable to the practical solution of the problem involved, which was decided in the end upon rights by grant, irrespective of claims by "appropriation." The so-called appropriator got nothing in the end. For "the term 'appropriation' as applied to the acquirement of the right to the use of water has in this State a statutory technical meaning,"[19] and, as declared in Lux v. Haggin, in the accepted sense of that word, it does not exist at common law or on private land. Only the freehold estate, good against the world because obtained on public land under the Federal Statute to-day passed in that behalf (the act of 1866) can be properly called an "appropriation" in California, without confusion.[20]

[18] Mason v. Hill, 5 Barn. & Adol. 1, 110 Eng. Reprint, 692.

[19] Alta etc. v. Hancock, 85 Cal. 219, at 223, 20 Am. St. Rep. 217, 24 Pac. 645. Likewise Merrill v. Southside Co., 112 Cal. 433, 44 Pac. 720; Hildreth v. Montecito Co., 139 Cal. 29, 72 Pac. 395.

[20] In 22 Harvard Law Review, 312, reviewing the second edition of this book, the reviewer comments on "the view taken in a late case (Duckworth v. Watsonville Co., 150 Cal. 520, 89 Pac. 338), that 'the right to appropriate water under the provisions of the Civil Code is not confined to streams

The reader should appreciate, however, that it is this principle alone of "claims subject to a paramount title" (that is, wrongful appropriations by disseisin) that is contemplated in the few opinions mentioned saying that the law of prior appropriation of water in California applies to waters on private land, and to percolating waters, while holding most emphatically that this type of "appropriation" is of no avail against the riparian owner or overlying landowner. They are in fact not "appropriations," but "disseisins," which are no *rights* at all until prescription has arisen.

(3d ed.)

§ 248. Conclusions.—The general principles deducible from the authorities upon appropriations on, or of waters on, private lands, we have stated at the end of the preceding chapter. We here venture to state the following exceptions, deducible from the authorities considered in the present chapter:

(a) A diversion made on, or of waters flowing over, one's own private land by the landowner himself or his privies will not be open to attack merely because of the private character of the land of the party making the diversion, or his privies.

(b) Rights may be obtained against the landowner by grant, condemnation or prescription.

(c) Priority of possession will govern claims of trespassers on, or as to waters flowing over, private land, solely between themselves, subject to the paramount right of the private landowner or true water-right owner, and terminable by him; but under the California doctrine such claims are not properly "appropriations," that term having generally a sense of paramount right, denoting title good against riparian owners and the whole world, and obtainable only on public land; nor, probably, are such temporary, ter-

running over public lands'; the court using the expression 'common-law appropriation'"; and says: "This loses sight of the California theory of the historic basis (referred to in the opinion) of appropriation as an implied grant from the United States (Act of 1866, U. S. Rev. Stats., secs. 2339, 2340) and from the State by the provisions of the code. The view is squarely opposed to all the California authorities which have passed upon this point. The qualifications, however, contained in the opinion practically confine appropriators of the class indicated to rights ripened by prescriptive user."

The Duckworth opinion says you can rightfully appropriate, and get a "vested" right for nonriparian use thereof, any water on private land to which vested rights have not already attached. What such water can there be when the riparian owner is entitled in California to absolutely enjoin such use? Does not the statement of necessity limit *rights* by appropriation (as distinguished from wrongs) to waters on public land?

minable claims governed by the statutes upon "appropriation" when those statutes differ from the common law in respect to disseisin of the true owner by two adverse claimants both subject to the paramount title. They are not vested rights.

(d) The rights of any person infringed cannot be considered in opposition to a claim when set up by a stranger to the party infringed. If not set up by the injured party or someone in privity with him, the infringed right does not militate against the claim; and when prescription has arisen, a vested right then, but not till then, results (a right by prescription, not by appropriation).

§§ *249–255. (Blank numbers.)*

CHAPTER 12.

RELATION OF PUBLIC LAND APPROPRIATORS TO RIPARIAN PROPRIETORS.

§ 256. Another phase of the same question.
§ 257. Subsequent settlers.
§ 258. Subsequent settlers under Federal Right of Way Acts.
§ 259. Prior settlers.
§ 260. Prior settlers who hold the land in fee.
§ 261. Prior settlers before patent.
§ 262. Prior settlers under the Colorado doctrine.
§ 263. Prior settlers under Federal Right of Way Acts.
§ 264. Conclusion.
§§ 265–274. (Blank numbers.)

(3d ed.)

§ 256. The foregoing chapters and the present one cover matters which have been usually discussed independently, and they were so treated in the preparation of this book. It is only when the work is done and they are placed side by side that they are seen to be identical questions. Any repetition which may seem to result in devoting this chapter to it after it has been substantially covered in what has gone before must be laid at other doors than the author's. I have but followed the original sources, in which, as the reader must already have seen, there has been all the difficulty which results from diversities of thought that were not appreciated; and it is only by following the discussion through the same varying forms which it has taken in the authorities themselves that some degree of completeness and clearness may be hoped for.

(3d ed.)

§ 257. **Subsequent Settlers.**—The United States having granted the right to use the water while on public land to appropriators under the act of 1866 (such being the theory of the California doctrine), later settlers take subject thereto, as in any case of successive grants from a common grantor where the prior grantee is in possession. A grant of land from the United States remains subject to prior appropriations of water or prior rights to

ditches.[1] In the first case cited in the note, the later grant was by patent to railway lands; in the last, to mining ground. In De Necochea v. Curtis, it was of a homestead. No matter what the character of the later land grant, it is not devested of prior rights of appropriation of water or rights to ditches acquired while the land was public. This is true under both the California and Colorado doctrines of water law (except that the latter does not rest it upon the act of 1866, but upon local law alone).[2]

[1] U. S. Rev. Stats., 2340 (the act of 1866, as supplemented in 1870); Broder v. Natoma Water Co., 101 U. S. 274, 25 L. Ed. 790, 5 Morr. Min. Rep. 33; S. C., 50 Cal. 621, 4 Morr. Min. Rep. 670; Irwin v. Phillips, 5 Cal. 140, 63 Am. Dec. 113, 15 Morr. Min. Rep. 178; Himes v. Johnson, 61 Cal. 259; South Yuba Water Co. v. Rosa, 80 Cal. 333, 22 Pac. 222; De Necochea v. Curtis, 80 Cal. 397, 20 Pac. 563, 22 Pac. 198; Burrows v. Burrows, 82 Cal. 564, 23 Pac. 146; Ramelli v. Irish, 96 Cal. 214, 31 Pac. 41; Taylor v. Abbott, 103 Cal. 421, 37 Pac. 408; Faulkner v. Rondoni, 104 Cal. 140, 37 Pac. 883; McGuire v. Brown, 106 Cal. 660, 39 Pac. 1060, 30 L. R. A. 384; Jacob v. Day, 111 Cal. 571, 44 Pac. 243; Senior v. Anderson, 115 Cal. 496, 47 Pac. 454; Williams v. Harter, 121 Cal. 47, 53 Pac. 405; Land v. Johnston (1909), 156 Cal. 253, 104 Pac. 449; Tuolumne etc. Co. v. Maier, 134 Cal. 583, 66 Pac. 863, 21 Morr. Min. Rep. 678.

[2] *Arizona.*—Miller v. Douglas, 7 Ariz. 41, 60 Pac. 722; Hill v. Lenormand, 2 Ariz. 354, 16 Pac. 266.

California.—Patterson v. Mills (Cal.), 68 Pac. 1034; Judkins v. Elliott (Cal.), 12 Pac. 116; Wutchumna Water Co. v. Pogue, 151 Cal. 105, 90 Pac. 362; Wolfskill v. Smith, 5 Cal. App. 175, 89 Pac. 1001; Land v. Johnston (1909), 156 Cal. 253, 104 Pac. 449, and cases in preceding note.

Colorado.—Tynon v. Despain, 22 Colo. 240, 43 Pac. 1039 (railway grant); Larimer etc. Co. v. People, 8 Colo. 614, 9 Pac. 794; Coffin v. Left Hand D. Co., 6 Colo. 443.

Idaho.—Drake v. Earhart, 2 Idaho, 750, 23 Pac. 541; Le Quime v. Chambers (1908), 15 Idaho, 405, 98 Pac. 415, 21 L. R. A., N. S., 76.

Montana.—Cottonwood D. Co. v. Thom (1909), 39 Mont. 115, 101 Pac. 825, 104 Pac. 281.

Nebraska.—Rasmussen v. Blust (1909), 85 Neb. 198, 133 Am. St. Rep. 650, 122 N. W. 862.

New Mexico.—Trambley v. Luterman, 6 N. M. 25, 27 Pac. 312.

Oregon.—Carson v. Gentner, 33 Or. 512, 52 Pac. 506, 43 L. R. A. 130; Brosnan v. Harris, 39 Or. 148, 87 Am. St. Rep. 649, 65 Pac. 867, 54 L. R. A. 628; Dodge v. Marden, 7 Or. 457, 1 Morr. Min. Rep. 63; Tolman v. Casey, 15 Or. 83, 13 Pac. 669; Nevada etc. Co. v. Bennett, 30 Or. 59, 60 Am. St. Rep. 777, 45 Pac. 472; Speake v. Hamilton, 21 Or. 3, 26 Pac. 855; Kaler v. Campbell, 13 Or. 596, 11 Pac. 301; Britt v. Reed, 42 Or. 76, 70 Pac. 1029; Parkersville etc. Dist. v. Wattier, 48 Or. 332, 86 Pac. 775; Davis v. Chamberlain, 51 Or. 304, 98 Pac. 154; Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, at 1094, 102 Pac. 728.

South Dakota.—Driskill v. Rebbe, 22 S. D. 242, 117 N. W. 135.

Utah.—Lehi Irr. Co. v. Moyle, 4 Utah, 327, 9 Pac. 867.

Washington.—Thorpe v. Tenem Ditch Co., 1 Wash. 566, 20 Pac. 588; Geddis v. Parrish, 1 Wash. 587, 21 Pac. 314; Isaacs v. Barber, 10 Wash. 124, 45 Am. St. Rep. 772, 38 Pac. 871, 30 L. R. A. 665. A statute to the contrary is held unconstitutional, as giving the patentee power to destroy the right of an appropriator acquired on public land. Miller v. Wheeler (1909), 54 Wash. 429, 103 Pac. 641, 23 L. R. A., N. S., 1065.

United States.—Morris v. Bean (Mont.), 147 Fed. 425; Broder v. Natoma Water Co., 101 U. S. 274, 25 L. Ed. 790, 5 Morr. Min. Rep. 33.

See in general, also, the cases in support of the Colorado doctrine, *supra*, sec. 118. The two doctrines are in entire accord in this.

In a recent California case it is said:[3] "As to plaintiff's title to the water, it is indisputable that the Wutchumna ditch was constructed over vacant government land prior to the time that Pogue acquired any of his rights either as an appropriator or as an owner of riparian lands, and, consequently, upon well-settled principles, the plaintiff's earlier rights of appropriation are superior to Pogue's later rights either as an appropriator or as riparian landowner."[4]

This is a point now no longer questioned, and it is hard to-day to appreciate that it furnished the early controversy in the Western water law. The Nevada court once held otherwise, on the ground that appropriators were trespassers,[5] but Congress settled the contrary in the acts of 1866 and 1870,[6] and the supreme court of the United States held that the appropriation prevailed even before that act.[7] The Nevada case was overruled,[8] and to-day a public land diversion is in all jurisdictions a vested right, which is protected whether the later land patent was issued before or after 1866, and whether it does or does not contain a clause reserving accrued water-rights. Successors in interest of the original appropriator are protected, notwithstanding the patent did not reserve any vested or accrued water-right,[9] but land patents now contain a clause ex-

[3] Wutchumna Water Co. v. Pogue, 151 Cal. 105, 90 Pac. 362.

[4] Citing Osgood v. Eldorado Water Co., 56 Cal. 571, 5 Morr. Min. Rep. 37; Senior v. Anderson, 115 Cal. 500, 47 Pac. 454; San Jose L. & W. Co. v. San Jose Ranch Co., 129 Cal. 673, 62 Pac. 269.

[5] *Supra*, sec. 87; Van Sickle v. Haines, 7 Nev. 249, 15 Morr. Min. Rep. 201; Union Min. Co. v. Ferris, 2 Saw. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90; Thorp v. Freed, 1 Mont. 651, Wade, C. J.; Ison v. Nelson Min. Co., 47 Fed. 199.

[6] U. S. Rev. Stats., secs. 2339, 2340; *supra*, sec. 92.

[7] *Supra*, sec. 98.

[8] Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; Shoemaker v. Hatch, 13 Nev. 261; Hobart v. Wicks, 15 Nev. 418, 2 Morr. Min. Rep. 1; Jones v. Adams, 19 Nev. 78, 3 Am. St. Rep. 788, 6 Pac. 442. Nevada now goes further, and supports the Colorado doctrine as in a later section.

[9] Broder v. W. Co., 101 U. S. 274, 25 L. Ed. 790, 5 Morr. Min. Rep. 33, in which an 1853 appropriation prevailed over an 1864 patent. Accord, Davis v. Chamberlain, 51 Or. 304, 98 Pac. 154; Carson v. Gentner, 33 Or. 512, 52 Pac. 506, 43 L. R. A. 130; Hough v. Porter (1908), 51 Or. 318, 95 Pac. 732, 98 Pac. 1094, 102 Pac. 728; Isaacs v. Barber, 10 Wash. 124, 45 Am. St. Rep. 772, 38 Pac. 871, 30 L. R. A. 665; Parkersville Irr. Dist. v. Wattier, 48 Or. 332, 86 Pac. 775, at 778; Coffin v. Left Hand Ditch Co., 6 Colo. 443; Jones v. Adams, 19 Nev. 78, 3 Am. St. Rep. 788, 6 Pac. 442; Twaddle v. Winters, 29 Nev. 88, 85 Pac. 280, 89 Pac. 289; United States v. Winans, 198 U. S. 371, 25 Sup. Ct. Rep. 662, 49 L. Ed. 1089.

In Patterson v. Mills (Cal. 1902), 68 Pac. 1034, an 1855 appropriation was held to prevail over a subsequent patentee (date of patent not appearing). Lux v. Haggin, while discussing the Van Sickle case, and trying to minimize Broder v. Water Co.,

pressly reserving existing water-rights, the origin of which excepting clause is shown in the note.[10] The same thing applies to rights of way.

So far as the later Federal land grant carries riparian rights at all, those rights exist only in the surplus over all prior appropriations.[11]

(3d ed.)

§ 258. Subsequent Settlers Under Federal Right of Way Acts.—One who completes a ditch across public lands for irrigation purposes, and who is in possession thereof at the time another makes his homestead entry on the lands, acquires a right of way across the lands, and the homesteader takes his homestead subject

was forced to admit concerning the latter, "The construction given to the language of the reservation, of course, implies that those who appropriated lands or waters on the public lands, prior to the acts of 1864 [Railway Act] and 1866, had not been treated by the government in those acts as mere trespassers, but as there by license." 69 Cal., at 347, 10 Pac. 674. But cf. a remark in Duckworth v. Watsonville etc. Co., 150 Cal. 530, 89 Pac. 338, that an appropriator must rely *solely on the act of Congress;* which would inferentially leave him without protection against land patents issued before the act. Cf. Land v. Johnston (1909), 156 Cal. 253, 104 Pac. 449.

10 DEPARTMENT OF THE INTERIOR.

General Land Office,

Washington, D. C., March 21, 1872.

Hon. A. A. Sargent, M. C., Washington, D. C.

Sir: I have the honor to acknowledge the receipt to-day, by reference from you, of a letter bearing date of the twelfth instant, from George E. Williams, Esq., of Placerville, California, recommending an excepting clause to be inserted in patents issued for lands in the mineral regions, for the protection of rights for the use of water ditches, etc., in which you concur.

In response, I would state that this question came before me for consideration several weeks since, and although from an examination of the ninth section of the mining act of July 26th, 1866, and the seventeenth section of the amendatory act of July 9, 1870, I am satisfied that rights to the use of water for mining, manufacturing, agricultural or other purposes, and rights for the construction of ditches and canals, used in connection with such water-rights, are fully protected by law; yet, in order that all misapprehension that might exist between the holder or claimant of such right and such patentee might be set at rest, it was determined in all patents hereafter granted in mineral regions of the United States, to insert an additional clause or condition, expressly protecting and reserving such water-rights, and making the patent subject thereto, the same as before it was granted.

The blank forms for this patent are now being printed, and will be ready for use in a day or two, pending the receipt of which, the granting of patents in the mineral region for agricultural lands will be temporarily suspended.

I am, sir, very respectfully,
Your obedient servant,
WILLIS DRUMMOND,
Commissioner.

Land patents have ever since contained an excepting clause protecting accrued water or ditch rights. See Redwater Co. v. Jones (S. D., 1911), 130 N. W. 85.

11 See following sections.

to such right of way.[12] The Right of Way Act of 1891 expressly so declares for ditches built under it, but the rule is the same even though the ditch builder did not proceed under the Federal Right of Way Act of 1891,[13] or even if he attempted to do that but was not successful in acquiring a right under such acts.[14] For the act of 1866 [15] confirms his right against subsequent settlers,[15a] and the Right of Way Acts are but supplementary to the act of 1866 in this and do not in this repeal it. The right of way probably relates back to the beginning of the survey to determine its priority against the subsequent settler, just as against a rival right of way claimant. These matters are considered at some length in a later chapter devoted to the Federal Right of Way Acts.[16]

But the subsequent settlers are subject only to the easement, which gives the right of way owner no right to build a house alongside the canal.[17] Nor are they (probably) subject to the holders of the mere revocable permits (not amounting to easements) for rights of way under the act of 1901 and the rules of the Forest Service.[18]

An easement for a reservoir granted under the act of March 3, 1891, and subsequently acquired by the United States for use in connection with a project under the Reclamation Act, does not become extinguished by merger in the estate of the government in the land, and entries allowed for such lands within and below the flowage contour line of the reservoir are subject to the right of flowage by storage of waters in the reservoir.[19]

(3d ed.)

§ 259. Prior Settlers.—Under the California doctrine, riparian rights attach to the land of prior settlers, which appropriations

[12] Cottonwood D. Co. v. Thom (1909), 39 Mont. 115, 101 Pac. 825, 104 Pac. 281. Accord as to a water ditch, Broder v. W. Co., 101 U. S. 274, 25 L. Ed. 790, 15 Morr. Min. Rep. 33 (railway grant); Rasmussen v. Blust (1909), 85 Neb. 198, 133 Am. St. Rep. 650, 122 N. W. 862; and as to a pipe-line, Le Quime v. Chambers (1908), 15 Idaho, 405, 98 Pac. 415, 21 L. R. A. 76 (homestead).

[13] Cottonwood D. Co. v. Thom, *supra*.

[14] Rasmussen v. Blust (1909), 85 Neb. 198, 133 Am. St. Rep. 650, 122 N. W. 862.

[15] Rev. Stats., secs. 2339, 2340.

[15a] *Supra*, sec. 92 et seq.

[16] *Infra*, sec. 430 et seq.

[17] Whitmore v. Pleasant Valley Co., 27 Utah, 284, 75 Pac. 748; Nippel v. Forker, 9 Colo. App. 106, 47 Pac. 766; Nippel v. Forker, 26 Colo. 74, 56 Pac. 577. See *infra*, sec. 502, changes of ditches.

[18] *Infra*, sec. 431.

[19] July 7, 1908; 37 Land Dec. 6. Compare Minidoka Co. v. Weymouth (Idaho), 113 Pac. 454 (railway right of way over homestead land of United States reclamation project).

thereafter must not disturb. Proceeding upon the theory of grant from the United States as landowner, under the California doctrine the relation between the prior settler and the subsequent appropriator is that of successive grantees from the same owner, and the later grant can cover only what was left after the earlier one was made. This is the distinctive feature of what is laid down in Lux v. Haggin,[20] affirming Crandall v. Woods,[21] and affirmed in a long list of cases,[22] and is what is called "the California doctrine."

What riparian rights consist of is fully considered in the next part of this book, devoted to the common-law system.

In California, prior settlers on riparian land, whether homesteads, pre-emptions, railway grants or whatever the nature of their holding, have the rights of riparian owners, which later appropriators cannot take away, though they go on other and vacant public land to do it. In States following the Colorado doctrine, riparian rights can never be acquired by anyone, rejecting the California doctrine. These are matters already fully set forth, and authorities cited elsewhere.[23]

The law of appropriation under the California doctrine is limited to waters upon the public domain. The United States holds those waters open to free use, so long as they belong to the United States, but when the United States parts with the land over which the waters flow, the California law says it parts with its right to dispose of the water; the private landowner is thereafter the one whose right of disposal is paramount.[24]

The settler's riparian right will attach to the surplus over prior appropriations, if there be prior appropriators who do not use the

[20] 69 Cal. 255, 10 Pac. 674.

[21] 8 Cal. 136, 1 Morr. Min. Rep. 604. See especially the passage quoted *supra*, sec. 156, from Moore v. Smaw, 17 Cal. 199, 79 Am. Dec. 123, 12 Morr. Min. Rep. 418.

[22] E. g., see Sturr v. Beck, 133 U. S. 541, 10 Sup. Ct. Rep. 350, 33 L. Ed. 761; McGuire v. Brown, 106 Cal. 660, 39 Pac. 1060, 30 L. R. A. 384; Hargrave v. Cook, 108 Cal. 72, 41 Pac. 18, 30 L. R. A. 390; Miller v. Madera etc. Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A., N. S., 391 (opinion on rehearing). See cases *supra*, sec. 117.

[23] *Supra*, secs. 117, 118.

Important modification of the ground taken under the California doctrine has very recently been made in Oregon. Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1098, 102 Pac. 728. See *supra*, sec. 129.

In Nebraska the law is somewhat like that of Oregon as to lands patented since 1889, the date in which riparian rights are held abrogated in Nebraska by State statute. *Supra*, sec. 126.

[24] Crawford v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647, 60 L. R. A. 889, 93 N. W. 781.

whole stream, and his riparian right to such surplus will prevail over later appropriators.[25]

As to any surplus over the requirements of the riparian owner, reference is made to later chapters.[1] As a general statement, his right is not limited by requirements or uses.

The following passages state the rule in California: "Both the right to appropriate water on the public lands and that of the occupant of portions of such lands are derived from the implied consent of the owner, and as between the appropriator of land or water the first possessor has the better right. The two rights stand upon an equal footing, and when they conflict they must be decided by the fact of priority.[2] Since the United States, the owner of the land and water, is presumed to have permitted the appropriation of both the one and the other, as between themselves the prior possessor must prevail."[3] Likewise, in a very early case, "One who locates upon public lands with a view of appropriating them to his own use becomes the absolute owner thereof as against everyone but the government,[4] and is entitled to all the privileges and incidents which appertain to the soil, subject to the single exception of rights antecedently acquired. . . . . The rule *'qui prior est in tempore potior est in jure'* must apply."[5]

We add quotations from other States following the California doctrine: In Montana it was said in an early case allowing appropriation: "This decision, it will be understood, does not go to the extent of allowing parties to appropriate and divert water so as to prevent the same from flowing over land to which a party had obtained the government title after the acquisition of this title. If no one before the pre-emption and entry of land by a party has acquired the right to divert the waters of a stream, then the patent from the general government conveys the water as an incident to the soil over which it flows. If it has been appropriated

[25] Barrows v. Fox, 98 Cal. 63, 32 Pac. 811; Faulkner v. Rondoni, 104 Cal. 140, 37 Pac. 883; Avery v. Johnson (Wash.), 109 Pac. 1028. Cf. Hutchinson v. Watson D. Co. (1909), 16 Idaho, 484, 133 Am. St. Rep. 125, 101 Pac. 1059.

[1] *Infra*, sec. 755, between riparian owners; sec. 814 et seq., between a riparian and a nonriparian owner.

[2] Citing Irwin v. Phillips, 5 Cal. 140, 63 Am. Dec. 113, 15 Morr. Min. Rep. 178.

[3] Lux v. Haggin, 69 Cal. 255, at 355, 10 Pac. 674.

[4] As to the exception of the government in this early case, see *supra*, sec. 91.

[5] Crandall v. Woods, 8 Cal. 136, 1 Morr. Min. Rep. 604.

In a recent case (Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. 338), Mr. Justice Shaw said: "The effect of an appropriation under the statute, when completed, is that the appropriator thereby acquires a

before the time when the patent takes effect, it does not."[6] In Washington: "The right to appropriate water for mining and agricultural purposes from watercourses on the public domain is sanctioned by acts of Congress, and recognized by all the courts; but when the government ceases to be the sole proprietor, the right of the riparian owner attaches, and cannot be subsequently invaded in those States where the common-law doctrine of riparian rights prevails."[7] In Nebraska:[8] "We conclude, therefore, that in this State, under any view we may take of the subject, the right of riparian proprietors to the use of the waters flowing in the streams to which their lands are adjacent, when once attached, is, in its nature, a vested right of property, a corporeal hereditament, being a part and parcel of the riparian land which is annexed to the soil, and the use of it is an incident thereto which the owners cannot rightfully be deprived of or devested except by grant, prescription, or condemnation, with compensation by some of the means and methods recognized by law for the taking or damaging of private property for public use."[9]

In the supreme court of the United States: In Sturr v. Beck,[10] the court said that when the government ceased "to be the sole proprietor, the right of the riparian owner attaches and cannot be subsequently invaded," and that "the riparian owner has the

right superior to that of any subsequent appropriator on the same stream. . . . . But he acquires thereby no right whatever as against rights existing in the water at the time his appropriation was begun. An appropriation does not, of itself, deprive any private person of his rights. . . . . It affects and devests the riparian rights otherwise attaching to public lands of the United States, solely because the act of Congress declares that grants of public lands shall be made subject to all water rights that may have previously accrued to any person other than the grantee." Regarding this passage, see further, *supra*, sec. 246.

6 Knowles, J., in Thorp v. Freed, 1 Mont. 651.

7 Nesalhous v. Walker, 45 Wash. 621, 88 Pac. 1032. See, also, Sander v. Wilson, 34 Wash. 659, 76 Pac. 280.

8 Crawford v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647, 93 N. W. 781, 60 L. R. A. 889.

9 In a late South Dakota case where plaintiff appropriated water for non-riparian use after defendants had settled upon an upper part of the stream but before defendants were using it, it was said: "As riparian proprietors, however, they have the right, as against the plaintiff, to use sufficient water for domestic purposes and for the irrigation of all the cultivable riparian land which can be irrigated, and which was settled upon by their grantors prior to the location of the plaintiff's appropriation. As to riparian land settled upon subsequently to such location, the owner thereof is not entitled to use any water for irrigation to the injury of the plaintiff's appropriation." Redwater etc. Co. v. Reed (S. D.), 128 N. W. 702. See, also, Redwater Co. v. Jones (S. D.), 130 N. W. 85.

10 133 U. S. 541, 551, 10 Sup. Ct. Rep. 350, 33 L. Ed. 761.

right to have the water flow *ut currere solebat*, undiminished except by reasonable consumption of upper [riparian] proprietors, and no subsequent attempt to take the water only can override the prior appropriation of both land and water," etc.

The prior grant of land receives this protection against later taking away of the water merely because it is the same protection that is given to the whole of a piece of land that is private property. The rest of the land receives the same protection. The land, by virtue of a prior grant from the government, being private, the appropriator cannot build a ditch over it, which is taking a right of way.[11] The appropriator cannot ditch over a prior mining claim,[12] nor build a house on land in private hands of another,[13] nor interfere with the prior right of way of another.[14] The cases in all States to-day recognize this inviolability (except by condemnation on eminent domain) of the right of the prior grantee to the land itself; the difference is only that the Colorado doctrine refuses to extend it also to the right to the water on the land.

(3d ed.)

§ 260. Prior Settlers Who Hold the Land in Fee.—All land that has passed into private ownership in fee simple is fully within this rule, and protected in its riparian rights against subsequent appropriators, though the appropriator goes on vacant public land to make his appropriation. Usually the land passes into private ownership by virtue of a patent under the homestead, pre-emption, or other Federal laws. But the fee may have been acquired by virtue of a Mexican grant, made before the United States acquired sovereignty; and riparian rights (in jurisdictions recognizing riparian rights) fully attach to land whose title is deraigned under a Mexican grant.[15] Of course, the California rule

[11] *Supra*, sec. 221 et seq.

[12] Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240, 4 Morr. Min. Rep. 504.

[13] Whitmore v. Pleasant Valley Co., 27 Utah. 284, 75 Pac. 748.

[14] Bybee v. Oregon etc. Co., 139 U. S. 663, 11 Sup. Ct. Rep. 641, 35 L. Ed. 305 (*quaere*).

[15] Fox v. Haggin, 69 Cal. 255, 10 Pac. 674; Pope v. Kinman, 54 Cal. 3; Vernon etc. Co. v. Los Angeles, 106 Cal. 237, 39 Pac. 762; City of Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585; Pomeroy on Riparian Rights, sec. 42. See Crystal Springs Co. v. Los Angeles, 177 U. S. 169, 20 Sup. Ct. Rep. 573, 44 L. Ed. 720. Titles under Mexican grants were settled under act of Congress March 3, 1851, entitled, "An act to ascertain and settle the private land claims in the State of California." Mexican grants enter prominently into the land law of California. In Moore v. Smaw, 17 Cal. 199, 79 Am. Dec. 123, 12 Morr. Min. Rep. 418, Judge Field held a confirmation of a Mexican grant to be equivalent to an ordinary United States patent. The supreme court of the United States now holds the con-

does not apply in jurisdictions where riparian rights are rejected *in toto*.[16]

Riparian rights attach likewise to a grant of State lands.[17]

(3d ed.)

§ 261. **Prior Settlers Before Patent.**—As we have repeatedly said of the California law, "the right to divert water *from a riparian owner* has never been recognized by customs, laws, or decisions of courts in this State. On the contrary, all the decisions of this court as to acquiring water by naked appropriation have been based on the fact that the water was on the public domain, and that there were no riparian owners to complain."[18]

The only question upon the matter which ever existed in the California reports was, *When* did the land become private respecting rights of way or waters thereon? Was it from the mere taking possession by the settler? Or was it from the date he entered an application for the land in the land office? Or was it when he made final proof in the land office? Or was it when he got a certificate from the land office of full payment to the United States for the land? Or, finally, was it only when a patent actually issued to him for the land? This matter remained long in conflict, though to-day it is well settled that riparian rights are protected from the first step necessary to acquire patent. The

trary. Bouquillas etc. Co. v. Curtis, 213 U. S. 339, 29 Sup. Ct. Rep. 493, 53 L. Ed. 822. It is now held a confirmation and not a quitclaim. Los Angeles Co. v. Los Angeles, 217 U. S. 217, 30 Sup. Ct. Rep. 452.

[16] Gutierres v. Albuquerque etc. Co., 188 U. S. 545, 23 Sup. Ct. Rep. 338, 47 L. Ed. 588. Before the treaty of Guadalupe Hidalgo or the Gadsden purchase, landowners are held in Arizona *not* to have had the rights of riparian owners, and hence that no such right attaches to a Mexican grant so as to be preserved by confirmation of the grant after the United States acquired sovereignty. On the contrary, the Mexican law resembled (it is held in Arizona) the law of appropriation rather than the law of riparian rights. Boquillas Land Co. v. Curtis, 11 Ariz. 128, 89 Pac. 504. Affirmed in Boquillas etc. Co. v. Curtis, 213 U. S. 339, 29 Sup. Ct. Rep. 493, 53 L. Ed. 822.

And there is an exception even in California, which subordinates the Mexican grant's riparian rights to the pueblo right of the city of Los Angeles. Los Angeles Co. v. Los Angeles (1910), 217 U. S. 217, 30 Sup. Ct. Rep. 452, 54 L. Ed. 736. See *supra*, sec. 68.

[17] Lux v. Haggin, 69 Cal. 255, 10 Pac. 674, saying: "Our conclusion on this branch of the case is that section 1422 saves and protects the riparian rights of all those who, under the land laws of the State, shall have acquired from the State the right of possession to a tract of riparian land prior to the initiation of proceedings to appropriate water in accordance with the provisions of the code."

[18] T. B. McFarland, counsel, in Osgood v. El Dorado etc. W. Co., 56 Cal. 572, 5 Morr. Min. Rep. 37, later a member of the supreme court.

patent relates back to the first step to acquire it, just as the water appropriation relates back to posting of notice or commencement of work.[18a]

The difficulty was that, in the pioneer days all possessions (or "possessory rights"), whether of waters or mines or lands, were, in technical law, mere trespassers against the government as owner of the public lands and had, it was claimed, no actual rights until patent. But Crandall v. Woods [19] protected the settler against later diversion, from the very date of occupancy or taking possession of the land, and similar dicta appeared in other early California cases.[20] So, likewise, the act of 1866 contains a proviso that an appropriation must not conflict with the "possession" of any settler on the public domain.[21] Notice may also be taken of an early Colorado act, copied in other States, that one holding a *possessory claim* to land on a stream bank should have preserved to him a right to use the water "to the fullest extent of the soil." [22] However, the contrary was held in early Nevada cases, saying he would be protected only when patent issues,[23] and likewise the supreme court of the United States at first refused to consider a mere riparian possessor as having any riparian rights until patent actually issued,[24] and for a time the California court withdrew from the position taken in the first cases and held that, until patent actually issues for the land, or at least until full payment, riparian rights were not to be protected against later appropriation.[25]

But to-day it is well settled that a patent takes effect (at least as against water appropriators) by relation back to the initial

[18a] *Infra*, sec. 393 et seq.

[19] 8 Cal. 136, 1 Morr. Min. Rep. 604, affirmed in Leigh v. Ditch Co., 8 Cal. 328, 12 Morr. Min. Rep. 97.

[20] E. g., Hill v. Newman, 5 Cal. 445, 63 Am. Dec. 140, 4 Morr. Min. Rep. 513, saying prior location upon the land gave rights; but see Irwin v. Phillips, 5 Cal. 140, 63 Am. Dec. 113, 15 Morr. Min. Rep. 178, refusing to consider the occupant a "tenant at will" of the government.

[21] U. S. Rev. Stats., sec. 2339. See McGuire v. Brown, 106 Cal. 660, 39 Pac. 1060, 30 L. R. A. 384; Titcomb v. Kirk, 51 Cal. 288, 5 Morr. Min. Rep. 10; Jacob v. Lorenz, 98 Cal. 335, 33 Pac. 119; Woodruff v. North Bloomfield Co., 18 Fed. 753, 9 Saw. 441; Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240, 4 Morr. Min. Rep. 504, construing the proviso in the act of 1866 to this effect. But notice that the act also speaks of "homesteads *allowed*."

[22] *Supra*, sec. 119.

[23] Covington v. Becker, 5 Nev. 281; Hobart v. Ford, 6 Nev. 77, 15 Morr. Min. Rep. 236; Lake v. Tolles, 8 Nev. 285.

[24] Basey v. Gallagher, 87 U. S. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683.

[25] Osgood v. Water Co., 56 Cal. 571, 5 Morr. Min. Rep. 37; Farley v. Spring Valley etc. Co., 58 Cal. 142. Not until final proof was the holding originally in Washington. Ellis v. Pomeroy etc. Co., 1 Wash. 572, 21 Pac.

step to acquire it; and the first formal step under the land laws for acquiring the land (upon surveyed land, filing entry or application in the land office) is to-day sufficient to entitle the settler to protection in his riparian rights against subsequent appropriators.[1] "It was held in McGuire v. Brown,[2] which is the leading case in the State and a case most excellently reasoned, that the statutes above quoted[3] do not confer the right upon an appropriator of water on public land to go upon land after its entry by another as a homestead but before the claimant had made final

27. See, also, Tynon v. Despain (1896), 22 Colo. 240, 43 Pac. 1039. This was the real point involved in this Colorado case, though the Colorado law now proceeds upon wholly different considerations.

There has been much uncertainty in the law of this matter so far as concerns the related matter of railway rights of way over the land of existing settlers before patent. Thus, while at one time it was held that a railroad, under grant of Congress, could locate its road, without compensation, over an existing unpatented mining claim (Doran v. Central Pac. Co., 24 Cal. 245), or an existing pre-emption claim (People v. Shearer, 30 Cal. 645; Southern Pac. Co. v. Burr, 86 Cal. 282, 24 Pac. 1032; Western P. Ry. v. Tevis, 41 Cal. 489), or over an existing ditch (Bybee v. Oregon etc. Co., 139 U. S. 680, 11 Sup. Ct. Rep. 641, 35 L. Ed. 305), yet the usual holding has protected the possessory claim against the railroad. As to a mining claim, Alaska etc. Co. v. Copper etc. Ry. (Alaska, 1908), 160 Fed. 862, 87 C. C. A. 666; South. Cal. Ry. Co. v. O'Donnell, 3 Cal. App. 385, 85 Pac. 932; as to a pre-emption claim, Washington etc. Co. v. Osborne (1889), 2 Idaho, 527, 557, 21 Pac. 421; as to a homestead claim, Johnson v. Bridal etc. Co. (Or. 1893), 24 Or. 182, 33 Pac. 528; Larsen v. Oregon Ry. & Nav. Co. (1890), 19 Or. 240, 23 Pac. 974; Spokane Falls etc. Co. v. Ziegler, 167 U. S. 65, 17 Sup. Ct. Rep. 728, 42 L. Ed. 79. See, also, 37 Land Dec. 789. The question is newly arising under the National Irrigation Act, as to how far *the United States* must compensate unpatented settlers on land withdrawn for the national irrigation projects, it being recently held that they are not entitled to compensation. United States v. Hansen (Wash. 1909), 167 Fed. 881. See, also, 38 Land Dec. 603; Messenger v. Kingsbury (Cal., Nov. 21, 1910), 112 Pac. 65, *dictum*. The national irrigation case presents direct action by the United States; the railway cases presented action under an express act of Congress; but in theory these are no different from the water cases, which, in California, also rest the appropriation of water in grant from the United States; and in the water law it is now well settled that the riparian rights of the possessory estate will be protected against appropriators in California. (See the opinion of Judge Whitson in the Hansen case.)

[1] Sturr v. Beck, 133 U. S. 541, 10 Sup. Ct. Rep. 350, 33 L. Ed. 761; Lone Tree etc. Co. v. Cyclone etc. Co., 15 S. D. 519, 91 N. W. 352; Same v. Same (S. D.), 128 N. W. 596; Redwater etc. Co. v. Reed (S. D.), 128 N. W. 702; Cruse v. McCauley, 96 Fed. 369; Conkling v. Pacific etc. Co., 87 Cal. 296, 25 Pac. 399; Shenandoah etc. Co. v. Morgan, 106 Cal. 409, 39 Pac. 802; McGuire v. Brown, 106 Cal. 660, 39 Pac. 1060, 30 L. R. A. 384; Union M. & M. Co. v. Dangberg, 2 Saw. 450, Fed. Cas. No. 14,370, 8 Morr. Min. Rep. 113; Long on Irrigation, sec. 30.

The certificate of final entry of land, issued by the United States Land Office, is evidence of the facts recited therein, including the date on which settlement was made. Davis v. Chamberlain, 51 Or. 304, 98 Pac. 154.

[2] 106 Cal. 660, 39 Pac. 1060, 30 L. R. A. 384.

[3] U. S. Rev. Stats., secs. 2339, 2340 (act of 1866).

proof, and change the point of diversion or construct new ditches or in any way to interfere with the initiatory rights of the homestead applicant. Sturr v. Beck[4] holds that the filing of a homestead entry of a tract across which a stream of water runs in its natural channel, with no right or claim of right to divert it therefrom, confers a right to have the stream continue running in that channel without diversion, which right, when completed by full compliance with the requirements of the statutes on the part of the settler, relates back to the date of the filing and cuts off intervening adverse claims to the water. The reasoning in this case would apply equally to the relation back of the right of the homestead entryman to the land conveyed to him by the patent."[5]

A valid mining location constitutes the locator a riparian owner within this rule; and water flowing through a mining location cannot be appropriated later to the injury of the owner of the mining claim's riparian rights, though the claim be not patented.[6]

The date from which riparian rights are now protected is, in the California decisions (as already said), for surveyed land the filing of entry or application in the land office—the first formal step under the homestead or other statutes for acquiring the land.[7] In some cases in other jurisdictions it is stated indefinitely, but seemingly to the same effect, such as "from the first necessary proceedings" or "from the very inception of his title."[8] But there are statements in the cases which date riparian rights from the date of settlement or occupancy with intent to acquire title, though

[4] 133 U. S. 541, 10 Sup. Ct. Rep. 350, 33 L. Ed. 761.

[5] Atkinson v. Washington Irr. Co., 43 Wash. 75, 12 Am. St. Rep. 978, 86 Pac. 1123, protecting the settler against an irrigation company which sought to initiate work on the ground that patent had not yet issued to the settler.

[6] Crandall v. Woods, 8 Cal. 136, 1 Morr. Min. Rep. 634; Leigh v. Ditch Co., 8 Cal. 323, 12 Morr. Min. Rep. 97. See Pomeroy on Riparian Rights, sec. 33 et seq.; Madigan v. Kougkarok M. Co., 3 Alaska, 63; Schwab v. Beam, 86 Fed. 41, 19 Morr. Min. Rep. 279. (See *infra*, sec. 366, as to this case.)

But not where riparian rights are rejected *in toto* as under the Colorado doctrine. Van Dyke v. Midnight Sun Co. (Alaska), 177 Fed. 90; Snyder v. Colorado etc. Co. (Colo. C. C. A.), 181 Fed. 62. See Cascade Co. v. Empire Co. (Colo.), 181 Fed. 1011.

[7] To the same effect, Sturr v. Beck, 6 Dak. 71, 50 N. W. 486; Cruse v. McCauley, 96 Fed. 369.

[8] Benton v. Johncox, 17 Wash. 277, 61 Am. St. Rep. 912, 49 Pac. 498, 39 L. R. A. 107, adding: "The doctrine that the rights of a patentee or grantee of the government relate back to the first act of the settler necessary in the proceedings to acquire title is also announced in the following cases: Shepley v. Cowan, 91 U. S. 330, 23 L. Ed. 424; Larsen v. Navigation Co., 19 Or. 240, 23 Pac. 974; Faull v. Cooke, 19 Or. 455, 20 Am. St. Rep. 836, 26 Pac. 662. See, also, Kinney on Irrigation, sec. 210; Union etc. Min. Co. v. Dangberg, 2 Saw. 450. Fed. Cas. No. 14,370, 8 Morr. Min. Rep. 113."

no filings have yet been made.[9] These rulings seem to be made for *unsurveyed* land only. As to unsurveyed land, titles relate back to the settlement antedating the filings, since filings are impossible until survey is made.[10]

But whether, on either surveyed or unsurveyed land, naked occupancy without actually intending to make the necessary land filings at all, will protect riparian rights, is a different question. Against a wrongdoer equally without right to the land or water, it may be that the first mere squatter is entitled to such protection.[11] Thus naked occupancy of land was sometimes held alone enough in the pioneer days of California before the Federal statutes, when a naked appropriation of land by taking possession was as complete a right as the United States afforded, and the land appropriator was presumed (as against later water appropriators) to have the government's grant because of his occupancy.[12] But since the Federal statutes for acquiring land titles, an express grant of land is provided for, and to protect land rights (or riparian rights incident thereto) in favor of one not proceeding thereunder, and against one proceeding under the water appropriation statutes, would seem in violation of both the land and water statutes. Consequently it has been held that a bare squatter upon public land, surveyed or unsurveyed, who has no *intention* of filing upon the land or of proceeding to actually acquire title, has no riparian rights against an appropriator complying

[9] Morgan v. Shaw, 47 Or. 333, 83 Pac. 534; Lone Tree Ditch Co. v. Cyclone Ditch Co., 15 S. D. 519, 91 N. W. 352; Same v. Same (S. D.), 128 N. W. 596; Stengle v. Tharp, 17 S. D. 13, 94 N. W. 402; Redwater etc. Co. v. Reed (S. D.), 128 N. W. 702; Faull v. Cooke, 19 Or. 455, 20 Am. St. Rep. 836, 26 Pac. 662; Benton v. Johncox, 17 Wash. 277, 61 Am. St. Rep. 912, 49 Pac. 498, 39 L. R. A. 107, saying the settler is entitled to the common-law rights of riparian proprietors, as against subsequent appropriators of the water, from the date of their occupancy, with intent to acquire the title of the government in pursuance of law. In Redwater Co. v. Jones (S. D.), 130 N. W. 85, it is said the rule is the same whether a pre-emption or a homestead.

[10] U. S. Rev. Stats., sec. 2266, allowed pre-emption rights from date of settlement with intent to acquire title, provided a statement was filed in the local land office within three months after survey. The Homestead Act of May 20, 1862, 12 Stat. 392, did not originally allow settlements on unsurveyed land; but after A. C. May 14, 1880, homesteading was also permitted on unsurveyed land; so that thereafter, under both the pre emption and homestead laws land titles of settlers relate back to the date of settlement and not merely to entry of record of claim in the land office. St. Paul Ry. Co. v. Donohue, 210 U. S. 21, 30, 28 Sup. Ct. Rep. 600, 52 L. Ed. 941; William Boyle, 38 Land Dec. 603.

[11] *Supra*, sec. 246, "disseisin"; *infra*, sec. 319, "trespassers"; *infra*, sec. 724, "who are riparian proprietors."

[12] Crandall v. Woods, 8 Cal. 136, 1 Morr. Min. Rep. 634.

with the water statutes.[13] Naked possession of the public lands gives no rights against those who peaceably seek to obtain rights under the statutes now passed for that purpose.[14]

(3d ed.)

§ 262. **Prior Settlers Under the Colorado Doctrine.**—The foregoing is the California doctrine. Under the Colorado doctrine, as a general principle, riparian rights can never be acquired by anyone.[15] Private land in Colorado through which a stream flows carries no riparian rights, and at any time before water flowing through it is actually appropriated to use by the landowner himself, anyone else may divert away the whole above him, though the water be the sole element of value of the land, and though the land patent issued before the adoption of the provisions in the Colorado constitution regarding appropriation.[16] In Colorado the presence of water on land is not an element in damages on condemning the land on eminent domain, where the landowner had made no application of the water;[17] nor does the Federal land grant confer color of title to water flowing through it.[18] There is an early statute in Colorado and similar States, to which we have frequently referred, declaring that all landowners on the banks of streams shall be entitled to use the waters to the full extent of the soil; but this is held to refer only to cases where the water is actually in use by the landowner.[19]

(3d ed.)

§ 263. **Prior Settlers Under the Federal Right of Way Acts.** Settlers or landowners having initiatory rights at the time the survey for a right of way was made under the Federal Right of Way Acts[20] are, by the act of 1891, entitled to damages. The clause in this regard is practically identical with the clause in the act of 1866, and under that act ditch building on private land is,

[13] Lux v. Haggin, 69 Cal. 255, at 432, 433, 10 Pac. 674; Morris v. Bean (Mont.), 146 Fed. 432; Scott v. Toomey, 8 S. D. 639, 67 N. W. 838; Silver Creek etc. Co. v. Hayes, 113 Cal. 142, 45 Pac. 191; Kendall v. Joyce, 48 Wash. 489, 93 Pac. 1091; Avery v. Johnson (Wash.), 109 Pac. 1028; Hobart v. Ford, 6 Nev. 77, 15 Morr. Min. Rep. 236; Lake v. Tolles, 8 Nev. 285, both Nevada cases being while riparian rights were recognized. Compare United States v. Hanson (Wash.), 167 Fed. 881.

[14] Lindley on Mines, sec. 216 et seq. See Cal. Pen. Code, sec. 420.

[15] *Supra*, sec. 118.

[16] Sternberger v. Seaton etc. Co. (1909), 45 Colo. 401, 102 Pac. 168; citing this book. Cf. Cascade Co. v. Empire Co. (Colo.), 181 Fed. 1011.

[17] Siedler v. Seely, 8 Colo. App. 499, 46 Pac. 848.

[18] Clark v. Ashley, 34 Colo. 285, 82 Pac. 588.

[19] *Supra*, sec. 119. For the recent exception in Idaho, see *supra*, secs. 118 and 185.

[20] *Infra*, sec. 430.

as just considered, not sanctioned except by condemnation. The rule seems to be that the approval of the Secretary of Interior can give no right of way over private land; and land entered by a settler, though not yet patented, is private in this regard.[21]

In a suit by the United States to restrain canal building under the act of 1891, the rights of settlers affected by the canal cannot be adjudicated if they are not parties to the suit.[22]

(3d ed.)

§ **264. Conclusions.**—(a) The relation between appropriators and riparian owners as respects use of water raises no question upon the law of waters under the Colorado doctrine, as riparian rights are not there recognized.

(b) The relation between appropriators and riparian proprietors under the California doctrine is that of successive grantees from the United States as owner of the right to the water incident to the public lands. Priority of right on public land governs on the one hand, as to whether the riparian owner's rights prevail or not; on the other hand, riparian rights exist in the surplus over the prior appropriation. As to any surplus over the possible uses of the riparian owner, no appropriation, properly speaking, can be made, even though possibly such surplus diversions may not, in all cases, be wrongful.[23]

(c) Priority governs between settlers and ditch builders (irrespective of water-rights); the settler's right and the ditch builder's right both relating back to their initiatory proceedings respectively.

21 *Supra*, sec. 221 et seq., ditches on private land. See, also, Whitmore v. Pleasant Valley Co., 27 Utah, 284, 75 Pac. 748; Nippel v. Forker, 9 Colo. App. 106, 47 Pac. 766; Nippel v. Forker, 26 Colo. 74, 56 Pac. 577; Baldridge etc. Co. v. Leon, 20 Colo. App. 518, 80 Pac. 477, and cases in sec. 261, note 21, *supra*.

The land office says, in a circular of June 6, 1908, containing regulations concerning rights of way: "All persons settling on a tract of public land, to part of which right of way has attached for a canal, ditch, or reservoir, take the land subject to such right of way, and at the total area of the subdivision entered, there being no authority to make deduction in such cases. If a settler has a valid claim to land existing at the date of the filing of the map of definite location, his right is superior, and he is entitled to such reasonable measure of damages for right of way as may be determined upon by agreement or in the courts, the question being one that does not fall within the jurisdiction of this department."

22 United States v. Lee (N. M.), 110 Pac. 607. See *infra*, sec 626 et seq.

23 *Infra*, sec. 824 et seq.

§§ *265–274. (Blank numbers.)*

PART III.

THE LAW OF PRIOR APPROPRIATION.

CHAPTER 13.

ELEMENTS OF A RIGHT BY APPROPRIATION.

§ 275. Introductory.
§ 276. The right is usufructuary.
§ 277. No property in the "*corpus*" of the water.
§ 278. No property in the channel.
§ 279. The right is exclusive.
§ 280. Distinguished from right to a ditch.
§ 281. Independent of mode of enjoyment.
§ 282. Recent tendency to the contrary.
§ 283. Real estate.
§ 284. Same—Taxation.
§ 285. An estate of freehold.
§ 286. Conditional.
§ 287. An incorporeal hereditament.
§ 288. Definition.
§ 289. Same.
§§ 290–298. (Blank numbers.)

(3d ed.)

§ 275. **Introductory.**—In the law of watercourses the rules governing the usufruct in natural streams form the bulk of the law. The law of watercourses is a law of natural resources. We shall deal with this body of law under two systems prevailing in the Western States: first, the system of prior appropriation (the system of priorities), which gives unequal rights in streams according to the relative times of beginning use; second, the common law of riparian rights (the system of correlative rights), which gives equal rights to all riparian proprietors without regard to the relative times of beginning use. The reason for considering them in this order is that the common law, in Western jurisdictions applying it, will not come into full force until the riparian lands are well settled; while the law of prior appropriation, in the present day of large stretches of vacant unsettled

public land, is (outside of California, where private land predominates in agricultural regions) of more frequent application at the present time, even in the jurisdictions which, as to private lands, apply the common-law system.

Speaking now of the law of prior appropriation, attention is again called to the transition which it is undergoing within itself. From a possessory system, arising as a possessory right upon the public domain, acquired by taking possession, measured by capacity of ditch (the amount in possession) and lasting until possession is intentionally abandoned, it is changing to a "particular use" basis, acquired by actual use, measured by beneficial use alone, and lost by nonuse without regard to intention to abandon or relinquishment of possession; a change set forth more in detail in a preceding chapter.[1] Consequently, the elements of the right are more or less in a state of flux; and although to-day they have the form set forth in the following sections, departures from time to time may be expected from many rulings to-day made in some of these matters.

(3d ed.)

§ 276. **The Right is Usufructuary.**—Speaking of "qualified property" as opposed to an absolute right of property, Blackstone says:[2] "Many other things may also be the objects of qualified property. It may subsist in the very elements of fire or light, of air, and of water. A man can have no absolute permanent property in these, as he may in the earth and land; since these are of a vague and fugitive nature, and therefore can admit only of a precarious and qualified ownership, which lasts so long as they are in actual use and occupation, but no longer. If a man disturbs another, and deprives him of the lawful enjoyment of these; if one obstructs another's ancient windows, corrupts the air of his house or gardens, fouls his water, or unopens and lets it out, or if he diverts an ancient watercourse that used to run to the other's mill or meadow; the law will animadvert hereon as an injury, and protect the party injured in his possession. But the property in them ceases the instant they are out of possession; for, when no man is engaged in their actual occupation, they become again common, and every man has equal right to appropriate them to his own use."[3]

1 *Supra*, sec. 139.

2 Book II, chapter 25, p. 395.

3 This quotation is given as an explanation of what is meant by a usu-

The right of an appropriator is likewise only usufructuary. Although for shortness' sake, the appropriator is spoken of as the owner of the *water,* yet there is no property in the water itself nor in the channel of the stream conferred by the appropriation; the appropriator owns a right only to have the *flow and use* of the stream, which is called his "water-right."[4] The stream water itself is in the "negative community," the property of no one; or, by the recent Water Code form of expression, "belongs to the public" or to the "State in trust for the people."[5]

(3d ed.)

§ 277. No Property in the "Corpus" of the Water.—Property in the *corpus* of the waters is not recognized, so long as flowing naturally; the naturally flowing substance is like the air in the atmosphere, incapable of being owned. "This court has never departed from the doctrine that running water, so long as it continues to flow in its natural course, is not, and cannot be, made the subject of private ownership. A right may be acquired to its use, which will be regarded and protected as property; but it has been distinctly declared in several cases that this right carries with it no specific property in the water itself." Adding that it may be different with water in a ditch severed from the natural stream.[6]

Hence, the appropriator cannot sue for the value of water at so much per inch or gallon diverted from the stream above him by another; he must declare for the damage to his enterprise from loss of the flow and use.[7] Likewise a sale of the water-

fructuary right, that feature being common to both the systems of appropriation and riparian rights. The passage quoted and others in Blackstone were at one time further thought to countenance the law of appropriation in England; but that was a misunderstanding of the passage, and has long since been repudiated. See *infra,* sec. 666 et seq.

[4] Riverside etc. Co. v. Gage, 89 Cal. 410, 26 Pac. 889; Smith v. Green, 109 Cal. 229, 41 Pac. 1022.

[5] *Supra,* c. 1.

[6] Kidd v. Laird, 15 Cal. 162–180, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571. Neither a riparian proprietor nor an appropriator has title or ownership in the water of the stream. This has been expressly decided with respect to appropriators. The same rule applies to the riparian owner. Mr. Justice Shaw, in Duckworth v. Watsonville Water Co., 150 Cal. 520, 89 Pac. 336.

That appropriation is only usufructuary, and confers no ownership in the *corpus* of the water is set forth at length in the first part of this book. See especially, sec. 18, *supra.*

[7] Parks etc. v. Hoyt, 57 Cal. 44; Riverside etc. Co. v. Gage, 89 Cal. 410, 418, 26 Pac. 889.

right does not mean the delivery of any specific quantity of water.[8] It does not sell the water itself, but only the right to use it.[9] Nor can one set up a claim to water after it has been allowed to run off without intent to recapture.[10] When, however, the water has once been severed from its natural watercourse, so long as it is in an artificial structure such as reduces it to possession, it does become the subject of ownership, and like the law respecting the fish in the water after being caught, the *corpus* is private property.[11]

The point here involved is a fundamental one in all legal conceptions of rights in running water as distinguished from standing or percolating water, being borrowed into the law of appropriation from the common law and into the common law from the civil law. It is what is comprehended by the phrase that running waters are "*publici juris,*" or "belong to the public," elsewhere herein discussed.[12]

(3d ed.)

§ 278. **No Property in the Channel.**—Property in the channel does not pass to the appropriator, but remains in the United States unless granted as land to others under the homestead or other Federal land laws. And, consequently, the same channel may be used by several appropriators, as where one man had appropriated water and a later comer above stream added a large volume of water to the channel, and then diverted it again before it reached the former appropriator, thus using the channel as a link in a long ditch line.[13] If the appropriator happens also to own the channel by some other source of title, he may sell it without affecting the water-right and *vice versa.*[14] Others may build a reservoir in the bed.[15] If a river abandons its channel while on public land, the channel cannot, after title to the bed has passed as land to a private owner, be used for drainage of

8 Booth v. Chapman, 59 Cal. 149.

9 Johnston v. Little Horse etc. Co., 13 Wyo. 208, 110 Am. St. Rep. 986, 79 Pac. 26, 70 L. R. A. 341.

10 Eddy v. Simpson, 3 Cal. 249, 58 Am. Dec. 408, 15 Morr. Min. Rep. 175. *Supra*, sec. 37 et seq.

11 *Supra*, c. 3.

12 *Supra*, c. 1. See, also, *infra*, sec. 688.

13 Hoffman v. Stone, 7 Cal. 46, 4 Morr. Min. Rep. 520; Butte Co. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769, 4 Morr. Min. Rep. 552. *Supra*, sec. 38.

14 Doyle v. San Diego Co., 46 Fed. 709.

15 Larimer etc. Co. v. People, 8 Colo. 614, 9 Pac. 794.

waste by an appropriator, since his appropriation gave him no property in the channel itself.[16]

(3d ed.)

§ 279. **The Right is Exclusive.**—As opposed to the correlative rights of the common law, whereby all riparian owners on the stream have equal rights, under the law of appropriation the rights of the claimants are unequal. Each has an exclusive right to the extent of his prior appropriation, and appropriations vary greatly in the extent of right appropriated. "A party appropriating water has the *sole and exclusive* right to use the same for the purposes for which it was appropriated."[17] So long as the water is put to beneficial use, priority alone governs. Full protection is given to the prior appropriator against all later comers.[18] This exclusiveness includes the right to tributaries and sources,[19] even tributary percolating water so far as proof traces it as tributary,[20] and also storm waters that are of annual occurrence.[21] It is held: "The prior appropriator of a particular quantity of water from a stream is entitled to the use of that water, or so much thereof as naturally flows in the stream, unimpaired and unaffected by any subsequent changes which, in the course of nature, may have been wrought. To the extent of his appropriation his supply will be measured by the waters naturally flowing in the stream and its tributaries above the head of his ditch, whether those waters be furnished by the usual rains or snows, by extraordinary rain or snow fall, or by springs or seepage which directly contribute."[22] It is said, "The appropriator took the water with the right to have the stream flow as it was wont to flow,"[23] which is as strict a statement as the "*aqua currit et debet currere ut currere solebat*" of riparian rights. And he can insist on the flow, though he has

[16] Boglino v. Giorgetta, 20 Colo. App. 338, 78 Pac. 612. Cf. Schodde v. Twin Falls Co., 161 Fed. 43, 88 C. C. A. 207, holding that an appropriator has no property in the "current," but the real effect of the decision involves a different matter elsewhere considered. *Infra*, sec. 310 et seq.

[17] Hoffman v. Stone, 7 Cal. 49, 4 Morr. Min. Rep. 520.

[18] A tendency to modify this rule that priority gives an exclusive right is below considered. *Infra*, sec. 310 et seq.

[19] *Infra*, sec. 337.

[20] *Infra*, sec. 1082.

[21] *Infra*, sec. 347. See, also, *infra*, sec. 825.

[22] Beaverhead etc. Co. v. Dillon etc. Co., 34 Mont. 135, 85 Pac. 880.

[23] Morris v. Bean, 146 Fed. 435. But see Schodde v. Twin Falls etc. Co. (Idaho), 161 Fed. 43, 88 C. C. A. 207.

also rights on another stream which would supply him—he cannot be made to exhaust his rights on one before using the other.[24]

This exclusive right of the prior appropriator to have the natural flow to the extent of his appropriation does not, however, enable him to insist upon receiving it in the natural channel; the upper appropriator may instead give it to him by returning it into his ditch above his place of use—not necessarily into the stream above the head of his ditch—if he gets the quantity to which he is entitled, thereby substantially permitting the substitution of an artificial flow if it can be done without damage[25] (provided that the party substituting an artificial flow sustains the burden of proof (which is on him) that he will not, now or in the future, damage the prior appropriator; for if he does not plead and prove this, or if his artificial plan has any element of doubt, it will be unlawful).[1] The prior appropriator further has no right to waters brought into the stream exclusively by the labor or artificial works of another man who has not intended to abandon them, for such artificial increments are not part of the natural flow;[2] nor has he a right to any flow where, from natural causes, such as drying up, the stream if undisturbed would not reach him anyway[3] (provided, however, that where, in the absence of surface flow to him, there is still an underflow

[24] Norman v. Corbley, 32 Mont. 195, 79 Pac. 1059.

[25] Pomona W. Co. v. San Antonio W. Co. (1908), 152 Cal. 618, 93 Pac. 881; Wiggins v. Muscupiabe etc. Co., 113 Cal. 182, 54 Am. St. Rep. 337, 45 Pac. 160, 32 L. R. A. 667; Huffner v. Sawday (1908), 153 Cal. 86, 94 Pac. 424, *dictum;* Fuller v. Sharp, 33 Utah, 431, 94 Pac. 817; Harrington v. Demarris, 46 Or. 111, 77 Pac. 603, 82 Pac. 14, 1 L. R. A., N. S., 756; Chandler v. Austin, 4 Ariz. 346, 42 Pac. 483.

[1] Miller v. Bay Cities W. Co., 157 Cal. 256, 107 Pac. 115, 27 L. R. A., N. S., 772; Huffner v. Sawday, 153 Cal. 86, 94 Pac. 424.

[2] *Supra,* secs. 38, 61.

[3] Beaverhead etc. Co. v. Dillon etc. Co., 34 Mont. 135, 85 Pac. 880; Paige v. Rocky Ford etc. Co., 83 Cal. 84, 21 Pac. 1102, 23 Pac. 875; Raymond v. Wimsette, 12 Mont. 551, 33 Am. St. Rep. 604, 31 Pac. 537; Cruse v. McCauley (Mont.), 96 Fed. 373; West Point etc. Co. v. Moroni etc. Co., 21 Utah, 229, 61 Pac. 16; Howcroft v. Union etc. Co., 25 Utah, 311, 71 Pac. 487; Booth v. Trager, 44 Colo. 409, 99 Pac. 60; Union etc. Co. v. Dangberg (C. C. Nev.), 81 Fed. 73; City of Telluride v. Blair, 33 Colo. 353, 80 Pac. 1053; Fuller v. Sharp, 33 Utah, 431, 94 Pac. 817; Duckworth v. Watsonville W. Co., 150 Cal. 520, 89 Pac. 336; Guttierrez v. Wege, 145 Cal. at 735, 79 Pac. 449; the latter two applying the same rule to riparian owners. *Contra,* Morris v. Bean, 146 Fed. 436, saying that it is no defense that water would not reach plaintiff anyway, if defendant's diversion is a contributing cause. Such a defense, the court says, is quite common, as old as irrigation, and perhaps as old as trespass itself. See, also, Petterson v. Payne, 43 Colo. 184, 95 Pac. 301, holding that there is a presumption against the validity of the defense. Compare Perry v. Calkins (Cal., 1911), 113 Pac. 136.

or "subflow" in the dry bed, the upper surface diversion must not diminish the underflow,[4] and also provided the evidence that the water would all naturally disappear before reaching plaintiff is clear and convincing,[5] of which defendant has the burden of proof).[6] There is no right in the natural flow such as would allow the ditching back of a stream that had shifted its course naturally;[7] nor, if a stream becomes filled with mud and silt, can the appropriator raise his dam higher so as to preserve the natural depth there, if in so doing the rights of others are interfered with, though later in time.[8]

The right to exclusive use carries with it such right to exclusive flow as is necessary to preserve the appropriator's use without damage to his use; but is not violated by any act that does not interfere with his use of the water. The right to the flow is subordinate to the right of use, and cannot exceed it. "The principle, in brief, is this: That where one is entitled to the use of a given amount of water at a given point, he may not complain of any prior use made of the water which does not impair the quantity or quality to which he is entitled, and, on the other hand, he may not lay claim to any excess of water over the amount to which he is entitled, however it may be produced."[9]

Under the possessory origin of the law of appropriation, the right to the natural flow was the main thing,[10] but the change to a "particular use" system has put first the specific use made of the water, and subordinates the right of flow to the right of use. To that extent, however, the right of flow remains exclusive of later appropriators.

(3d ed.)

§ 280. Distinguished from Right to a Ditch.—The water-right is entirely distinct from the right to the ditch, canal, or other structure in which the water is conveyed. The latter is an easement over *land*. The former is an incorporeal hereditament

[4] Huffner v. Sawday, 153 Cal. 86, 94 Pac. 424; Petterson v. Payne, 43 Colo. 184, 95 Pac. 301.

[5] Alamosa Co. v. Nelson, 42 Colo. 140, 93 Pac. 1112.

[6] Petterson v. Payne, 43 Colo. 184, 95 Pac. 301; Miller v. Bay Cities W. Co., 157 Cal. 256, 107 Pac. 115, 27 L. R. A., N. S., 772; Huffner v. Sawday, 153 Cal. 86, 94 Pac. 424.

[7] Paige v. Rocky etc. Co., 83 Cal. 84, 21 Pac. 1102, 23 Pac. 875; Wholey v. Caldwell, 108 Cal. 95, 49 Am. St. Rep. 64, 41 Pac. 31, 30 L. R. A. 820.

[8] Nevada etc. Co. v. Powell, 34 Cal. 109, 91 Am. Dec. 685, 4 Morr. Min. Rep. 253.

[9] Pomona W. Co. v. San Antonio W. Co. (1908), 152 Cal. 618, 93 Pac. 881.

[10] *Supra*, sec. 139.

sui generis, in the flow and use of the *stream* as a natural resource, and not an easement. The water-right and ditch-right may be conveyed separately, or the one may exist without the other. An abandonment of one does not necessarily include abandonment of the other. One may, however, be appurtenant to the other. The matter is discussed and cases cited at length later.[11]

(3d ed.)

§ 281. **Independent of the Mode of Enjoyment.**—The possessory origin of the law of appropriation of water has its strongest survival in the rule that the right is independent of ownership or possession of any land, and independent of the manner, means, place or purpose of use or of point of diversion. Upon the public domain where the law of appropriation arose, no private claimant originally owned any land—all were asserted to be but trespassers against the United States. Besides, the purposes for which appropriations were made in the early days—that is, distribution to miners—required the taking of water to distant lands occupied by strangers to the appropriator. Possession of a stream on public land being the right (the United States permitting absolute freedom in the matter), that possession could be shifted from place to place or from purpose to purpose, and the point of diversion moved up or down stream, all these things being done on unoccupied public land.[12]

This has had strong survival, and as the authorities generally stand to-day, the water may be taken from and over and be used on distant lands owned entirely by the government or (with their permission) by other private parties, as was and is frequently the case with canal companies. This is a distinguishing feature of the law of appropriation. Appropriation is the doctrine of separate ownership of land and water.[13] The original case of Irwin v. Phillips[14] was such a case. Title to land is in no way concerned.[15] This is now accepted without comment in California. We may also quote the following from a Montana case:[16] "The legal title to the land upon which a water-right

11 *Infra*, secs. 455, 456.

12 *Supra*, sec. 139.

13 Crawford etc. Co. v. Hathaway, 60 Neb. 754, 84 N. W. 273.

14 5 Cal. 140, 63 Am. Dec. 113, 15 Morr. Min. Rep. 178.

15 Santa Paula etc. Works v. Peralta, 113 Cal. 38, 45 Pac. 168.

16 Smith v. Denniff, 24 Mont. 20, 81 Am. St. Rep. 408, 60 Pac. 398, 50 L. R. A. 741.

acquired by appropriation made on the public domain is used or intended to be used in no way affects the appropriator's title to the water-right." In a recent Utah case[17] it is said: "The exclusive right to use certain waters in this State has always been independent of, and separate from, the ownership of the land on which the water was used or the ownership of any land.[18] The authorities generally support this view."[19]

An important application of the rule is in the recent matter of interstate streams, where it is held that an appropriation, being independent of the place of use, may (in the absence of express statutory prohibition) be made in one State for use in any other State.[20]

The rule has been chiefly litigated in regard to change of place of use, and sale of the water-right for use on different land, and citation of authorities is postponed to a later section,[21] except for a few to show the prevailing acceptance in the courts of the rule that the appropriation is independent of title or possession of any land.[22]

[17] Patterson v. Ryan (Utah), 108 Pac. 1118, Mr. Justice Frick.

[18] Citing Sullivan v. Mining Co., 11 Utah, 438, 40 Pac. 709, 30 L. R. A. 186.

[19] Citing this book, 2d ed., sec. 63.

[20] *Infra*, sec. 340 et seq.

[21] *Infra*, sec. 508 et seq.

[22] *California.*—Calkins v. Sorosis etc. Co., 150 Cal. 426, 88 Pac. 1094.

Colorado.—Coffin v. Left Hand Ditch Co., 6 Colo. 443; Thomas v. Guiraud, 6 Colo. 530; Strickler v. Colorado Springs, 16 Colo. 61, 25 Am. St. Rep. 245, 26 Pac. 313; Town of Sterling v. Pawnee etc. Co., 42 Colo. 421, 94 Pac. 341, 15 L. R. A., N. S., 238; Davis v. Randall, 44 Colo. 488, 99 Pac. 322.

Idaho.—Hard v. Boise etc. Co., 9 Idaho, 589, 76 Pac. 331, 65 L. R. A. 407. See Mahoney v. Neiswanger, 6 Idaho, 750, 59 Pac. 561.

Montana.—Hays v. Buzard, 31 Mont. 74, 77 Pac. 423; Smith v. Denniff, 24 Mont. 20, 81 Am. St. Rep. 408, 60 Pac. 398, 50 L. R. A. 741.

Nevada.—Union etc. Co. v. Dangberg, 81 Fed. 73.

Oregon.—Nevada etc. Co. v. Bennett, 30 Or. 59, 60 Am. St. Rep. 777, 45 Pac. 472. It was held in Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1098, 102 Pac. 728, that a *bona fide* intention to devote water to a beneficial use may comprehend the use to be made by or through other persons and upon lands other than those of the appropriator.

Utah.—Patterson v. Ryan (Utah), 108 Pac. 1118; Sowards v. Meagher (Utah), 108 Pac. 1113.

Washington.—Thorpe v. Tenem Ditch Co., 1 Wash. 566, 20 Pac. 588. But see *contra*, Avery v. Johnson (Wash.), 109 Pac. 1028.

Wyoming.—Johnston v. Little Horse etc. Co., 13 Wyo. 208, 110 Am. St. Rep. 986, 79 Pac. 22, 70 L. R. A. 341; Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210; Frank v. Hicks, 4 Wyo. 502, 35 Pac. 475, 1025.

See, also, Hawaiian Com. etc. Co. v. Wailuku etc. Co., 15 Hawaii, 677; Pomeroy on Riparian Rights, secs. 46, 92; Kinney on Irrigation, sec. 156; Gould on Waters, sec. 230; 17 Am. & Eng. Ency. of Law, 497, and cases collected in 65 L. R. A. 407, note.

(3d ed.)

§ 282. Same—Recent Tendency to the Contrary.—The necessity for taking the water to distant lands without returning it to the stream and making the right to the water independent of ownership of riparian land aided in giving rise to the rule that the right is independent of ownership of any land. Use on distant land is hence characteristic. This characteristic use on distant lands involves loss of the efficiency of the water and is a necessary evil of the law of appropriation. In one case the loss by seepage in transportation was so great as to damage the lands passed over.[23]

Under the rule of riparian rights at common law the right to use the water is annexed to riparian lands and dependent upon title thereto; and the law of appropriation was a protest against fastening the right to any land; conforming to the possessory origin of the law of appropriation and necessities of miners in the early days in California, when the use had to be made on the public domain and in regions where the mines were in the mountains often away from the stream valley, and changed from place to place as old claims gave out and new ones were discovered. But to-day it is sometimes thought unfortunate in its application to irrigation, which can be made best in the valleys near the stream, or, at all events, may be permanently carried on in a fixed location. The recent legislation, consequently, is attacking this principle, and in the arid States (as an instance of the general change now going on from a possessory to a use system)[24] substituting the principle "that the right to use the water for irrigation inheres in the land irrigated," and is inseparable therefrom, or separable only with the permission of the State Engineer and publication of notice.[25] President

23 Stuart v. Noble etc. Co., 9 Idaho, 765, 76 Pac. 255.

24 *Supra*, sec. 139.

25 *Arizona.*—Gould v. Maricopa etc. Co., 8 Ariz. 429, 76 Pac. 598; Slosser v. Salt River etc. Co., 7 Ariz. 376, 65 Pac. 332.

Idaho.—Laws 1903, p. 223; Laws 1907, p. 507. See, also, Rev. Codes, sec. 3240; Laws 1901, sec. 9, b.

Nebraska.—Farmers' Irr. Dist. v. Frank, 72 Neb. 136, 100 N. W. 286; Comp. Stats., sec. 6436.

Nevada.—Stats. 1905, p. 66. But see Stats. 1909, p. 31.

New Mexico.—Stats. 1907, p. 71, c. 49, sec. 44.

North Dakota.—Stats. 1905, c. 34, secs. 23, 50.

Oklahoma.—Stats. 1905, p. 274, c. 21, secs. 21, 30.

Oregon.—Stats. 1909, c. 216, sec. 65.

South Dakota.—Stats. 1907, p. 373, c. 180, secs. 31, 49.

Utah.—Stats. 1905, c. 108, secs. 63, 60. See, also, Comp. Laws of 1907,

Roosevelt said in a message:[1] "In the arid States the only right to which water should be recognized is that of use. In irrigation this right should attach to the land reclaimed and be inseparable therefrom." The National Irrigation Congress[2] adopted a memorial declaring among other things that the right to the use of water for irrigation should inhere in the land irrigated. Is this an attempt at a compromise between appropriation and riparian rights? A characteristic of the common law of riparian rights is that the right to use the water is attached to certain lands; a characteristic feature of appropriation is that the appropriation is independent of title to or possession of any lands.

Another evidence of a tendency to depart from the older rule arises in connection with the distribution of water to public uses in Colorado. Under a tendency to public ownership of irrigation systems, consumers are regarded in Colorado as owning the appropriations in the streams rather than the company, and one ground for such ruling is that in the connection mentioned the right is held to be dependent upon the place where the use is made by the consumer.[3] Here, again, the law is in a state of development, for the older view is still frequently taken in this connection also; for example, the supreme court of the United States has said that corporations diverting water need not own any land, nor ne d they be a combination of landowners.[4] And recent cases in other jurisdictions have ruled that the rights of canal companies or any appropriator remain unaffected by the fact that they do not own the land where the use is made.[5]

Another modification and a return to the principle, in this respect, of riparian rights, appears in the New Mexico statute[6]

sec. 1288x8 and 24, amended in Laws 1909, c. 62, p. 84.

Washington. — Avery v. Johnson (Wash.), 109 Pac. 1028.

Wyoming, in 1909, prohibited change absolutely. Laws 1909, c. 68, p. 112, sec. 1.

See statutes of other States in secs. 506, 509, *infra*, and in Part VIII below.

[1] To the 57th Congress, 1st Sess. (Cong. Rec., vol. 35, pp. 85, 86).

[2] Ninth Session held at Chicago, Illinois, November 21–24, 1900.

[3] *Infra*, sec. 1338 et seq.

[4] Gutierres v. Albuquerque etc. Co., 188 U. S. 545, 23 Sup. Ct. Rep. 338, 47 L. Ed. 588. See Montezuma Co. v. Smithville Co., 218 U. S. 371, 31 Sup. Ct. Rep. 67, 54 L. Ed. 1074.

[5] Nevada D. Co. v. Bennett, 30 Or. 59, 60 Am. St. Rep. 777, 45 Pac. 472; Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1098, 102 Pac. 728; Sowards v. Meagher (Utah), 108 Pac. 1113. See generally *infra*, sec. 395 et seq. (application to use), and secs. 1324, 1338 et seq. (consumers as appropriators).

[6] Laws 1907, c. 49, p. 71.

prohibiting an appropriation for use beyond the watershed of the stream from which the water is taken; and, a recent Idaho decision that unused water must be returned to the stream from which taken so far as not inconsistent with the use for which appropriated, even though there be no appropriators, but only riparian proprietors, on the stream below.[7] Likewise, some statutes provide that an appropriator must return any surplus water to the stream from which he diverted it,[8] which, so far as it applies (if it does so apply) to *prior* appropriators, is a great change, as hitherto the law has been that, being independent of place of use, the water may be taken from use under one watershed to use in an entirely different watershed.[9]

Consequently, while the general rule to-day maintains the original possessory basis of the independence of the right upon its mode of enjoyment, yet the transition which the law of appropriation is now undergoing from a possessory to a specific use system is causing numerous departures.[10]

(3d ed.)

§ 283. **Real Estate.**—The right to the flow and use of water, being a right in a natural resource, is real estate.[11]

7 Hutchinson v. Watson D. Co. (1909), 16 Idaho, 484, 133 Am. St. Rep. 125, 101 Pac. 1059.

8 Nev. Stats. 1907, p. 30, sec. 4; Mont. Stats. 1907, p. 109; Cobbey's Nebraska Stats., sec. 6813. Such is also the *effect* of Anderson v. Bassman, 140 Fed. 14.

9 In a Colorado case—Coffin v. Left Hand Ditch Co., 6 Colo. 443—the appellee claimed to have appropriated certain water from St. Vrain Creek, through its diversion by means of a ditch which conducted the water to the James Creek, thence along the bed of the same to Left Hand Creek, where it was again diverted by lateral ditches, and used to irrigate land adjacent to the last-named stream. It was contended that such appropriation was unlawful. But the court upheld it.

10 See *supra*, sec. 139, transitionary state of the law.

11 *California.*—Civ. Code, sec. 801; Hill v. Newman, 5 Cal. 445, 63 Am. Dec. 140, 4 Morr. Min. Rep. 513; California etc. Co. v. County of Los Angeles (1909), 10 Cal. App. 185, 101 Pac. 547; Pacific Club v. Sausalito Co., 98 Cal. 487, 33 Pac. 322; Fudickar v. East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. 1024; Santa Paula etc. Co. v. Peralta, 113 Cal. 38, 45 Pac. 168; South Tule etc. Co. v. King, 144 Cal. 450, 454, 77 Pac. 1032, and cases below cited.

Colorado.—Travelers' etc. Co. v. Childs, 25 Colo. 360, 54 Pac. 1020; Davis v. Randall (1909), 44 Colo. 488, 99 Pac. 322; Bates v. Hall, 44 Colo. 360, 98 Pac. 3; Wyatt v. Larrimer & Weld etc. Co., 18 Colo. 298, 36 Am. St. Rep. 280, 33 Pac. 144; Talcott v. Mastin, 20 Colo. App. 488, 79 Pac. 973; Burnham v. Freeman, 11 Colo. 601, 19 Pac. 761.

Idaho.—Rev. Stats. 1887, sec. 2825; Knowles v. New Sweden Irr. Dist. (1909), 16 Idaho, 217, 101 Pac. 81; Taylor v. Hulett, 15 Idaho, 265, 97 Pac. 37, 19 L. R. A., N. S., 535; Ada Co. etc. Co. v. Farmers' etc. Co., 5 Idaho, 793, 51 Pac. 990, 40 L. R. A. 485; McGinness v. Stanfield, 6 Idaho, 372, 55 Pac. 1020; Hall v. Black-

In Hill v. Newman [12] the court says: "From the policy of our laws it has been held in this State to exist without private ownership of the soil upon the ground of prior location upon the land or prior appropriation and use of the water. The right to water must be treated in this State as it has always been treated, as a right running with the land, and as a corporeal *privilege* bestowed upon the occupier or appropriator of the soil; and *as such*, has none of the characteristics of mere personalty." The court held that a justice of the peace has no jurisdiction over an action for diversion of water because it was an action concerning title to real estate.[13] The statute of frauds, concerning conveyances of real estate, applies to it, and transfers must be by deed.[14] The statute of limitations concerning land applies to it.[15] So do the recording statutes, as between successive conveyances.[16] The right to have water flow from a river into a ditch is real property.[17] A wrongful diversion of water is an injury to real property.[18] The right to take water from a river and conduct it to a tract of land is realty.[19] The right to have water flow through a pipe from a reservoir to and upon a tract of land is an appurtenance to the land.[20] An undivided interest in a ditch and in the right to water flowing therein is real property.[21] And where one person has a right to the flow of water and another has the right to have a part

man, 8 Idaho, 272, 68 Pac. 19. But a mere permit from the State Engineer is not real property. Speer v. Stephenson (1909), 16 Idaho, 707, 102 Pac. 365.

Montana.—Hale v. Jefferson County, 39 Mont. 137, 101 Pac. 973 (but see Helena W. W. Co. v. Settles, 37 Mont. 237, 95 Pac. 838).

Nevada.—Rickey L. & C. Co. v. Miller & Lux, 152 Fed. 14, 81 C. C. A. 207.

Utah.—Conant v. Deep Creek Co., 23 Utah, 627, 90 Am. St. Rep. 721, 66 Pac. 188.

[12] 5 Cal. 445, 63 Am. Dec. 140, 4 Morr. Min. Rep. 513.

[13] A somewhat similar decision appears in Pacific etc. Club v. Sausalito etc. Co., 98 Cal. 487, 33 Pac. 322.

[14] Griseza v. Terwilliger, 144 Cal. 456, 77 Pac. 1034; Smith v. O'Hara, 43 Cal. 371, 1 Morr. Min. Rep. 671; Oneto v. Restano, 78 Cal. 374, 20 Pac. 743; Dorris v. Sullivan, 90 Cal. 279, 27 Pac. 216; Hayes v. Fine, 91 Cal. 391, 27 Pac. 772; Bates v. Hall, 44 Colo. 360, 98 Pac. 3. See *infra*, sec. 555 et seq., parol sale.

[15] Yankee Jim etc. Co. v. Crary, 25 Cal. 504, 85 Am. Dec. 145, 1 Morr. Min. Rep. 196, and see *infra*, sec. 579 et seq.

[16] Partridge v. McKinney, 10 Cal. 181, 1 Morr. Min. Rep. 185; Lyles v. Perrin, 119 Cal. 264, 51 Pac. 332. *Infra*, sec. 542.

[17] Lower Kings River W. D. Co. v. Kings River & F. C. Co., 60 Cal. 410.

[18] Last Chance etc. Co. v. Emigrant D. Co., 129 Cal. 278, 61 Pac. 960.

[19] South Tule etc. Co. v. King, 144 Cal. 454, 77 Pac. 1032.

[20] Standard v. Round Valley Co., 77 Cal. 403, 19 Pac. 689.

[21] Hayes v. Fine, 91 Cal. 398, 27 Pac. 772.

of such water flow to his land for its irrigation, the right of the latter is real property.[22] Ditches and water-rights may be sold on execution as real property.[23] An action to quiet title as for real property is proper.[24] And an action to settle rights is one to quiet title to realty.[25] In Idaho water-rights are declared real estate by statute.[1] As it is real property, an action to quiet title thereto cannot be brought by an administrator.[2] It may be acquired by descent, as real property.[3] It is a vested right, protected by the constitution,[4] and capable of estimation in money.[5]

That the usufructuary right to the flow and use of a natural stream by appropriation is real property is fully recognized.[6]

A permit from the State Engineer to make an appropriation is not, however, real property, not being an appropriation, but only a consent to acquire one.[7]

The *corpus* of water, as distinguished from its usufruct in the natural resource, is not real property.[8]

(3d ed.)

§ 284. Same—Taxation.—For convenience, we state here some matters regarding taxation of ditches and water-rights.

Water-rights are real estate for the purposes of taxation,[9] but should not be assessed separately from the lands to which (if

22 Dorris v. Sullivan, 90 Cal. 286, 27 Pac. 216; Farmers' etc. Co. v. New Hampshire etc. Co. (1907), 40 Colo. 467, 92 Pac. 290. See, also, Stanislaus Water Co. v. Bachman (1908), 152 Cal. 716, 93 Pac. 858, 15 L. R. A., N. S., 359.

23 Gleason v. Hill, 65 Cal. 18, 2 Pac. 413.

24 Gutheil etc. Co. v. Montclair, 32 Colo. 420, 76 Pac. 1050.

25 Taylor v. Hulett, 15 Idaho, 265, 97 Pac. 37, 19 L. R. A., N. S., 535.

1 Idaho Rev. Stats. 1887, sec. 2825; Boise etc. Co. v. Stewart, 10 Idaho, 38, 77 Pac. 32, 321; Ada etc. Co. v. Farmers' etc. Co., 5 Idaho, 793, 51 Pac. 990, 40 L. R. A. 485; McGinness v. Stanfield, 6 Idaho, 372, 55 Pac. 1020; Hall v. Blackman, 8 Idaho, 272, 68 Pac. 19; Taylor v. Hulett, 15 Idaho, 265, 97 Pac. 37.

2 Travelers' Ins. Co. v. Childs, 25 Colo. 360, 54 Pac. 1020.

3 Hall v. Blackman, 8 Idaho, 272, 68 Pac. 19.

4 Town of Sterling v. Pawnee etc. Co., 42 Colo. 421, 94 Pac. 339, 15 L. R. A., N. S., 238. See, also, Lamar etc. Co. v. County etc. Co., 26 Colo. 370, 77 Am. St. Rep. 261, 58 Pac. 600; Mohl v. Lamar etc. Co. (Colo.), 128 Fed. 776; Knowles v. New Sweden Irr. Dist., 16 Idaho, 217, 101 Pac. 81; Miller v. Wheeler (1909), 54 Wash. 429, 103 Pac. 641, 23 L. R. A., N. S., 1065; Montpelier Co. v. Montpelier (Idaho, 1911), 113 Pac. 741.

5 Waha-Lewiston etc. Co. v. Lewiston Co. (Idaho), 158 Fed. 137.

6 As to when the *corpus* of water is *personal property*, see *supra*, sec. 35.

7 Speer v. Stephenson (1909), 16 Idaho, 707, 102 Pac. 365.

8 *Supra*, sec. 1 et seq. As to when it is *personal property*, see *supra*, sec. 35.

9 Authorities *supra;* also Cal. Pol. Code, sec. 3663; *contra*, Helena W. Co. v. Settles, 37 Mont. 237, 95 Pac. 838.

any) they are appurtenant.[10] In California, the Political Code provides:[11] "Water ditches constructed for mining, manufacturing or irrigation purposes, and wagon and turnpike toll roads must be assessed the same as real estate by the assessor of the county, at a rate per mile for that portion of such property as lies within his county."[12] Water actually reduced to possession and contained in waterworks may be taxed as personalty,[13] but not so the water-right in the stream as distinguished from the *corpus* of the water.[14]

Irrigation works are exempt from taxation in some States.[15] Under the Idaho and Colorado exemption it is held that "In order to have shown that this ditch was exempt, it was necessary to show that the waters thereof were used exclusively upon the lands owned by the owner of the ditch, or to have shown that, in fact, the ditch and right of way had never been assessed."[16]

Wells have been held taxable as real estate.[17]

(3d ed.)

§ 285. A Freehold.—A water-right by appropriation is not only real estate, but has all the dignity of and is an estate of fee simple, or a freehold. It was not always accepted as such in the early days, however. This historical denial that the estate was a freehold we have already traced at much length in the historical chapters; how, before the act of Congress of 1866, it was strenuously urged that the appropriators had no right at

[10] Hale v. Jefferson County (1909), 39 Mont. 137, 101 Pac. 973; Colo. Const., art. 10, sec. 3. See Hart v. Plum, 14 Cal. 148, taxation of flume.

[11] Sec. 3663.

[12] See, also, *infra*, sec. 590, adverse use. As to place of taxation of water-rights, see 22 Harvard Law Review, 233, note; Miller v. Madera etc. Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A., N. S., 391.

[13] Irrigation Co. v. Ogden City, 8 Utah, 494, 33 Pac. 135.

[14] *Supra*, c. 2. But in Helena W. W. Co. v. Settles, 37 Mont. 237, 95 Pac. 838, the *water-right* was also held taxable as personalty under Montana statutes. The decision, *aside from any special statute*, would be against authority and principle.

[15] *Arizona.*—Stats. 1907, p. 170.
Colorado.—To some extent. See Const., art. 10, sec. 3; Rev. Stats. 1908, secs. 5545, 5546. See Empire etc. Co. v. Rio Grande etc. Co., 21 Colo. 249, 40 Pac. 449; Murray v. Montrose County, 28 Colo. 430, 65 Pac. 26.
Idaho.—Laws 1899, p. 221; Rev. Stats. 1887, sec. 4043. See Swank v. Sweetwater Co., 15 Idaho, 353, 98 Pac. 297.
Nebraska.—Laws 1895, c. 69, p. 266, sec. 61; Cobbey's Ann. Stats., sec. 6815.
New Mexico.—Stats. 1905, p. 270, sec. 8.
Utah.—Const., art. 13, sec. 3.
This list is probably not complete.

[16] Swank v. Sweetwater etc. Co., 15 Idaho, 353, 98 Pac. 297. Colorado cases, *supra*.

[17] California etc. W. Co. v. Los Angeles (1909), 10 Cal. App. 185, 101 Pac. 547.

all, but were trespassers on the public lands, the United States being the real owner of the right to the water; how the right hence took on many features of a *possessory* character;[18] how the early cases nevertheless gave to the rights of the pioneers all the recognition and force of freehold estates;[19] and how. Congress ratified this by the act of 1866.[20] All doubts were put at rest by that act; and ever since all the freehold remedies are allowed the appropriators in the courts, and their rights have ever since had all the attributes of freehold realty. As said in a very late case: "The first appropriator, to the extent of his appropriation when completed and established, is the owner as *against all the world.*"[21]

(3d ed.)

§ 286. **Conditional.**—Although a freehold, the right is conditional, in the nature of a determinable fee; a feature in common with other rights which have grown out of the possessory system on the public domain, such as mining claims before patent. As to the possessory rights on public land generally, it was said: "Our courts have given them the recognition of legal estates of freehold, and so, to all practical purposes—*if we except some doctrine of abandonment, not, perhaps, applicable to such estates*—unquestionably they are."[22] Though to-day elevated to the dignity of real estate, water-rights of appropriation still retain the impress of their origin, and were (and frequently are) called

[18] *Supra*, sec. 139.

There was some early contention that this mere possessory estate, being without actual title to the realty itself (which belonged to the United States) was in fact personalty. There was much contention that, as personalty, a justice of the peace had jurisdiction over actions concerning mining claims (Yale on Mining Claims and Water Rights, page 115); but this was finally given up *(Ibid.)*; and as to water-rights it was denied as early as Hill v. Newman, quoted *supra*, sec. 283, saying that a *water-right* was not personalty because the *policy of the law* treated it as a freehold. Note, however, a curious survival in some rulings that the statute of frauds does not (in some respects) apply; that a parol sale operates as an abandonment of the appropriation, as though the estate were still the mere possessory one of a trespasser, and not a fee. (*Infra*, sec. 555 et seq.)

[19] *Supra*, sec. 89 et seq. See especially Merritt v. Judd, 14 Cal. 64, 6 Morr. Min. Rep. 62.

[20] *Supra*, sec. 92 et seq.

[21] Sowards v. Meagher (Utah), 108 Pac. 1113.

In the opinions of Mr. Justice Shaw, in California appropriations are sometimes still said to be mere possessory rights and not freehold; but only in one case was this attempted to be applied in actual decision, and reference is made to a preceding chapter where that case (Duckworth v. Watsonville Co., 150 Cal. 520, 89 Pac. 3381) is discussed. *Supra*, sec 246.

[22] Merritt v. Judd, 14 Cal. 64, 6 Morr. Min. Rep. 62

a privilege, license or franchise[23] (under the "California" theory by grant from the United States as proprietor of the public lands; under the Colorado or Wyoming theory, by permit from the State); subject to the conditions of the local law (in the early California days, of the customs of miners) which insist upon forfeiture or abandonment upon failure to make beneficial use. And some recent Water Codes name the final certificate issued to the appropriator a "license."[24] This franchise, privilege or license is conditioned on beneficial use of the water; a failure of this condition causes a loss of the right.[25]

The conditions had their origin in the customs of the California miners, but custom has long been superseded by decision and statute; and custom has no more bearing in this subject to-day than in the general law of real estate.[1]

(3d ed.)

§ 287. An Incorporeal Hereditament.—A water-right by appropriation is not within the term "land."[2] It is not subordinate to any land, but independent thereof and of equal dignity therewith, and hence not an easement.[3] Often it is called an easement,[4] but it is submitted that such is not the better view.[5] Being but a usufruct, or privilege of flow and use, it is incorporeal.[6] It is held to be incorporeal in Swift v. Goodrich,[7] deciding consequently that contracts concerning water-rights

[23] E. g., Conger v. Weaver, 6 Cal. 548, 558, 65 Am. Dec. 528, 1 Morr. Min. Rep. 594; Mitchell v. Amador Canal etc. Co., 75 Cal. 464, 483, 17 Pac. 246; Natoma etc. Water Co. v. Hancock, 101 Cal. 42, 31 Pac. 112, 35 Pac. 334.

[24] *Infra*, sec. 420.

[25] *Infra*, secs. 478, 567 et seq.

[1] See, however, as to the rule in Oregon, Washington and Alaska, *infra*, secs. 635, 1430.

The same is, to a considerable extent, true in the mining law, where miners' customs and regulations are now almost wholly superseded by statute and decision. Costigan on Mining Law, pp. 23, 24.

[2] Mt. Carmel Fruit Co. v. Webster, 140 Cal. 183, 73 Pac. 826; Helena W. Co. v. Settles etc. Co., 37 Mont. 237, 95 Pac. 838.

[3] Yale on Mining Claims and Water Rights, 204, 215; and cases cited *infra*, sec. 456.

[4] E. g., Smith v. Hawkins, 110 Cal. 122, 42 Pac. 453; Smith v. Denniff, 24 Mont. 20, 81 Am. St. Rep. 408, 60 Pac. 398, 50 L. R. A. 741; Cal. Civ. Code, 801.

[5] See, also, Lux v. Haggin, 69 Cal. 255, 293, 10 Pac. 674. A perpetual water-right is not a "lien and encumbrance." Nampa Irr. Dist. v. Gess, 17 Idaho, 552, 106 Pac. 993.

[6] In Hill v. Newman, 5 Cal. 445, 63 Am. Dec. 140, 4 Morr. Min. Rep. 513, quoted in a preceding section, it is called a *corporeal* hereditament. See Yale on Mining Claims and Water Rights, pp. 204, 215; Helena W. Co. v. Settles etc. Co., 37 Mont. 237, 95 Pac. 838.

[7] 70 Cal. 103, 11 Pac. 561.

cannot create the relation of landlord and tenant, as, being incorporeal, no tenancy can exist therein.[8]

(3d ed.)

§ 288. **Definition.**—From these characteristics, the following definition, it is suggested, may be deduced:

A water-right of appropriation is real estate, independent of the ditch for carrying the water, and independent of ownership or possession of any land and independent of place of use or mode of enjoyment, whereby the appropriator is granted by the government the exclusive use of the water anywhere so long as he applies it to any beneficial purpose; and it is an incorporeal hereditament, solely usufructuary, not conferring ownership in the *corpus* of the water or in the channel of the stream.

This definition, being made by consolidating the elements already separately considered, is in each element supported by the authorities.[9]

(3d ed.)

§ 289. **Same.**—There is, however, some confusion in the use of the word "appropriation." This confusion occurs in statutes and decisions. There are at least eight different ways in which the word "appropriation" has been used in the law of waters. These are as follows:

(1) A diversion on public land of a stream flowing wholly over public land, and, because a grant from the United States, constituting a freehold indefeasible usufructuary estate in the natural resource, good against riparian owners subsequently acquiring land, and good against the world. This is the only

[8] Was called incorporeal in Rickey etc. Co. v. Miller, 152 Fed. 14, 81 C. C. A. 207; Frank v. Hicks, 4 Wyo. 502, 35 Pac. 475, 481, 1025. See, also, Gutheil etc. Co. v. Montclair, 32 Colo. 420, 76 Pac. 1050, holding it unnecessary in the case to decide whether corporeal or incorporeal.

[9] Another definition which we deduced elsewhere (*supra*, sec. 19) is: "A *water-right* is a usufruct in a stream, consisting in the right to have the water flow so that some portion of it (which portion the law limits in various ways) may be reduced to possession and be made the private property of an individual."

Other definitions are given *infra*, sec. 370, of which the following is an example: "It has been repeatedly decided in this jurisdiction that an 'appropriation' consists of an actual diversion of water from a natural stream, followed within a reasonable time thereafter by an application thereof to some beneficial use." Windsor R. Co. v. Lake Supply Co., 44 Colo. 214, 98 Pac. 729. "Appropriation is the intent to take, accompanied by some open, physical demonstration of the intent, and for some valuable use." Larimer Co. Res. Co. v. People, 8 Colo. 616, 9 Pac. 794.

For a statutory definition in Wyoming, see *infra*, sec. 1449.

proper sense in which the word can be (and usually is) used under the California doctrine. Properly speaking, the word "appropriation," as already set forth, denotes a freehold estate, or, as the California court has frequently said, "The term 'appropriation' as applied to the acquirement of the right to the use of water has in this State a statutory technical meaning," [10] and is confined to rights obtained on the public domain.

(2) As denoting a diversion of waters flowing on either public or private land under the Colorado doctrine.

(3) As denoting in California wrongful possessions by disseisin, the possession of one mere trespasser or "disseisor" in respect to water on private land against another mere trespasser, both subject to the paramount right of riparian owners (the disseisees) who have not yet objected to either—a possession defeasible *in toto* by riparian owners at any time before prescription has arisen, and not a freehold. This is a revival of the idea that an appropriation is but a possessory right against other mere possessors and not a freehold.[11] However, from an early period in the law, possessory rights *on the public domain* were regarded as freehold titles, and only such freehold estates acquired on public land are, as in the first use of the word above, properly called "appropriations" in California.[12]

(4) As, in California, denoting (possibly) surplus diversion over all possible present or future needs of an individual exist-

[10] Alta etc. Co. v. Hancock, 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. 645; Merrill v. Southside Irr. Co., 112 Cal. 433, 44 Pac. 720.

[11] The possession of adverse trespassers between themselves has been called an "appropriation," though neither party has an estate in fee in the waters. Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. 338, speaking of "common-law appropriation," meaning to designate such a possessory right by disseisin. See *supra*, sec. 246.

[12] In Katz v. Walkinshaw, 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, and Burr v. Maclay Rancho etc. Co. (1908), 154 Cal. 428, 98 Pac. 260, the users of underground water, in the one case coming from artesian wells and in the other case pumped from an underground basin (see *infra*, secs. 1106, 1158), are spoken of in the court's opinion as "appropriators for use on distant lands," although the court expressly declares in the Katz case (page 135), "There is no statute on this subject, as there now is concerning appropriations of surface streams," and in the Burr case expressly decides that this kind of an "appropriation" is only a temporary one, terminable at the suit of any neighboring landowner who wants the water for use on his own land, and against whom, to the extent of his capacity of use, this kind of "appropriation" is no appropriation at all in the sense of permanent right. *Infra*, sec. 1156 et seq. See, also, Hudson v. Dailey (1909), 156 Cal. 617, 105 Pac. 748.

ing plaintiff riparian owner.[13] This also is not a positive right, being defeasible by some other riparian owner who can show that he may possibly be damaged (though the present plaintiff cannot so show); and certainly defeasible by a sufficient number of riparian owners joining against it. It is in no true sense an "appropriation."

(5) As applied to the *corpus* of the water instead of its *usufruct*, as where one dips a bucket in the stream he is sometimes said to "appropriate" that individual bucketful.[14]

(6) As denoting a right acquired on eminent domain by forced purchase, making compensation.

(7) Under the California constitution, water "appropriated" for distribution means water applied or devoted thereto, however acquired.[15]

(8) As denoting the first step in acquiring a right. "Appropriation is a much-abused word. It is often loosely spoken of as the preliminary step—such as filing a notice, making a claim to the water or the like,"[16] which is a wholly improper use of the word.[17]

It is hence not surprising that confusion has occurred in the law.[18]

§§ *290–298. (Blank numbers.)*

[13] *Infra*, sec. 822 et seq.

[14] *Supra*, sec. 30 et seq.

[15] The constitution of California, article 14, section 1, declares that "the use of all waters now appropriated, or that may hereafter be appropriated for sale, rental, or distribution, is hereby declared to be a public use." The word "appropriated" here means "applied," or "devoted," and does not connote any special method or kind of acquisition. Merrill v. Southside Irr. Co., 112 Cal. 426, 44 Pac. 720; Hildreth v. Montecito Co., 139 Cal. 29, 72 Pac. 395; Mahoney v. American Land etc. Co., 2 Cal. App. 186, 83 Pac. 267. See *infra*, secs. 1264, 1265.

[16] Morris v. Bean (Mont.), 146 Fed. 425.

[17] *Infra*, sec. 376. See, also, Speer v. Stephenson, 16 Idaho, 707, 102 Pac. 365, as to a "permit."

[18] Because of this confusion there is some tendency in very recent California cases to drop the word "appropriation" and speak instead of "paramount right" to indicate, against riparian owners, rights by grant, condemnation or prescription and *public land* appropriations.

CHAPTER 14.

RELATION BETWEEN APPROPRIATORS.

A. SENIOR RIGHTS.

§ 299. Priority governs.
§ 300. Whole stream.
§ 301. In times of deficiency.

B. JUNIOR RIGHTS.

§ 302. Successive appropriation.
§ 303. Same.
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§ 305. Periodical appropriations.
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§ 307. No partiality.
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§ 309. Pro-rating.

C. CORRELATIVE RIGHTS BETWEEN APPROPRIATORS.

§ 310. The principle of "unreasonable priority."
§ 311. Some early rulings.
§ 312. The *dictum* in Basey v. Gallagher.
§ 313. Recent tendencies.
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§ 315. Conclusions.
§§ 316–317. (Blank numbers.)

A. SENIOR RIGHTS.

(3d ed.)

§ 299. **Priority Governs.**—Under the theory upon which the law of appropriation arose, and what is still the theory of the California doctrine, several appropriators on the same stream upon public land (to which alone does the doctrine of appropriation apply in California) bear to each other the relation of successive grantees of parcels of one original holding, namely, of the sole right to the waters held by the United States as original owner. Like successive grants between private parties, where they conflict, the later one can hold only what was left after the earlier one was made. The maxim, "*Qui prior est in tempore, portior est in jure,*" is continually quoted in the early cases upon this subject as governing; a maxim drawn from the law of successive

grants of real estate between private parties who took from the same owner subject to the possession of a prior grantee.[1]

Under the theory of the Colorado doctrine, priority governs because the waters are *publici juris*, and the possession and use of the first taker, whether on public or private land, gives a good title thereto against later comers on the principle that prior possession and use thereof is the only source of title. That priority gives the better right sometimes appears in the constitutions of the arid States.

Water-rights by appropriation are frequently spoken of as "priorities." That priority governs is a fundamental principle of the law of appropriation.[2]

A simple illustration of the doctrine of priority is the following: A settler living on unsurveyed public land at a spring used

1 In Lux v. Haggin the court says: "Recognizing the United States as the owner of the lands and waters, and as therefore authorized to permit the occupation or diversion of the waters as distinct from the lands, the State courts have treated the prior appropriator of water on the public lands of the United States as having a better right than a subsequent appropriator, on the theory that the appropriation was allowed or licensed by the United States." Lux v. Haggin, 69 Cal. 255, at 339, 10 Pac. 674.

2 *Alaska.*—(For mining) Revenue etc. Co. v. Balderston, 2 Alaska, 363.

California.—Irwin v. Phillips, 5 Cal. 140, 63 Am. Dec. 113, 15 Morr. Min. Rep. 178; Conger v. Weaver, 6 Cal. 548, 65 Am. Dec. 528, 1 Morr. Min. Rep. 594; Kelley v. Natoma W. Co., 6 Cal. 106, 1 Morr. Min. Rep. 592; Tenney v. Miners' Ditch Co., 7 Cal. 335, 11 Morr. Min. Rep. 31; Thompson v. Lee, 8 Cal. 275, 1 Morr. Min. Rep. 610; Marius v. Bicknell, 10 Cal. 217; Butte etc. Ditch Co. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769, 4 Morr. Min. Rep. 552; Kimball v. Gearhart, 12 Cal. 27, 1 Morr. Min. Rep. 615; Ortman v. Dixon, 13 Cal. 33; McDonald v. Bear River Co., 13 Cal. 220, 1 Morr. Min. Rep. 626; Esmond v. Chew, 15 Cal. 137, 5 Morr. Min. Rep. 175; Kidd v. Laird, 15 Cal. 161, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571; Logan v. Driscoll, 19 Cal. 623, 81 Am. Dec. 90, 6 Morr. Min. Rep. 172; McKinney v. Smith, 21 Cal. 374, 1 Morr. Min. Rep. 150; Phoenix Water Co. v. Fletcher, 23 Cal. 481, 15 Morr. Min. Rep. 185; Weaver v. Lake Co., 15 Cal. 274, 1 Morr. Min. Rep. 642; Hill v. Smith, 27 Cal. 476, 4 Morr. Min. Rep. 597; Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Nevada Water Co. v. Powell, 34 Cal. 109, 91 Am. Dec. 685, 4 Morr. Min. Rep. 253; Nevada etc. Co. v. Kidd, 37 Cal. 283; Osgood v. Water Co., 56 Cal. 571, 5 Morr. Min. Rep. 37; Mitchell v. Mining Co., 75 Cal. 482, 17 Pac. 246; Ramelli v. Irish, 96 Cal. 214, 31 Pac. 41; Barrows v. Fox, 98 Cal. 63, 32 Pac. 811; Wutchumna etc. Co. v. Pogue, 151 Cal. 105, 90 Pac. 362; Civ. Code, sec. 1414, "As between appropriators, the one first in time is first in right."

Colorado.—Const., art. 16, sec. 6; Coffin v. Ditch Co., 6 Colo. 443; Sieber v. Frink, 7 Colo. 149, 2 Pac. 901; Wheeler v. Irrigation Co., 10 Colo. 583, 3 Am. St. Rep. 603, 17 Pac. 487; Hammond v. Rose, 11 Colo. 524, 7 Am. St. Rep. 258, 19 Pac. 466; Farmers' etc. Reservoir Co. v. Southworth, 13 Colo. 111, 21 Pac. 1028, 4 L. R. A. 767; Platte Water Co. v. Northern Colorado Irr. Co., 12 Colo. 525, 21 Pac. 711; Combs v. Ditch Co., 17 Colo. 146, 31 Am. St. Rep. 275, 28 Pac. 966; Saint v. Guerrerio, 17 Colo. 448, 31 Am. St. Rep. 320, 30 Pac. 335; Thomas v. Guiraud, 6 Colo. 530; Armstrong v. Larimer etc. Co., 1 Colo. App. 49, 27 Pac. 235; Strickler v. City of Colorado Springs, 16 Colo. 61,

the spring for culinary purposes and watering a saddle-horse, though having no right or title in the land he occupied (unsurveyed public land). Sheep and cattle men from time to time watered at the spring, and after the settler's death one of them set up an appropriation against the settler's administrator. It was held the settler had a better right (which would pass to the administrator) to the extent of use for culinary purposes and

25 Am. St. Rep. 245, 26 Pac. 313; Ft. Morgan Co. v. So. Platte D. Co., 18 Colo. 1, 36 Am. St. Rep. 259, 30 Pac. 1032; Bloom v. West, 3 Colo. App. 212, 32 Pac. 846; Colorado Mill etc. Co. v. Larimer Irr. Co., 26 Colo. 47, 56 Pac. 185; Cache La Poudre Co. v. Water Sup. Co., 27 Colo. 532, 62 Pac. 420; Fulton etc. Co. v. Meadow etc. Co., 35 Colo. 588, 86 Pac. 748; Baer etc. Co. v. Wilson, 38 Colo. 101, 88 Pac. 265; Const., art. 16, sec. 6.

Idaho.—Malad Val. Irr. Co. v. Campbell, 2 Idaho, 378 (411), 18 Pac. 52; Kirk v. Bartholomew, 3 Idaho, 367, 29 Pac. 40; Conant v. Jones, 3 Idaho, 606, 32 Pac. 250; Krall v. United States, 79 Fed. 241, 24 C. C. A. 513; Dunniway v. Lawson, 6 Idaho, 28. 51 Pac. 1032; Moe v. Harger, 10 Idaho, 302, 77 Pac. 645.

Kansas.—Clark v. Allaman, 71 Kan. 206, 80 Pac. 571, 70 L. R. A. 971; Gen. Stats., sec. 3501.

Montana.—Thorp v. Freed, 1 Mont. 651; Woolman v. Garringer, 1 Mont. 535, 1 Morr. Min. Rep. 675; Alder Gulch etc. Co. v. Hayes, 6 Mont. 31, 9 Pac. 581; Quigley v. Birdseye, 11 Mont. 439, 28 Pac. 741; Toohey v. Campbell, 24 Mont. 13, 60 Pac. 396; Civ. Code, sec. 1885.

Nebraska.—Cobbey's Ann. Stats., sec. 6753; Laws 1889, c. 68, p. 504, sec. 7.

Nevada.—Lobdell v. Simpson, 2 Nev. 274, 99 Am. Dec. 537; Ophir Min. Co. v. Carpenter, 4 Nev. 534, 97 Am. Dec. 550, 4 Morr. Min. Rep. 640; Proctor v. Jennings, 6 Nev. 83, 3 Am. Rep 240, 4 Morr. Min. Rep. 265; Simpson v. Williams, 18 Nev. 432, 4 Pac. 1213; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; Chiatovich v. Davis, 17 Nev. 133, 28 Pac. 239; Reno Smelting Co. v. Stevenson, 20 Nev. 269, 19 Am. St. Rep. 364, 4 L. R. A. 60, 21 Pac. 317; Union Mill Co. v. Dangberg (Nev.), 81 Fed. 73; Ennor v. Raine, 27 Nev. 178, 74 Pac. 1; Twaddle v. Winters, 29 Nev. 88, 85 Pac. 284, 89 Pac. 289.

New Mexico.—Millheiser v. Long, 10 N. M. 99, 61 Pac. 111; Albuquerque Irr. Co. v. Gutierrez, 10 N. M. 177, 61 Pac. 357; S. C., Gutierres v. Albuquerque etc. Co., 188 U. S. 545, 23 Sup. Ct. Rep. 338, 47 L. Ed. 588.

Oregon.—Kaler v. Campbell, 13 Or. 596, 11 Pac. 301; Simmons v. Winters, 21 Or. 35, 28 Am. St. Rep. 727, 27 Pac. 7; Speake v. Hamilton, 21 Or. 3, 26 Pac. 855; Hindman v. Rizor, 21 Or. 112, 27 Pac. 13; McCall v. Porter, 42 Or. 49, 70 Pac. 820, 71 Pac. 976; Nevada etc. Co. v. Bennett, 30 Or. 59, 60 Am. St. Rep. 777, 45 Pac. 472; Mann v. Parker, 48 Or. 321, 86 Pac. 598; Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1098, 102 Pac. 728.

South Dakota.—Lone Tree D. Co. v. Cyclone D. Co., 15 S. D. 519, 91 N. W. 355; Stats. 1905, p. 204, sec. 2; Stats. 1907, c. 180, sec. 2.

Utah.—Munroe v. Ivie, 2 Utah, 535, 8 Morr. Min. Rep. 127; Lehi Irr. Co. v. Moyle, 4 Utah, 327, 9 Pac. 867; Salina Creek Irr. Co. v. Salina Stock Co., 7 Utah, 456, 27 Pac. 578; Hague Nephi Irr. Co., 16 Utah, 421, 67 Am. St. Rep. 634, 41 L. R. A. 311, 52 Pac. 765; Herriman Irr. Co. v. Butterfield M. Co., 19 Utah, 453, 57 Pac. 537, 51 L. R. A. 930; Salt Lake City v. Salt Lake etc. Co., 24 Utah, 249, 67 Pac. 672, 61 L. R. A. 648, 25 Utah, 456, 71 Pac. 1069.

Wyoming.—Const., art. 8, sec. 3; Moyer v. Preston, 6 Wyo. 308, 71 Am. St. Rep. 914, 44 Pac. 845; Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210.

See, also, Pomeroy on Riparian Rights, sec. 15; Gould on Waters, sec. 228 et seq.; Kinney on Irrigation, sec. 150 et seq.

watering the horse, and to the extent of the times in the year he so used it, and the administrator could transfer it to other uses or to use on other lands.[3]

The subsequent appropriator who claims that diversion will not injure the prior appropriator below him should be required to establish that fact by clear and convincing evidence.[4] A notice of appropriation is ineffectual against water already appropriated and in use.[5] A diminution of the quantity appropriated need not be the result of actual diversion; for example, if sawdust from a sawmill clogs up one's ditch so as to diminish the flow, it is actionable.[6] Or if the velocity is diminished by a dam preventing the working of a mining claim by a prior appropriator, or causing irregularity of flow.[7] Water must not be discharged into another's canal to his injury.[8] Under the doctrine of appropriation of water, he who is first in time is first in right, and so long as he continues to apply the water to a beneficial use, subsequent appropriators cannot deprive him of the rights his appropriation gives, either by diminishing the quantity or deteriorating the quality.[9]

In one case the governing force of priority is denied on the ground of the selfish result to which it led where the prior appropriation of a stream to run a current-wheel would have prevented irrigation, by a subsequent appropriator, of a large region; and the prior appropriator was not given damages for interference with the flow to the injury of his water-wheels.[10] But this case is really based upon a modification of the law of appropriation, rather than under it, and in that regard we consider it later.[11]

Compliance with an unconstitutional statute cannot aid a claim of priority.[12]

3 Patterson v. Ryan (Utah, 1910), 108 Pac. 1118, citing this book, 2d ed.

4 Moe v. Harger, 10 Idaho, 302, 77 Pac. 645.

5 Weidensteiner v. Mally (1909), 55 Wash. 79, 104 Pac. 143.

6 Phoenix Water Co. v. Fletcher, 23 Cal. 481, 15 Morr. Min. Rep. 185.

7 Phoenix Water Co. v. Fletcher, 23 Cal. 481, 15 Morr. Min. Rep. 185; Natoma etc. Co. v. McCoy, 23 Cal. 490, 4 Morr. Min. Rep. 590; Stone v. Bumpers, 46 Cal. 218, 4 Morr. Min. Rep. 278; Parker v. Gregg, 136 Cal. 413, 69 Pac. 22. See, also, De Baker v. Southern Cal. Ry. Co., 106 Cal. 257, 46 Am. St. Rep. 237, 39 Pac. 610.

8 North Point etc. Co. v. Utah etc. Co., 16 Utah, 246, 67 Am. St. Rep. 607, 52 Pac. 168, 40 L. R. A. 851.

9 Arizona etc. Co. v. Gillespie (Ariz., 1909), 100 Pac. 465.

10 Schodde v. Twin Falls etc. Co. (Idaho), 161 Fed. 43, 88 C. C. A. 207.

11 *Infra*, sec. 310.

12 Lamar etc. Co. v. Amity etc. Co., 26 Colo. 370, 77 Am. St. Rep. 261, 58 Pac. 600; Great Plains etc. Co. v. Lamar etc. Co., 31 Colo. 96, 71 Pac. 1119; Mold v. Lamar Canal Co., 128 Fed. 776.

(3d ed.)

§ 300. **Whole Stream.**—If for a beneficial purpose, one may hence appropriate a whole stream.[13] An appropriation is limited to beneficial use, but may absorb a whole stream to that end.[14] "Under such doctrine the first appropriator may appropriate the entire flow of a stream, if used in proper irrigation.[15] Also, a nonriparian owner may appropriate and get an exclusive right to the whole water of a stream for nonriparian lands."[16] Another says: "Beyond question, under our laws (Idaho), a party may be protected in the use of all the water he actually appropriates and uses, even if it be every drop that flows in as great a river as the Snake."[17]

(3d ed.)

§ 301. **In Times of Deficiency.**—In times of natural or other deficiency, also, unless otherwise provided by statute, the prior appropriator may still claim his full amount; the loss must fall on the later appropriators. In a case enforcing an appropriation to the extent of seventy-five per cent of the whole stream, it is said: "It further appears from this defense that at certain seasons of the year the flow of the stream will only supply the needs of the defendants. It appears, therefore, from the averments of this defense, that the defendants have a prior right to the use of the water from the natural stream, and, when low, to the entire volume thereof, and the demurrer thereto should have been overruled."[18] This is true even where (indeed, especially where) unusual scarcity or dry season causes the deficiency.[19]

[13] As to beneficial use, see *infra*, c. 21.

[14] Bolter v. Garrett, 44 Or. 304, 75 Pac. 143; Malad etc. Co. v. Campbell, 2 Idaho, 411, 18 Pac. 52; Moe v. Harger, 10 Idaho, 302, 77 Pac. 645; Lockwood v. Freeman, 15 Idaho, 395, 98 Pac. 295; Wellington v. Beck, 30 Colo. 409, 70 Pac. 687; Same v. Same, 43 Colo. 70, 95 Pac. 297; Alhambra etc. Co. v. Mayberry, 88 Cal. 74, 25 Pac. 1101; Brown v. Mullin, 65 Cal. 89, 3 Pac. 99.

[15] Citing Hammond v. Rose, 11 Colo. 524, 7 Am. St. Rep. 258, 19 Pac. 466; Drake v. Earhart, 2 Idaho, 750, 23 Pac. 541.

[16] Meng v. Coffey, 67 Neb. 500, 108 Am. St. Rep. 697, 93 N. W. 715, 60 L. R. A. 910.

[17] Trade etc. Co. v. Fraser, 148 Fed. 587, 79 C. C. A. 37.

[18] Wellington v. Beck, 30 Colo. 409, 70 Pac. 687; S. C., 43 Colo. 70, 95 Pac. 297.

[19] *Ibid.*, and Huning v. Porter, 6 Ariz. 171, 54 Pac. 584; City of Telluride v. Blair, 33 Colo. 353, 80 Pac. 1053. Compare Brown v. Smith, 10 Cal. 508, 4 Morr. Min. Rep. 539; Brown v. Mullin, 65 Cal. 89, 3 Pac. 99. "It is unfortunate that the flood waters of Antoine Creek cannot be conserved for the use of all, but, so long as our laws measure the rights of the appropriator of water by the necessities of the dry season, the first in time must be held to be the first in right. The just purpose of the trial judge to apportion the waters

This is in marked contrast to the doctrine of riparian rights, where all riparian owners have an equal right, and, in time of deficiency, the water would be apportioned among them.[20]

These possible results have been frequently urged as arguments against the doctrine of appropriation, saying that the enforcement of appropriation may well work for the benefit of a few against many, but must be enforced nevertheless, and it is said that prior appropriation is a selfish system.[21] In California the court said that it would not require a prophetic vision to see a monopoly of waters as a result of the law of appropriation,[22]

cannot be sustained in the light of the evidence showing that there is no excess of water running to, or waste by, the appellants. This cause is remanded with instructions to enter a decree fixing the amount of water actually necessary to irrigate the lands of appellants even to the full flow of the stream in the dry season," etc. Avery v. Johnson (Wash.), 109 Pac. 1028.

[20] *Infra*, sec. 751 et seq. See, also, Kinney on Irrigation, secs. 173, 225 (saying this may seem a selfish principle to one acquainted only with the common law upon the subject), 229, 240; Sayre v. Johnson, 33 Mont. 15, 81 Pac. 389; Kirk v. Batholomew, 3 Idaho, 367, 29 Pac. 40; and the emphatic opinion in Hillman v. Hardwick, 3 Idaho, 255, 28 Pac. 438; Long on Irrigation, sec. 57.

The State Engineer of Idaho says in Bulletin 216 of the Office of Experiment Stations, United States Department of Agriculture: "So long as there is water sufficient for all appropriators the matter of priority is of no particular importance, but in case of shortage of water it becomes the duty of the water-master to see that the earlier appropriators are served, although the later appropriators may suffer. To illustrate: In the case of three rights, one established in 1870, the second in 1880, and the third in 1890, in the event of shortage the two earlier rights would receive their full amount and the last would have what surplus there might be. If there were enough to supply only one of the rights, the 1870 right would receive all the water and the two later ones none at all. This, in simple terms, is an application of the law of priority in the use of water and the equitable principle upon which it is based is expressed in the words, 'first in time, first in right.'"

[21] "A few men will locate their farms near the mouth of a stream and appropriate the waters thereof, and any subsequent locators up the stream would be guilty of a trespass if they undertook to use any of the waters thereof, and an action could be prosecuted and maintained against them. . . . . Thus, the prior appropriator renders vast tracts of land utterly worthless, and their sale is lost to the government and their cultivation to the people." Wade, C. J., in Thorp v. Freed, 1 Mont. 678, arguing that the law of appropriation should be rejected entirely as to irrigation.

In one recent case it is said that an appropriation may be made though it has the result "to lay barren and waste the lands of defendants in Montana, that two farms in Wyoming may be supplied with water," because the contention to the contrary "disregards the maxim that he who is first in time is strongest in right, which is the very essence of the doctrine of appropriation." Morris v. Bean, 146 Fed. 435. See, also, Cave v. Tyler, 133 Cal. 566, 65 Pac. 1089. Many Colorado streams are already over-appropriated, says the court in Humphreys T. Co. v. Frank, 46 Colo. 524, 105 Pac. 1093. The Boise River in Idaho has been wholly appropriated. United States v. Burley, 172 Fed. 615.

[22] Lux v. Haggin, 69 Cal. 255, 10 Pac. 674, quoted *infra*, sec. 1015, confining appropriation in California to waters on public lands.

and Mr. Pinchot says such a monopoly is already upon us. In Nebraska a statute setting up the law of prior appropriation was attacked as in conflict with a constitutional prohibition against monopolies, but it was held that the requirement that the prior appropriator must put the water to beneficial use before he can have any right removes the system from such invalidity.[23]

Although the controlling force of priority has long been accepted and applied, yet to-day there is a tendency in the courts to depart from this extreme position, and, in times of scarcity, to apportion the water instead of enforcing the priorities;[24] and there is also some movement in the legislatures to enact prorating statutes.[25] Likewise the requirement of beneficial use prevents holding the water for speculation. And it may be further noted in defense that since most of the large appropriations are made for distribution of the water to public use, they are subject to the law of the State made for the control of public service and to prevent abuses.[1]

B. JUNIOR RIGHTS.

(3d ed.)

§ 302. Successive Appropriations.—It is well settled that, subject to the rule of priority, later comers may make appropriations, each later comer in succession being required to respect the appropriations of all who came before him. Later appropriations may be made of the surplus over what has been appropriated by prior appropriators, or of any use that does not materially interfere with prior appropriators.[2] In Colorado the suc-

[23] Farmers' Irr. Dist. v. Frank, 72 Neb. 136, 100 N. W. 286. Cf. Munroe v. Ivie, 2 Utah, 535, 8 Morr. Min. Rep. 127.

[24] *Infra*, sec. 310, correlative rights between appropriators.

[25] *Infra*, sec. 309.

[1] *Infra*, Part VII, sec. 1245 et seq.

[2] Kelly v. Natoma etc. Co., 6 Cal. 105, 1 Morr. Min. Rep. 592; Brown v. Smith, 10 Cal. 510; Ortman v. Dixon, 13 Cal. 33, 4 Morr. Min. Rep. 539; McDonald v. Bear River etc. Co., 13 Cal. 220, 1 Morr. Min. Rep. 626; McKinney v. Smith, 21 Cal. 374, 1 Morr. Min. Rep. 150; American Co. v. Bradford, 27 Cal. 360, 15 Morr. Min. Rep. 190; Nevada Water Co. v. Powell, 34 Cal. 109, 91 Am. Dec. 685; Nevada etc. Co. v. Kidd, 37 Cal. 282, at 313; Higgins v. Barker, 42 Cal. 233, 7 Morr. Min. Rep. 525; Smith v. O'Hara, 43 Cal. 371, 1 Morr. Min. Rep. 671; Stein Canal Co. v. Kern Island etc. Co., 53 Cal. 563; Hillman v. Newington, 57 Cal. 56; Brown v. Mullin, 65 Cal. 89, 3 Pac. 99; Junkans v. Bergin, 67 Cal. 267, 7 Pac. 684; Edgar v. Stevenson, 70 Cal. 286, 11 Pac. 704; Ball v. Kehl, 87 Cal. 505, 25 Pac. 679; Barrows v. Fox, 98 Cal. 63, 32 Pac. 811; Natoma etc. Co. v. Hancock, 101 Cal. 42, 31 Pac. 112, 35 Pac. 334; Santa Paula Water Co. v. Peralta, 113 Cal. 38, 45 Pac. 168; Senior v. Anderson, 115 Cal. 496, 47 Pac. 454; Smith v. Hawkins, 120 Cal. 86, 52 Pac. 139,

cessive appropriators are called "senior" and "junior," names drawn from the law of mining locations, where priority also governs.

A subsequent appropriator has a vested right against his senior to insist upon the continuance of the conditions that existed at the time he made his appropriation.[3] "A second appropriator has a right to have the water continue to flow as it flowed when he made his appropriation."[4] The subsequent appropriator is entitled to the surplus, and any attempt of the prior appropriator to make a sale of such surplus to someone else to the injury of existing appropriators, though subsequent, is of no avail.[5] The prior cannot charge the later one for use of the surplus water.[6] It has been held that the fact that water passed all other appropriators raises a presumption that there was a surplus in favor of a junior appropriator.[7]

Among the successive appropriators each is in the position of a prior one toward all who are subsequent to himself.[8] The independence of the appropriators *inter se* is shown by the decision that where a majority of users on a stream incorporate, they have no right to regulate the use of the minority who do not come into the corporation.[9]

There may, therefore, be numerous appropriations of water of the same stream, and for use at different times and seasons, or for different purposes.[10] And after the rights of subsequent appropriators have attached, the prior appropriator cannot change or extend his use to their injury.[11] An appropriator of water, it is true, may change the point of diversion or place of use, so long

19 Morr. Min. Rep. 243; Senior v. Anderson, 130 Cal. 290, 62 Pac. 563; Moe v. Harger, 10 Idaho, 302, 77 Pac. 645; Mann v. Parker, 48 Or. 321, 86 Pac. 598; McCall v. Porter, 42 Or. 49, 70 Pac. 820, 71 Pac. 976; Salt Lake City v. Salt Lake etc. Co., 24 Utah, 249, 67 Pac. 672, 61 L. R. A. 648, 25 Utah, 456, 71 Pac. 1069; Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728; Whited v. Cavin (Or.), 105 Pac. 396; Featherman v. Hennessey (Mont., 1911), 113 Pac. 751.

3 Handy Ditch Co. v. Louden etc. Co., 27 Colo. 515, 62 Pac. 847; Baer etc. Co. v. Wilson, 38 Colo. 101, 88 Pac. 265.

4 Lobdell v. Simpson, 2 Nev. 274, 90 Am. Dec. 537.

5 Creek v. Bozeman Water Co., 15 Mont. 121, 38 Pac. 459, *semble*.

6 Mann v. Parker, 48 Or. 321, 86 Pac. 598.

7 Niday v. Barker (1909), 16 Idaho, 73, 101 Pac. 254.

8 Pomeroy on Riparian Rights, sec. 83; Kinney on Irrigation, sec. 173 et seq.

9 Bartholomew v. Fayette etc. Co., 31 Utah, 1, 120 Am. St. Rep. 912, 86 Pac. 481.

10 McCall v. Porter, 42 Or. 49, 70 Pac. 820, 71 Pac. 976.

11 Cole v. Logan, 24 Or. 304, 33 Pac. 568; Bolter v. Garrett, 44 Or. 304, 75 Pac. 142; Proctor v. Jennings, 6 Nev. 83, 3 Am. Rep. 240, 4 Morr. Min. Rep. 265.

as he does not thereby injure or affect the rights of others, because in such case they have no ground for complaint. But he cannot extend the use, so as to injure or interfere with subsequently acquired rights.[12] In the cases in the following note the prior appropriator was protected from the acts of a subsequent appropriator which injured him,[13] while in the cases in the next note the subsequent appropriator was protected from unlawful acts of the prior appropriator, the subsequent appropriator's right to surplus over the prior appropriation being protected.[14]

The relative position of the appropriators, whether above or below each other, is immaterial.[15]

The rule of successive appropriation is a simple one, but in the heat of conflict between appropriators it has been necessary for the courts to repeat it again and again. Consequently some representative quotations expressing the rule are appended in the note.[16]

[12] Williams v. Altnow, 51 Or. 275, 95 Pac. 200, 97 Pac. 539. *Infra*, c. 22.

[13] Cache La Poudre etc. Co. v. Water Supply etc. Co., 25 Colo. 161, 71 Am. St. Rep. 131, 53 Pac. 331, 46 L. R. A. 175; Dunniway v. Lawson, 6 Idaho, 28, 51 Pac. 1032; Salt Lake City v. Salt Lake etc. Co., 24 Utah, 249, 67 Pac. 672, 61 L. R. A. 648; Morris v. Bean, 123 Fed. 618; Lytle Creek Co. v. Perdew, 65 Cal. 447, 4 Pac. 426; Simpson v. Harrah (1909), 54 Or. 448, 103 Pac. 58, 1007.

[14] Saint v. Guerrerio, 17 Colo. 448, 31 Am. St. Rep. 320, 30 Pac. 335; Soldier Gulch etc. Co. v. Hayes, 6 Mont. 31, 9 Pac. 581; Quigley v. Birdseye, 11 Mont. 439, 28 Pac. 741; Barnes v. Sabron, 10 Nev. 217; Union etc. Co. v. Dangberg, 81 Fed. 73; Mann v. Parker, 48 Or. 321, 86 Pac. 598; Smith v. Duff (1909), 39 Mont. 382, 133 Am. St. Rep. 587, 102 Pac. 984; Vogel v. Minnesota etc. Co., 47 Colo. 534, 107 Pac. 1108. Cf. Miller v. Wheeler (1909), 54 Wash. 429, 103 Pac. 641, 23 L. R. A., N. S., 1065. Where the quantity allowed a particular owner for irrigation is not required, it becomes subject to use by others on the stream in the order of their rights. Whited v. Cavin (Or., 1909), 105 Pac. 396.

[15] Hill v. King, 8 Cal. 336, 4 Morr. Min. Rep. 533; Windsor Co. v. Hoffman Co. (Colo.), 109 Pac. 422; Same v. Same (Colo.), 109 Pac. 425.

[16] "Priority of appropriation, where no other title exists, undoubtedly gives the better right. And the rights of all subsequent appropriators are subject to his who is first in time. But as others coming on the streams subsequently may appropriate and acquire a right to the surplus or residuum, so the rights of each successive person appropriating water from a stream are subordinate to all those previously acquired, and the rights of each are to be determined by the condition of things at the time he makes his appropriation. So far is this rule carried, that those who are prior to him can in no way change or extend their use to his prejudice, but are limited to the rights enjoyed by them when he secured his. Nor has anyone the right to do anything which will, in the natural or probable course of things, curtail or interfere with the prior acquired rights of those either above or below him on the same stream. The subsequent appropriator only acquired what has not been secured by those prior to him in time. But what he does thus secure is as absolute and perfect and free from any right of others to interfere with it as the rights of those before him are secure from interference by him." Proctor v. Jennings, 6 Nev. 83, 3 Am. Rep. 240, 4 Morr. Min. Rep. 265. Held, a subsequent appropriator's dam is not actionable if it interferes with prior's

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§ 303. **Same.**—Where water is appropriated for the purpose of furnishing power to a mill and after its use in the mill is permitted to flow, undiminished, back into the natural stream, it becomes subject to another appropriation, and when so appropriated the mill appropriator cannot change the character of use or place of diversion in such manner as to injure or deprive the latter appropriator below the mill of his use of the water,[17] nor change to storage or irrigation so as to prevent the continuance of the discharge.[18] Water of a stream used for placer mining purposes and finding its way back into the stream is subject to be appropriated to agricultural uses by farmers on the stream below.[19] Waste water returned to the natural stream from which taken

waterwheel above only because of heavy and fortuitous rains.

"When the right of the complainant attached and became fixed, the respondents could not in any manner encroach upon or interfere with it by afterward extending and enlarging their own rights beyond their first appropriation, by the acquisition of additional land, and the construction of ditches or other means to convey additional quantities of water away from said river to any portion of their subsequently acquired lands. No rule of law is better settled, oftener applied, more rigidly enforced, or based upon stronger principles of equity, justice, and right, in regard to the beneficial use of water, and the rights acquired by a priority of appropriation. The right of the first appropriator is fixed by his appropriation, and when others locate upon the stream, or appropriate the water, he cannot enlarge his original appropriation, or make any change in the channel, to their injury. Each subsequent locator or appropriator is entitled to have the water flow in the same manner as when he located, and may insist that the prior appropriator shall be confined to what was actually appropriated, or necessary for the purposes for which they intended to use the water. In other words, a person appropriating a water-right on a stream already partly appropriated acquires a right to the surplus or residuum he appropriates; and those who acquired prior rights, whether above or below him, on the stream, can in no way change or extend their use of the water to his prejudice, but are limited to the rights enjoyed by them when he secured his." Union Min. Co. v. Dangberg, 81 Fed. 73, per Judge Hawley.

"When rights of subsequent appropriators once attach, the prior appropriator cannot encroach on them by extending his use beyond the first appropriation. . . . . Each is, in respect to his own appropriation, prior in time and exclusive in right." Nevada M. Co. v. Powell, 34 Cal. 109, 91 Am. Dec. 685, 4 Morr. Min. Rep. 253.

[17] Last Chance etc. Co. v. Bunker Hill etc. Co. (C. C. Idaho), 49 Fed. 430, 17 Morr. Min. Rep. 449; Mills' Irrigation Manual, p. 70, citing Cache La Poudre etc. Co. v. Water Supply Co., 25 Colo. 161, 71 Am. St. Rep. 131, 53 Pac. 331, 46 L. R. A. 175. See Trambley v. Luterman, 6 N. M. 15, 27 Pac. 312; Gassert v. Noyes, 18 Mont. 216, 44 Pac. 959.

[18] Windsor Co. v. Lake Supply Co., 44 Colo. 214, 98 Pac. 729. Compare Hutchison v. Watson D. Co. (1909), 16 Idaho, 484, 133 Am. St. Rep. 125, 101 Pac. 1059, holding *(semble)* that an appropriator is in duty bound to return water to the stream from which it is taken even though no lower *appropriator* exists thereon.

[19] Head et al. v. Hale et al. (1909), 38 Mont. 303, 100 Pac. 222.

belongs to the appropriators below thereon, whether it comes by percolation, surface or subterranean flow.[20]

These are all rulings having in mind water returned to the stream from which diverted, and, although called "waste," being but a surplus of the natural flow. As to cases of waste water not returned to the stream from which taken, but entering a different drainage, or wasted at a distance from any stream at all, different considerations are involved.[21]

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§ 304. Same.—Where a prior appropriation is for filling a reservoir, a later appropriation may be made by another of the surplus after the prior reservoir is filled,[22] and the second is senior to all subsequent to him. Where a system of exchanges of water between different owners of reservoirs, if put in practice, would necessarily convert a junior water-right into a senior priority, it could not be sustained. In this case the facts were quite complicated, and may be stated to show the character of the difficulties that arise. A mill appropriated sixty second-feet, returning it to the stream after use. Thereafter a "storage" company above the mill appropriated, subject thereto, enough water to fill its reservoir. Still later, below the mill, a "reservoir" company appropriated the sixty second-feet returned to the stream by the mill. It was held that this third appropriation was superior to any right of the "storage" company to retain that sixty second-feet, because, as respects that specific flow, the "reservoir company" was, on the facts, the first appropriator, being a surplus over the prior storage appropriation; and this right to such surplus is not lessened by abandonment by the mill company, nor can the mill company sell its rights to the "storage" company to the "reservoir" company's prejudice.[23] Some special Colorado law appears in this case regarding successive reservoir appropriations (appropriations measured by volume) as distinguished from appropriations of continuous flow.[24]

[20] La Jara etc. Co. v. Hansen, 35 Colo. 105, 83 Pac. 645; Water Supply & Storage Co. v. Larimer etc. Reservoir Co., 25 Colo. 87–94, 53 Pac. 386; Clark v. Ashley, 34 Colo. 285, 82 Pac. 588; McClellan v. Hurdle, 3 Colo. App. 434, 33 Pac. 280; Schneider v. Schneider, 36 Colo. 518, 86 Pac. 348; Schulz v. Sweeny, 19 Nev. 359, 3 Am. St. Rep. 888, 11 Pac. 253. And see Wollman v. Garringer, 1 Mont. 544, 1 Morr. Min. Rep. 675; Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

[21] *Supra*, c. 4, especially secs. 55, 61.

[22] Windsor Res. Co. v. Lake Supply Co., 44 Colo. 214, 98 Pac. 729.

[23] Windsor Co. v. Lake Supply Co., 44 Colo. 214, 98 Pac. 729.

[24] See *infra*, sec. 475 et seq.

A prior appropriator of a lake by pumping cannot prevent a subsequent appropriation of any of the lake water which will not diminish the quantity nor increase the cost of the prior right.[25]

The prior appropriator is limited to the quantity appropriated by him at the time of the subsequent appropriation, and cannot thereafter take an increased quantity;[1] but an increase of mill capacity,[2] or an increase of acreage irrigated does not necessarily *per se* show the use of more water; it may merely show greater efficiency of the use of the same water.[3]

The same appropriator may have two or more priorities from the same stream, but of different dates, one of which will be superior to another appropriator because first in time, and the other inferior because not made until the intervening right had been acquired.[4] Where the court found that appellee made two distinct appropriations of water for a reservoir, the first on March 5, 1901, of two hundred cubic feet per second, and the second, on October 22d, of the same volume, a decree awarding appellee a priority of four hundred cubic feet per second, as to March 5, 1901, was erroneous.[5] That the same irrigating ditch may have two or more priorities belonging to the same party or to different parties is not an open question in Colorado.[6] That is, where one makes several appropriations at different times, he may become *both* a prior and a subsequent appropriator in relation to other users, and his rights will not merge, but will stand as though his multiple rights belonged to different persons independently of each other.

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§ 305. **Periodical Appropriations.**—The later appropriation in most of the cases is a claim to the surplus in amount of water.

25 *Dictum*, Duckworth v. Watsonville etc. Co., 158 Cal. 206, 110 Pac. 927; Same v. Same, 150 Cal. 520, 89 Pac. 338. Cf. Salt Lake City v. Gardner (Utah), 114 Pac. 147.

1 Rutherford v. Lucerne etc. Co., 12 Wyo. 299, 75 Pac. 445; Taughenbaugh v. Clark, 6 Colo. App. 235, 40 Pac. 153; Toohey v. Campbell, 24 Mont. 13, 60 Pac. 396.

2 Union Min. Co. v. Dangberg, 81 Fed. 73.

3 Cache La Poudre etc. Co. v. Larimer etc. Co., 25 Colo. 144, 71 Am. St. Rep. 123, 53 Pac. 318; Platte Valley etc. Co. v. Central Trust Co., 32 Colo. 102, 75 Pac. 391; Fulton etc. Co. v. Meadow etc. Co., 35 Colo. 588, 86 Pac. 748.

4 Whited v. Cavin (Or.), 105 Pac. 376, at 399.

5 Windsor Res. Co. v. Lake Supply Co., *supra*.

6 Park v. Park (1909), 45 Colo. 347, 101 Pac. 406; Thomas v. Guiraud et al., 6 Colo. 530; Rominger v. Squires, 9 Colo. 327, 12 Pac. 213; Fuller v. Swan River Placer Min. Co., 12 Colo. 12, 19 Pac. 836, 16 Morr. Min. Rep. 252; Farmers' High Line C. & R. Co. v. Southworth, 13 Colo. 111, 21 Pac. 1028, 4 L. R. A. 767; Nichols v. McIntosh, 19 Colo. 22, 34 Pac. 278.

It may just as well, however, be an appropriation of the surplus in time, to use the whole or part when the prior claimant is not using it at certain times. In Smith v. O'Hara (the leading case) [7] the court says: "If the person who first appropriates the waters of a stream only appropriates a part, another person may appropriate a part or the whole of the residue; and when appropriated by him his right thereto is as perfect, and entitled to the same protection, as that of the first appropriator to the portion appropriated by him. In Ortman v. Dixon,[8] it was decreed that the defendants were entitled to the waters of the creek for the use of their mill; that the plaintiffs were then entitled to sufficient water to fill their ditch No. 2; and that the defendants were next entitled to the residue to fill their ditch No. 3. The cases are very numerous which affirm, or assume without question, this doctrine. It is usually the case that the amount of water to which the several persons claiming its use are entitled is measured by inches, according to miner's measurement, or by the capacity of the ditches through which it is conducted from the stream, but there is no reason why the amount may not be measured in some other mode. They hold the amount appropriated by them respectively as they would do had the paramount proprietor granted to each the amount by him appropriated. The right to use the waters, or a certain portion of them, might be granted to one person for certain months, days or parts of days, and to other persons for other specified times. An agriculturist might appropriate the waters of a stream for irrigation during the dry season,[9] and a miner might appropriate them for his purposes during the remainder of the year. And so may several persons appropriate the waters for use during any different periods. There is no difference in principle between appropriations of waters, measured by time, and those measured by volume." [10]

At all times that the water is not required by one appropriator it should be at the disposal of the other for irrigation and other

[7] 43 Cal. 371, at 376, 1 Morr. Min. Rep. 671.

[8] 13 Cal. 34.

[9] Dry season defined. Daly v. Rudell, 137 Cal. 671, 676, 70 Pac. 784.

[10] To the same effect, Peregoy v. Sellick, 79 Cal. 568, 21 Pac. 966; Santa Paula Water Co. v. Peralta, 113 Cal. 38, 45 Pac. 168; Southside etc. Co. v. Burson, 147 Cal. 401, 81 Pac. 1107; Cache La Poudre Co. v. Water Supply Co., 25 Colo. 161, 71 Am. St. Rep. 131, 53 Pac. 331, 46 L. R. A. 175; City of Telluride v. Blair, 33 Colo. 353, 80 Pac. 1053; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673 (quoting Smith v. O'Hara); Twaddle v. Winters, 29 Nev. 88, 85 Pac. 283, 89 Pac. 289; Mann v. Parker, 48 Or. 321, 86 Pac. 598;

uses when needed.[11] An appropriation of water is limited, in quantity as well as in time, to the extent of the appropriation, and, where water was taken from a ditch for mining only through the winter months up to June 1st, the right of appropriation was limited to that period.[12] "There is no doubt that, where a party in the appropriation of water limits himself in using it to certain specified dates, subsequent appropriators may acquire a vested right to the water to be used at times not embraced in the claim of the first appropriator."[13] In Barnes v. Sabron[14] the court said: "We think the rule is well settled, upon reason and authority, that, if the first appropriator only appropriates a part of the waters of a stream for a certain period of time, any other person or persons may not only appropriate a part or the whole of the residue, and acquire a right thereto as perfect as the first appropriator, but may also acquire a right to the quantity of water used by the first appropriator at such times as not needed or used by him. In other words, if plaintiff only appropriated the water during certain days in the week, or during a certain number of days in a month, then the defendants would be entitled to its use in the other days of the week, or the other days in the month."

The essential element necessary to make an appropriation periodical in character consists in the intention of the appropriator to so limit his right. Where the intermittent character of use is not pursuant to design, but is accidental or due to unforeseen causes (having intended a continuous use at all times), the appropriation is not within the periodical class. In such cases during the nonuse periods the water may be taken by others as temporary appropriations, but they cannot insist upon receiving the water at any stated periods in the absence of prescription or forfeiture by the prior claimant. An appropriation is not periodical in character unless so intended; such intent being drawn from acts and circumstances as much as from the appropriator's actual expression or claim or notice.[15]

Stowell v. Johnson, 7 Utah, 215, 26 Pac. 290; Farnham on Waters, p. 2088; Pomeroy on Riparian Rights, sec. 84.

11 Gardner v. Wright, 49 Or. 609, 91 Pac. 286; Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728; Whited v. Cavin (Or., 1909), 105 Pac. 396.

12 Davis v. Chamberlain, 51 Or. 304, 98 Pac. 154.

13 Rodgers v. Pitt, 129 Fed. 932.

14 10 Nev. 217, 245, 4 Morr. Min. Rep. 673.

15 For example, it is held: "The fact that the volume of water, by reason of climatic conditions, is sufficient for the use intended during certain

(3d ed.)

§ 306. Temporary Appropriation.—A later comer may make an appropriation, temporary in its nature, in the following cases:

(a) Where the prior appropriator has posted his notice and begun construction work, but has not yet completed his flumes or other appliances by which the water is to be diverted. During this interval, which may last for a year or more in some cases, others have a right to use the water. Their right is entirely a temporary one, however, and ceases when the works of the prior claimant are completed.[16] This temporary use becomes wrongful if it hinders the prior claimant's construction work, or prevents his diversion of the water when his works are finished.[17] Likewise it must leave him sufficient water during the construction work to keep his new ditch in good condition, or the water otherwise needed to carry on his construction work.[18] The prior claimant need take no notice of temporary appropriations of this kind during the progress of his construction work; they cease *ipso facto* when he is ready, though he has not warned them.[19]

(b) After the works are completed but pending the application of the water thereby to actual use.[20]

(c) Where, after actual use has begun, the prior appropriator who has been using the water ceases temporarily to do so. During such time, a later comer may divert the water and use it. While a ditch by which the waters of a stream have been appropriated is out of repair, and not in a condition to carry any water, an action will not lie to abate, as a nuisance, a reservoir constructed across the bed of the stream, above the head of the ditch, by which the water of the stream is collected and detained and caused to overflow unequally.[21]

It will thus be seen that a fundamental object of the law of appropriation now is to have the water put to a beneficial use; conversely, to have none wasted. There are authorities against this,

portions of the year only, does not, of itself, limit the appropriation to such periods of time, but is available whenever, by reason of the flow, there is sufficient water for such beneficial use." City of Telluride v. Davis, 33 Colo. 355, 108 Am. St. Rep. 101, 80 Pac. 1051.

[16] Nevada etc. Co. v. Kidd, 37 Cal. 282; Miles v. Butte etc. Co., 32 Mont. 56, 79 Pac. 549.

[17] *Ibid.*

[18] *Ibid.;* and Weaver v. Conger, 10 Cal. 233, 6 Morr. Min. Rep. 203.

[19] *Ibid.;* and Woolman v. Garringer, 1 Mont. 535, 1 Morr. Min. Rep. 675.

[20] See future needs, *infra*, sec. 483 et seq.

[21] Bear River etc. Co. v. Boles, 24 Cal. 359.

(3d ed.)

§ 308. Preferences.—In a number of States the recent legislation, however, has departed from the foregoing rule of impartiality, and uses are classified with regard to scarcity, or where they are of incompatible character. Usually, domestic use is to be supplied first; second, irrigation; third, other uses. In Colorado this preference is enforced by a provision that if water appropriated for domestic use is used for irrigation to any extent whatever, it is a misdemeanor.[10] In Idaho, mining (in mining districts) has the second preference. In Wyoming, in 1909, an elaborate series of preferences was enacted. Preferences appear (with variations) in the statutes of Colorado, Idaho, Kansas, Nebraska, New Mexico, Oregon, Utah, Wyoming, and probably some other States.[11] (There should also be noted the provision elsewhere considered, giving the State Engineer power to reject appropriations "where

[10] See Fulton etc. Co. v. Meadow etc. Co., 35 Colo. 588, 86 Pac. 748; 3 M. A. S., 1905 ed., sec. 2269a; Rev. Stats. 1908, secs. 3178, 3179; Laws 1891, p. 402, sec. 1; Laws 1891, p. 403, sec. 2.

[11] *Arizona.*—Rev. Stats., c. 55, sec. 5, giving preference to irrigation.

Colorado.—Const., art. 16, sec. 6; 3 M. A. S., 3d ed., 2269a.

Idaho.—In the Idaho constitution, article 15, section 3, it is declared that in times of scarcity, domestic uses shall be supplied first; second, mining (in organized mining districts); third, agricultural; and fourth, manufacturing.

Kansas.—Gen. Laws, 1909, sec. 4423.

Nebraska.—Comp. Stats. 1903, sec. 6541.

New Mexico.—"No inhabitant of said territory shall have the right to construct any property to the impediment of the irrigation of land or fields, such as mills or other property that may obstruct the course [i. e., flow] of the water; as the irrigation of the fields should be preferred to all others [i. e., to all other uses]." N. M. Gen. Laws 1880, art. ——, sec. 2.

Oregon.—Laws of 1909, chapter 216, section 47, contain some preference to municipal purposes.

Utah.—Laws of 1905, chapter 108, provided the prior appropriator shall always be supplied in full before a subsequent appropriator gets any water, except in the annual low-water stage, when all users are on an equal footing, and pro-rate. In time of scarcity, domestic uses have preference over all other purposes, and agriculture over all except domestic use; those using for the same purpose maintaining priorities between themselves (sec. 56). And this is preserved in the later statutes.

Wyoming.—"Water-rights are hereby defined as follows according to use: Preferred uses shall include rights for domestic and transportation purposes in accordance with the provisions of the law relating to condemnation of property for public and semi-public purposes. Such domestic and transportation purposes shall include the following: First, water for drinking purposes for both man and beast; second, water for municipal purposes; third, water for the use of steam engines and for general railway use; fourth, water for culinary, laundry, bathing, refrigerating (including the manufacture of ice), and for steam and hot-water heating plants. The use of water for irrigation shall be superior and preferred to any use where turbine or impulse water-wheels are installed for power purposes." Laws 1909, c. 68, p. 112, sec. 2; Comp. Laws, 1910, sec. 725.

such denial is demanded by the public interest,"[12] which, it has been claimed, gives him power of choice between classes of uses.)

These provisions, so far as they attempt to annihilate the doctrine of priority between classes of uses, or to classify uses for the purposes of priority, are not fully enforced by the courts.

The preference to domestic uses, given the first preference, is held in Colorado as only preserving a right similar to the common-law riparian right of each riparian proprietor to domestic use on his land. If the attempt by such provision were to defeat prior appropriations for other purposes entirely it would be unconstitutional, as a prior appropriation has a vested right that can be taken only on eminent domain proceedings and payment of compensation.[13] The same has been held of the Nebraska provision[14] and of the Idaho provision.[15] These cases hold that the preference to domestic use does not give municipalities the right to take water away from prior appropriators owning rights for mining, irrigation, power, or manufacturing.

The present state of the Colorado law appears in the following cases: A water company purchased the water-rights of private parties with a view to furnish water for domestic use, and relied for priority on the rights of their grantors, who had been using the water for domestic use. The court says: "Upon the question of the right of appellees to divert the water for domestic use, based on the fact that their grantors, as riparian owners, had enjoyed such use since their first settlement upon the stream, the court below held that such claim could not be sustained, and that the right to use the water for such purpose must be exercised in connection with riparian ownership. This holding is in accord with

[12] *Infra*, secs. 313, 314, 415.

[13] Strickler v. Colorado Springs, 16 Colo. 61, 25 Am. St. Rep. 245, 26 Pac. 317; Armstrong v. Larimer etc. Co., 1 Colo. App. 49, 27 Pac. 235; Montrose etc. Co. v. Loutsenhizer etc. Co., 23 Colo. 233, 48 Pac. 532; Broadmoor etc. Co. v. Brookside etc. Co., 24 Colo. 541, 52 Pac. 792; Town of Sterling v. Pawnee etc. Co., 42 Colo. 421, 94 Pac. 341, 15 L. R. A., N. S., 238.

[14] In Nebraska it was held, citing the Colorado cases, that in the preference to domestic uses, the term "domestic purposes" has reference to such use of water for domestic purposes as was permitted to the riparian proprietor at common law, which ordinarily involves but little interference with the water of a stream or its flow, and does not contemplate diversion of large quantities of water in canals or pipe-lines. Crawford v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647, 93 N. W. 781, 60 L. R. A. 889. See Corporations and Consumers, *infra*, secs. 1343, 1344 et seq.

[15] Montpelier etc. Co. v. Montpelier (Idaho, 1911), 113 Pac. 741. The *Wyoming* statute, *supra*, expressly requires condemnation and payment before the preference can be exercised.

the views expressed in the recent case of Montrose Canal Co. v. Loutsenhizer Ditch Co.,[16] wherein it is said: 'While it is true that section 6 of article 16 of the constitution recognizes a preference in those using water for domestic purposes over those using it for any other purpose, it is not intended thereby to authorize a diversion of water for domestic use from the public streams of the State by means of large canals. . . . . The use protected by the constitution is such use as the riparian owner has at common law to take water for himself, his family, or his stock, and the like.' The court therefore correctly decided that the water could not be used for such purpose by the company, through its pipe-line."[17] In the latter case cited in the note the court said: "Rights to the use of water for a beneficial purpose, whatever the use may be, are property, in the full sense of that term, and are protected by section 15, article 11, of our constitution, which says that 'private property shall not be taken or damaged for public or private use without just compensation.' . . . . That a city or town cannot take water for domestic purposes which has been previously appropriated for some other beneficial purpose, without fully compensating the owner, is so clear that further discussion seems almost unnecessary. Any other conclusion would violate the most fundamental principles of justice, and result in destroying most valuable rights. It would violate that right protected by our constitution, that property shall not be taken from the owner either for the benefit of the public or for private use, without conpensation to the owner. The right of a city to divert water for the use of its inhabitants is not superior to the right of an individual, or a farming community, to divert water for domestic or other purposes, in the sense that the city may take water for that purpose from those who have previously appropriated it for the same, or some other, beneficial use, without compensating the senior appropriator."

The effect of these decisions is that the common law of riparian rights is not, after all, rejected *in toto,* in Colorado, or, rather, that is the effect if the provision in question is given any force at all.[18] As yet the courts have only been engaged in cutting down

[16] 23 Colo. 233, 48 Pac. 532.

[17] Broadmoor Dairy Co. v. Brookside Water Co., 24 Colo. 541, 52 Pac. 792. Affirmed in Town of Sterling v. Pawnee etc. Co., 42 Colo. 421, 94 Pac. 341, 15 L. R. A., N. S., 238, and the other cases already cited.

[18] The provision is not confined to appropriators, who own riparian land. Town of Sterling v. Pawnee etc. Co.,

that provision, and that is where the cases now stop, without affirmatively holding that the common-law right exists, but only that beyond the common-law right the preference does not go. It may be that the court will hold that the preference does not even extend to the common-law right, thus in effect nullifying the preference entirely.[19]

The second preference in Colorado, given to irrigators, was held not to apply to rights acquired before the adoption of the constitution.[20] The second preference in Idaho is given to mining, but the court has held that this does not give the miner any right to pollute the stream as against prior appropriators for irrigation.[21]

The matter is not of recent origin, and the courts find such preferences do not work justice. In the first historical chapter it was seen that a preference of such kind in favor of use for mining was urged when the foundations of the doctrine of appropriation were being laid, and the California court had much difficulty in overcoming it, but it was overcome. And it was fortunately so, for the preference then would have become fixed for mining, to the great detriment of irrigation, which has since overshadowed it, but was then in its infancy.[22] And so likewise a preference to irrigation to-day will prevent the growth of use of water for generating electric power, which is now in its infancy. The original rule, which still prevails in California and most other jurisdictions, of impartiality, is better.[1]

42 Colo. 421, 94 Pac. 341, 15 L. R. A., N. S., 238. In Idaho the first preference is given to domestic use. *Quaere*, what is the bearing of that preference upon the decision in Hutchinson v. Watson D. Co. (1909), 16 Idaho, 484, 133 Am. St. Rep. 125, 101 Pac. 1059? The common law itself is abandoning the distinction between domestic and other uses. *Infra*, sec. 741.

19 By the Carpenter Bill with Parrish amendment in the 1911 Colorado legislature, repeal is advocated of an act of April 13, 1901 (Stats. 1901, p. 194, sec. 4), giving direct irrigation from streams a preference over storage irrigation from reservoirs filled from the stream, the preference being considered both dangerous and unconstitutional. At this writing the bill has passed both Houses and will probably be signed by the governor.

20 Colorado etc. Co. v. Larimer etc. Co., 26 Colo. 47, 56 Pac. 185.

21 Hill v. Standard etc. Co., 12 Idaho, 223, 85 Pac. 909. See McCarthy v. Bunker Hill etc. Co. (Idaho, 1908), 164 Fed. 927, 92 C. C. A. 259; Humphreys T. Co. v. Frank (1909), 46 Colo. 524, 105 Pac. 1093.

22 See Crandall v. Woods, quoted *supra*, secs. 113, 114.

1 Elwood Mead, Chief of the Irrigation and Drainage Investigations of the Department of Agriculture, expressed the following views as a witness in Kansas v. Colorado: "The use of water for household and domestic purposes I would put as of primary importance. After that, irrigation.

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§ 309. Pro-rating.—The provisions for pro-rating, in times of scarcity, between users for the same purpose (e. g., between all irrigators) have also given much difficulty. Something more will be said of this hereafter.[2] In Colorado, the statute provides that water commissioners may pro-rate the water in time of deficiency between all appropriators, by volume or by time of use.[3] Between consumers from the same ditch, pro-rating is provided in times of scarcity.[4] The Colorado court here also has taken its stand against these modifications of the doctrine of priority. In Farmers' High Line etc. Co. v. Southworth,[5] the majority of the judges rendered opinions that the "pro-rating statute of 1883," if enforced literally and irrespective of the priorities of the several appropriators, was inhibited by the constitution.[6] That appropriators through the same ditch may have different priorities has been frequently held in this State.[7] Consequently, the court[8] has considered it *stare decisis* that there may be circumstances in which appropriators, even though through the same ditch, may not (even by statute) be compelled to pro-rate with each other.[9]

In an action where the right to pro-rate is claimed, all the parties who are to pro-rate are necessary parties.[10] A con-

I would put irrigation even ahead of its use for power where its use for power would prevent its being used for irrigation, because you can provide your power in some other way and you cannot provide food in any other way. I would put irrigation as superior to navigation, because of the far greater value that you can get out of the water, and because navigation is the one instance of the use of water where its importance instead of increasing is diminishing." In the 1905–1906 Report of the State Engineer of Wyoming it is suggested by the Superintendent of Water Division No. 2 that whenever the right to use water for power interferes with irrigation, a way should be provided for the appraisement and sale of the power right. And the Wyoming statute since passed (above quoted) should be referred to.

2 *Infra*, sec. 1343 et seq.

3 M. A. S. 2259, 2267.

4 In M. A. S. 2267.

5 13 Colo. 111, 21 Pac. 1028, 4 L. R. A. 767.

6 Elliott, J., thought pro-rating invalid generally (excepting where appropriators are of equal date or have expressly waived priorities, or regarding consumers from mutual companies), and this is probably accepted as the law of the case. Helm, C. J., thought the invalidity extended only as to consumers under different canals, and valid as to co-consumers under the same canal; but Judge Elliott's opinion seems to have prevailed.

7 Nichols v. McIntosh, 19 Colo. 22, 34 Pac. 278; Farmers' Independent Ditch Co. v. Agricultural Ditch Co., 22 Colo. 513, 521, 55 Am. St. Rep. 149, 45 Pac. 444; Brown v. Farmers' High Line Canal etc. Co., 26 Colo. 66, 56 Pac. 183.

8 In Farmers' etc. Co. v. White, 32 Colo. 114, 75 Pac. 416.

9 See, however, Larimer etc. Co. v. Wyatt, 23 Colo. 480, 48 Pac. 528.

10 Brown v. Farmers' High Line Canal etc. Co., 26 Colo. 66, 56 Pac. 183; Farmers' etc. Co. v. White, 32 Colo. 114, 75 Pac. 416.

tract with a company enforcing pro-rating will be upheld, however.[11]

In Utah, primary and secondary rights are by statute provided for, the latter referring to unusual increases in streams and the former being rights in ordinary stages.[12] In Washington, in cases of deficiency of supply, a statute provides that the courts may appoint commissioners to make an equitable apportionment by enforcing a pro-rata reduction from the full amount appropriated.[13]

The question of pro-rating is further considered in hereafter considering consumers from distributing companies.[14]

C. CORRELATIVE RIGHTS BETWEEN APPROPRIATORS.

(3d ed.)

§ 310. The Principle of "Unreasonable Priority."—That priority and beneficial use should be the exclusive test between appropriators has, as above, always been, aside from statute and to some extent in spite of statute, the established rule. Yet there has always been a minority current of authority contending that the exclusiveness of a prior right should be recognized only to a certain degree, and that priorities should not be enforced when to do so would be "unreasonable" to water users upon the same stream, though subsequent in time of use. It is this minority current of authority which these sections will set forth at some length in substantially the form in which the writer contributed it to the Yale Law Journal,[15] in the belief that this modification of the rule of priority is of importance, especially in view of the demand for the prevention of monopoly and the conservation of natural resources, recently become so strong.

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§ 311. Some Early Rulings.—The common law of riparian rights regards all riparian proprietors as upon an equal footing, giving each a right to a "reasonable" use of the stream at any time. Their rights are correlative, and no one of them can

[11] O'Neil v. Fort Lyon Co., 39 Colo. 487, 90 Pac. 849; Jackson v. Indian etc. Co. (1909), 16 Idaho, 430, 101 Pac. 814, 110 Pac. 251.

[12] 2 Utah Comp. Laws, 1888, secs. 2775–2789. As to primary and secondary rights in Utah, see Becker v. Marble etc. Co., 15 Utah, 225, 49 Pac. 892, 1119; Salt Lake City v. Salt Lake etc. Co., 25 Utah, 456, 71 Pac. 1069.

[13] Pierce's Code, secs. 5820–5824, 5831.

[14] *Infra*, secs. 1284, 1343 et seq.

[15] 18 Yale Law Journal, 188.

use the water in any manner that would, under all the surrounding facts and circumstances, be *unreasonable* in its effect upon the capacity of use by the others.[16] The California legislature in 1850[17] had adopted the common law, by statute, as the general rule of decision, and when the supreme court five years later began to recognize exclusive rights by priority in time of use, it was in some quarters accused of judicial legislation. These are matters already set forth at length.[18] This criticism induced in some of the judges a desire to reconcile the new decisions, as much as possible, to common-law rules; resulting in expressions in several early cases that the rights of appropriators were correlative as between riparian proprietors at common law, and that the prior appropriator must be confined to a "reasonable" use as determined by the effect of his use upon subsequent appropriators, just as between riparian proprietors at common law.

Conger v. Weaver[19] is a direct reply by the court to the charge that it was guilty of judicial legislation. It declared that the common law had not been departed from; that the common law itself was merely being applied to new conditions, and it expressly declared the intention of the court to apply the common-law rules so far as conditions permitted. The court, after saying, "We claim that we have neither modified its rules, nor have we attempted to legislate upon any pretended ground of their insufficiency," proceeds: "That new conditions and new facts may produce the novel application of a rule which has not been before applied in like manner does not make it any the less the common law," etc. The opinion then proceeds to reconcile the new decisions to the common law upon a point with which we are not here concerned;[20] it shows the desire which immediately arose, among some members of the court, to depart from the common law as little as possible.[21]

16 *Infra*, sec. 745 et seq.

17 Stats. 1850, p. 219, now Pol. Code, sec. 4468.

18 *Supra*, sec. 79 et seq.

19 6 Cal. 548, 65 Am. Dec. 528, 1 Morr. Min. Rep. 594.

20 See *supra*, secs. 89, 90.

21 The Chief Justice, however, was not convinced that the reasoning of the case was an answer to the complaint of judicial legislation; he opposed the recognition of appropriation at all on that account, and dissented. Accordingly, in his opinion in Hill v. King, 8 Cal. 338, 4 Morr. Min. Rep. 533, he practically admits the charge of judicial legislation, and enforces the rule of priority only because bound by the weight of cases already decided against his own opinion. In doing so, he says: "If the parties both claimed as riparian proprietors,

In a case decided soon after, the court said it had applied "the analogies of the common law," and refused an action to the prior appropriator for mining, against a subsequent claimant who polluted the stream in legitimate mining, considering it unreasonable for one miner, under the claim of priority, to withhold the stream entirely from use by other miners.[22]

Thereafter the early California decisions twice, in important cases, declared the doctrine of appropriation as conforming to the common law in regard to the requirement, now in question, that the prior use must be "reasonable" in its effect upon subsequent locators (similar to the correlative rights of riparian owners) and not exclusive or arbitrary. In Phoenix W. Co. v. Fletcher[23] the law was said to be: "The rule of law is well established that the owner of hydraulic works on the stream above has no right to detain the water *unreasonably*. He must so construct his mill, or other works, and so use the water, that all persons below him, who have a prior *or equal* right to the use of the water, may participate in its use and enjoyment without interruption"; and adds that all appropriators have a right to a *reasonable* use of the water, in conjunction with appropriators below. In support of this statement of the law of appropriation the court cites the classical authorities upon the common law of riparian rights—Angell on Watercourses and the opinion of Justice Story in Tyler v. Wilkinson.[24] Again, in Hill v. Smith[25] the court speaks of the "notion which has become quite prevalent, that the rules of the common law touching water-rights have been materially modified in this State upon the theory that they were inapplicable to the condition found to exist here, and there-

then each alike would be entitled to the reasonable use of the water for proper purposes," but that under the new rule the first appropriator must be held entitled to the exclusive enjoyment, which he need not share with any subsequent claimant, however extensive might be the prior use. As already above remarked, this is the general rule to-day. The Chief Justice in Hill v. King used the word "reasonable," but only with reference to the subsequent claimant, and without any attempt to place such a restriction on the prior appropriator.

[22] Bear R. Min. Co. v. New York M. Co., 8 Cal. 327, 68 Am. Dec. 325, 4 Morr. Min. Rep. 526. Modifying Hill v. King, *supra*, decided just a short time before, though the rule of Hill v. King has since prevailed as a general principle. Conrad v. Arrowhead etc. Co., 103 Cal. 399, 37 Pac. 386.

[23] 23 Cal. 486, 15 Morr. Min. Rep. 185.

[24] 4 Mason, 401, Fed. Cas. No. 14,312.

[25] 27 Cal. 481, 4 Morr. Min. Rep. 597.

fore inadequate to a just and fair determination of controversies touching such rights." And says: "This notion is without any substantial foundation. The reasons which constitute the groundwork of the common law upon this subject remain undisturbed. The conditions to which we are called upon to apply them are changed, and not the rules themselves. The maxim, '*Sic utere tuo ut alienum non laedas,*' upon which they are grounded, has lost none of its governing force; on the contrary, it remains now, and in the mining regions of this State, as operative a test of the lawful use of water as at any time in the past, or in any other country. This maxim is one which every riparian proprietor is bound to respect, and it is no less obligatory upon those who use and divert water for mining purposes. So that in all controversies like the present *the question to be determined after all is the same as that presented by a like controversy between riparian proprietors,*" etc. The rule which the court then lays down is not by any means the rule of the common law of riparian rights. That rule of correlative use is that "each must submit to that degree of inconvenience and hardship in the exercise of his rights which results from the existence of like rights in others,"[1] and instead of laying down such a rule, Hill v. Smith speaks of it disparagingly as a notion which "tolerates and winks at some uncertain and indeterminate amount of injury by the one" to the other. Hill v. Smith did not in actual decision attempt to restrict the exclusiveness of the prior right; its language, however, in the above passage, is nevertheless a general declaration that the analogies of riparian rights should be applied, and it has been regarded as supporting the rule that the law of appropriation should be made to conform to that of riparian rights in limiting the prior appropriator to a "reasonable" use so as not unreasonably to prevent use by others on the arbitrary claim of priority.

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§ 312. **The Dictum in Basey v. Gallagher.**—These early California attempts to minimize the departure of the law of appropriation from the common law of riparian rights, and to declare the appropriator limited to a "reasonable" use correlatively to

1 Parker v. American etc. Co., 195 Mass. 591, 81 N. E. 468, 10 L. R. A., N. S., 584.

the use of subsequent appropriators, are now almost forgotten. They are due largely to the reluctance of the California court to admit that it had taken upon itself to set up an entirely new system of law. To-day, the great weight of authority denies the idea that there can be an "unreasonable" priority, because of any policy favoring subsequent claimants.[2] The explanation of the above cases is probably historical, as an attempt to controvert criticism, rather than an attempt to formulate a policy.

Possibly, however, it was with these cases in mind that Mr. Justice Field (who was thoroughly familiar with them, having been Chief Justice of California, though not having sat upon any of the above cases) said in Basey v. Gallagher:[3] "'Water is diverted to propel machinery in flourmills and sawmills, and to irrigate lands for cultivation as well as to enable miners to work their claims; and in all such cases the right of the first appropriator, exercised *within reasonable limits*, is respected and enforced. We say within *reasonable limits*, for this right to water, like the right by prior occupancy to mining ground or agricultural land, is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use, and vest an absolute monopoly in a single individual."

Mr. Justice Beatty, in Idaho, now judge of the United States district court, in commenting upon this passage, reflects what, as said above, is undoubtedly the general law to-day, saying: "This language has been seized upon as justifying the equitable, if not equal, division of the water among all desiring or needing it, regardless of the claim of the prior appropriator. Such a construction is not justified, and would make the decision inconsistent with itself as well as with the other decisions of the same court.[4] It is evident that all the court means by this language is that the first appropriator shall not be allowed more than he needs for some useful purpose; that he shall not, by wasting or misusing it, deprive his neighbor of what he has not actual use for. In 98

[2] Lack of proof of facts showing correlative reasonableness results *sua sponte* in remanding a cause at common law, but is wholly immaterial under the law of appropriation. Hough v. Porter, 51 Or. 318, 95 Pac. 782, 98 Pac. 1083, 102 Pac. 731.

[3] 87 U. S. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683. Italics ours.

[4] Citing Jennison v. Kirk, 98 U. S. 461, 25 L. Ed. 240, 4 Morr. Min. Rep. 504; Broder v. Water Co., 101 U. S. 276, 25 L. Ed. 790, 5 Morr. Min. Rep. 33.

U. S. 461,[4a] *supra*, the court says: 'The owners of a mining claim and the owner of a water-right enjoy their respective properties from the dates of their appropriation—the first in time being the first in right; but when both rights can be enjoyed without interference with or material impairment of each other, the enjoyment of both is allowed.' It clearly follows, as the courts have certainly held, that when all cannot use the water without injury to the prior appropriator, the other must yield to his superior right."[5] Mr. Kinney, after quoting this and other similar authorities,[6] says: "From these authorities it is apparent that the rule in the arid region is settled that a prior appropriator can take the waters of a stream to the full extent of his original completed appropriation, and others claiming an appropriation in the waters subsequent to the first appropriation cannot devest the first of his rights, even if the first diverts all the water of the stream, provided he applies it all to some beneficial use or purpose."[7] And he also says: "A construction of the sentence from Basey v. Gallagher quoted above, that an equitable, if not an equal, division of the water among all desiring or needing it, regardless of the claim of the prior appropriator, was intended, cannot be justified."[8]

If we were to regard the contention of "reasonable priority" to rest solely on the few early California attempts to establish it, together with Basey v. Gallagher, it could be regarded as discarded. But the decisions which, as a whole, so firmly hold to the exclusiveness of priority, were given while the public domain was a vast unsettled region, and rights were to be adjusted between a few individuals rather than whole communities. To-day the lands have been far more fully settled, the water users on many streams are beginning to crowd each other, and the "exclusiveness" rule of priority comes more and more in conflict with the community idea. Justice is coming more and more to demand an equitable co-relation of the users for the common good, and these changed conditions have caused here and there revivals of the idea that the priority must be reasonable, all things and evidence being considered, or it will not be fully enforced.

[4a] 25 L. Ed. 240, 4 Morr. Min. Rep. 504.

[5] Drake v. Earhart, 2 Idaho, 750, 23 Pac. 541.

[6] E. g., Hillman v. Hardwick, 3 Idaho, 255, 28 Pac. 438.

[7] Kinney on Irrigation, p. 369.

[8] Kinney on Irrigation, p. 390.

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§ 313. **Recent Tendencies.**—This is likely to be a growing doctrine, with its leading authority in the case of Union Min. Co. v. Dangberg.[9] This opinion was written by the late Judge Hawley, one of the ablest of those judges who had grown up with the West from pioneer times. In a previous decision while Chief Justice of Nevada he had said: "The law which recognizes the vested rights of prior appropriators has always confined such rights within reasonable limits. . . . . What is a reasonable use depends upon the peculiar circumstances of each particular case."[10] This he applied in Union Mining Co. v. Dangberg,[11] when later judge of the United States district court in Nevada. In that case he decided that the rights of the many water users involved could be adjusted on the same basis as though they were riparian proprietors, though they were also appropriators having differing priorities. After saying that courts have, in the application of riparian rules, in order to allow all riparian proprietors "to make a *reasonable use* of the water," decreed a full flow for a definite period of time as reasonable, he asks "Why should not such a rule be followed in the present case?" Such a decree, he says, promotes peace, prevents litigation, and substantially reaches the end of justice. "The endless complications that have arisen in this case, the exigencies and necessities of the parties, as well as the number of parties involved, justify this court in adopting this rule." He accordingly decrees to defendants at all times use for domestic purposes, to complainant a full flow of six thousand inches of water to run its seven mills *except* during the irrigation season, during which season the defendants (irrigators) may take the whole, if necessary. This decree thus placed all the one hundred and twenty-six defendants on the same footing against complainant, though complainant was prior in his appropriation to some of them, and subsequent in time to others; and gave complainant a "reasonable" use of the river for all its seven mills taken together, though each mill had a different priority as against different defendants; and it gave to all subsequent appropriators a right to domestic use against the complainant, though complainant was, as to most of them, the prior appropriator. The result practically ignores

[9] 81 Fed. 73.

[10] Barnes v. Sabron, 10 Nev. 243, 4 Morr. Min. Rep. 673. This is the language of the common law of riparian rights.

[11] 81 Fed. 73.

the passage from Basey v. Gallagher above given, and also a case in Montana to the same effect,[20] that there should be an "equitable" division among appropriators in spite of priorities.

Beside this tendency in some judicial quarters, the recent "Water Code" legislation also seems to have some tendency in this direction. We have already referred to statutes enforcing pro-rating of loss in dry seasons. Moreover, the Wyoming constitution provides:[21] "Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied *except when such denial is demanded by the public interests.*" There was much debate over this section in the constitutional convention. Not over the clause we have italicized, but, on the contrary, over the first clause, because, it was argued, it laid too great a stress on priority. For example:[22] "If this section is adopted, it seems perfectly clear to me that no other consideration can matter or can be employed to aid in determination of rights. . . . . I believe it [priority] should properly be the greater consideration, but to allow nothing else to determine, I think this is an extraordinary decision," and said all the "equities" should also be considered in each case. In reply, among other things, it was said: "To provide that priority of appropriation shall not give the better right, *but that other matters shall come in,* is simply, sir, to throw this matter into the courts." This debate indicates the prevailing sentiment (and, as already said, the prevailing rule of law) that the courts shall have no discretion in restricting the force of priority, but the last clause of the section certainly seems an adoption of the contrary rule.

Under the common law of riparian rights the ultimate test in each case is what is reasonable under all the circumstances. Each case practically comes down to the discretion of court or jury deciding what is reasonable upon the entire evidence. The rulings of the courts above referred to are likewise shaping the law of appropriation into a discretionary system, with power in the Chancellor to apply his ideas of fairness whenever priorities would work injustice because of complication of the history of

[20] Fitzpatrick v. Montgomery, 20 Mont. 181, 187, 63 Am. St. Rep. 622, 50 Pac. 416, 417. See, also, Farmers' Irr. Dist. v. Frank, 72 Neb. 136, 100 N. W. 286; Salt Lake City v. Salt Lake etc. Co., 25 Utah, 456, 71 Pac. 1069; McCarthy v. Bunker Hill etc. Co. (Idaho, 1908), 164 Fed. 927, 92 C. C. A. 259.

[21] Article 8, sec. 3.

[22] Journal and Debates of the Wyoming Constitutional Convention, pp. 534, 535.

claims, or because of selfish results of enforcing them. Though it is a weakening of the strict rule of priority and contrary to the general rule to-day, yet this principle, which might be called "the principle of unreasonable priority," is likely to be a growing doctrine as the irrigated regions become more closely settled.[23]

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§ 314. Same.—Among the results of the foregoing modification of the law would be the enforcement of pro-rating among appropriators in times of scarcity; the settlement of controversies in many cases by enforcing rotation; the conservation of natural resources by preventing monopoly; and a general equality (instead of priority) of right among the members of the water-using community. For unsettled regions it is not applicable, just as the common law of riparian rights is there inapplicable; but for the settled regions it has its advantages. In settled regions it would bring the systems of appropriation and riparian rights much together, the chief remaining difference in such regions being that under the latter the water users would all lie within the same valley, while under the former they would be a mixture of valley and nonvalley users. But under both systems the chief test of use would be what is reasonable for each user consistently with equal rights for all, rather than prior rights for some.[24]

[23] Judge Morrow has expressed to the writer his approval of the foregoing presentation.

The matter of rejecting appropriations if demanded by the "public interest," following Wyoming, is in force in other States. See Young v. Hinderlider (N. M.), 110 Pac. 1045. See, also, S. D. Stats. 1907, c. 180, sec. 23. See *infra*, sec. 415.

[24] Commenting upon this matter, Mr. Morris Bien, of the Federal Reclamation Service, says:

"The principle of priority of appropriation was of great value in order to establish the idea that no greater appropriation of water should be allowed upon any stream than could be reasonably met from the water supply available in that stream. The adoption of laws tending to so limit appropriations was the first important step. When this is accomplished the next step will be to provide for the fluctuating discharge of the stream from year to year. Plainly, all people who have for several years been able to divert water from a stream and who have made valuable improvements dependent thereon should be protected by the law in the continued use of the waters. When, however, times of shortage occur, it is manifestly unjust to cut off from the use of this water supply those who have valuable property dependent thereon if there is any means of preventing it.

"A system of rotation in the use of the water will enable all parties to get sufficient for all their actual needs when the application of the strict rule of priority might deprive a number of the water needed to preserve their investments. The system of rotation in the use of water has been adopted in many irrigation communities, and the law must necessarily

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§ 315. Conclusions.—(a) Successive appropriators are independent and priority governs, on the one hand; on the other, the surplus over the prior appropriation vests in the later appropriator. Each appropriator is a prior one as against all who are subsequent to him, and has, against the subsequent ones, an exclusive right to have the stream flow for his use to the extent of his appropriation.

(b) The general rule is against modifying the force of priority either in times of scarcity or where it extends to a whole stream, or under any other circumstances; but statutes and decisions show an increasing tendency to some modification.

recognize this principle in order to secure to all parties their proportional rights in the streams. In many cases if the use of the water is rotated, there would be ample for all the water users, while in cases of extreme shortage the agricultural improvements of all could be preserved from destruction. The rigid doctrine of priority involves too much the idea of a monopoly to be fostered by decisions of our courts, and must undoubtedly in time give way to a distribution of the water that shall preserve all interests in the most practical manner.

"In drawing up my water code it did not seem wise to force this idea, as there was so much else of importance at stake that should be accomplished first. My idea was that in time when valuable interests had grown up to the limit of the available water supply the courts would not permit the destruction of these interests merely to enforce rigidly a theoretical plan of water division when a modification based upon reasonable use in proportion to the several interests would preserve them all."

Similar views were expressed by Mr. Bien in a paper before the National Irrigation Congress of 1909, in Spokane, Washington, as elsewhere quoted. *Supra*, sec. 140.

§§ *316–317. (Blank numbers.)*

CHAPTER 15.

WHO CAN APPROPRIATE.

§ 318. Persons generally.
§ 319. Trespassers.
§ 320. Tenants in common.
§ 321. Same.
§ 322. Riparian owners.
§ 323. Early riparian settlers in California.
§ 324. Same.
§ 325. Corporations.
§ 326. Appropriations by the United States.
§§ 327–330. (Blank numbers.)

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§ 318. **Persons Generally.**—There is no restriction respecting the persons who can appropriate.

"The silent acquiescence with which the government, prior to the act of Congress of July 26, 1866, regarded the appropriation of water on its lands, as well as the express recognition extended by that statute to rights so acquired, did not discriminate between Trojan and Tyrian—citizens and aliens; married women and minors were, in general, not competent to pre-empt land, but we have never heard that they might not make a valid appropriation of water; the tests of such appropriation were priority of possession and beneficial use;[1] and title, or the right to acquire title, in the place of intended use has never been a necessary element in the ownership of appropriated water. Besides, since the prior appropriation of water is a mode of acquiring a right in real property by purchase,[2] the alienage of the defendant was a matter between him and the government, and, if it were admitted that as against the government, he could have no valid right in the water, yet until 'office found,' it is conceived that private individuals were not at liberty to treat his appropriation as void of effect, or the water itself as still open to another to take."[3] In the case from

[1] Citing Maeris v. Bicknell, 7 Cal. 261, 68 Am. Dec. 257, 1 Morr. Min. Rep. 601; Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; De Necochea v. Curtis, 80 Cal. 397, 20 Pac. 563, 22 Pac. 198.

[2] Citing Hill v. Newman, 5 Cal. 445, 63 Am. Dec. 140, 4 Morr. Min. Rep. 513.

[3] Citing Norris v. Hoyt, 18 Cal. 217; Racouillat v. Sansevain, 32 Cal. 376; Lobdell v. Hall, 3 Nev. 516.

which this is quoted[4] appropriation by an alien was held good.[5] A lessee of land may be an appropriator of water for irrigating that land.[6] So may "a mere squatter or lessee or other person in possession."[7]

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§ 319. **Trespassers.**—So far as water is concerned, appropriations may be made by trespassers upon public land; which, in fact, is the way the law of appropriation arose.[8] Title to the place of use is immaterial.[9] The same is true of a ditch on public land so far as the United States (or a patentee of the United States) is not a party to the suit; and even against them also so far as the act of 1866 remains in force.[10]

So, likewise, appropriations can be made by trespassers on private land. If the water also belongs to another, the trespasser has an "appropriation" only in the sense that nobody but the true owner can dispute his use;[11] but it is not an "appropriation" against the true owner, since, for example, the use of water upon land to which it is already appurtenant before the trespass will not dissever the water from the land, nor confer any right in the trespasser to divert it or sell it after being lawfully ejected from the land.[12] But if the trespass is only upon the land (the water itself being open to appropriation, as flowing over public land, for example, and carried by the trespasser to the land trespassed upon), then the water-right belongs to the trespasser absolutely. Such appropriations carried to private land of another by trespassers do not make such water-right appurte-

4 Santa Paula Water Works v. Peralta, 113 Cal. 38, 43, 45 Pac. 168.

5 Accord, Lobdell v. Hall, 3 Nev. 507, upholding appropriation by an Indian; Quigley v. Birdseye, 11 Mont. 439, 28 Pac. 741, 743, appropriation by a Chinaman. See Long on Irrigation, sec. 35; Kinney on Irrigation, secs. 154, 155.

6 Sayre v. Johnson, 33 Mont. 15, 81 Pac. 389; Seaweard v. Pacific etc. Co., 49 Or. 157, 88 Pac. 963; Cooper v. Shannon, 36 Colo. 98, 118 Am. St. Rep. 95, 85 Pac. 175 *(dictum)*.

7 Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728, citing Rowland v. Williams, 23 Or. 515, 32 Pac. 402; Seaweard v. Pacific L. Co., 49 Or. 157, 88 Pac. 963.

8 *Supra*, sec. 82.

9 *Supra*, sec. 281. This is a different question from how far a trespasser can be regarded as a riparian proprietor, in which case the *land right* is in question. *Supra*, sec. 261; *infra*, sec. 724.

10 *Infra*, sec. 439.

11 *Supra*, sec. 246, appropriations by disseisin.

12 Alta etc. Co. v. Hancock, 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. 645.

nant to the land upon which it is so used.[13] The trespasser can change the use to other real property.[14]

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§ 320. **Tenants in Common.**—Where several join in making an appropriation, they will usually be tenants in common of the water-right.[15] There is this peculiarity arising out of such a tenure, that the water-right is held not to be in its nature subject to actual partition; and on a partition suit the only separation of the interests of the tenants in common that can be made is by ordering a sale and a division of the proceeds.[16]

Where two join in a diversion, but are to use the water on their separate lands, it has been held that there is not such unity of user as will constitute tenancy in common.[17]

[13] Smith v. Logan, 18 Nev. 149, 1 Pac. 678, approved in Alta etc. Co. v. Hancock, 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. 645. As to appropriations by a "mere interloper" against a riparian owner, see Hutchinson v. Watson D. Co., 16 Idaho, 484, 133 Am. St. Rep. 125, 101 Pac. 1059, and Sternberger v. Seaton etc. Co., 45 Colo. 401, 102 Pac. 168.

[14] Seaweard v. Pacific etc. Co., 49 Or. 157, 88 Pac. 963.

"Even trespassers upon land may acquire the exclusive right to the use of water that is used either to irrigate such land or is used thereon for other purposes, and such a right, when once acquired, is paramount to the rights of the true owner or claimant of the land, and the water claimant, when he is dispossessed of the land, may divert and use the water elsewhere than on the land if he can so divert and use it." Patterson v. Ryan (Utah, 1910), 108 Pac. 1118, citing the second edition of this book. Compare Snyder v. Colorado etc. Co. (Colo. C. C. A.), 181 Fed. 62. *Contra*, Avery v. Johnson (Wash.), 109 Pac. 1028.

[15] Abel v. Love, 17 Cal. 233, 11 Morr. Min. Rep. 350; Bradley v. Harkness, 26 Cal. 69, 11 Morr. Min. Rep. 389; Lytle Creek etc. Co. v. Perdew, 65 Cal. 447, 4 Pac. 426; Frey v. Lowden, 70 Cal. 550, 11 Pac. 838; Griseza v. Terwilliger, 144 Cal. 456, 77 Pac. 1034; Moss v. Rose, 27 Or. 595, 50 Am. St. Rep. 743, 41 Pac. 666; Carnes v. Dalton (Or.), 110 Pac. 170; and see Cal. Civ. Code, sec. 842.

As to partnership in water-rights, cf. Beckwith v. Sheldon, 154 Cal. 393, 97 Pac. 867; Bradley v. Harkness, *supra*.

[16] McGillivray v. Evans, 27 Cal. 92, 11 Morr. Min. Rep. 209; Lorenz v. Jacobs, 59 Cal. 262; Long on Irrigation, sec. 75. The cases here cited laid stress upon the fact that the appropriation was for mining. In a recent case, Verdugo W. Co. v. Verdugo (1908), 152 Cal. 655, 93 Pac. 1021, dealing with irrigation and with a riparian right, actual partition and apportionment were upheld. As to which see, also, Rose v. Mesmer, 142 Cal. 322, 75 Pac. 905. Compare *infra*, sec. 751, apportionment between riparian owners. McGillivray v. Evans has been cited approvingly in Lanfers v. Henk, 73 Ill. 411, 24 Am. St. Rep. 267, 5 Morr. Min. Rep. 67; Allard v. Carleton, 64 N. H. 25, 3 Atl. 313; Brown v. Cooper, 98 Iowa, 455, 60 Am. St. Rep. 197, 67 N. W. 378, 33 L. R. A. 61; Head v. Amoskeag Co., 113 U. S. 9, 5 Sup. Ct. Rep. 441, 28 L. Ed. 889.

Suits for partition of mines likewise generally can result only in a sale. 2 Lindley on Mines, 2d ed., sec. 535, p. 887, note 1.

[17] City of Telluride v. Davis, 33 Colo. 355, 108 Am. St. Rep. 101, 80 Pac. 1051, *sed qu.*

Use by one tenant in common of more than his share may be enjoined,[18] but it does not become adverse so as to start prescription until notice thereof is brought home to the other;[19] likewise where he sells more than his undivided interest, actual ouster and notice are necessary to constitute adverse use thereunder.[20] Nonuse by one does not diminish his right in favor of the others.[21] The wrongful acts or use of one do not give the other a right to dig a new ditch and take all.[22] Each must consider seepage and evaporation in the amount he is entitled to divert,[23] and each may alone sue a trespasser to enjoin wrongdoing,[24] or may sell his interest without the consent of the others.[25] A cotenant cannot be compelled to contribute for expense in replacing a dam or constructing a ditch (the original ones being washed out) at a point other than where the original ones were constructed, unless it be shown that the new ones answer the same purposes and results and give the cotenant the same rights as the old ones.[1] Under a California statute a tenant in common is entitled to treble damages against his cotenant under certain circumstances.[2]

Voluntary unincorporated associations of all owners along a stream constitute them tenants in common,[3] and consent is not necessary to a sale of the interest of any one of them.[4] But if they incorporate, obtaining a majority of all owners into the cor-

18 Lorenz v. Jacobs (Cal.), 3 Pac. 654; Carnes v. Dalton (Or.), 110 Pac. 170. Cf. City of Aberdeen v. Lytle etc. Co. (Wash.), 108 Pac. 945.

19 Smith v. North Canyon etc. Co., 16 Utah, 194, 52 Pac. 283.

20 Beers v. Sharpe, 44 Or. 386, 75 Pac. 717.

21 *Ibid.*

22 Arnett v. Linhart, 21 Colo. 188, 40 Pac. 355.

23 Anderson v. Cook, 25 Mont. 330, 64 Pac. 873, 65 Pac. 113.

24 Lytle Creek etc. Co. v. Perdew, 65 Cal. 447, 4 Pac. 426; Rodgers v. Pitt, 129 Fed. 932; Meagher v. Hardenbrook, 11 Mont. 385, 28 Pac. 451. The cotenant is not an indispensable party to the determination of one's rights. The Debris Case, 16 Fed. 25, 34, 8 Saw. 628; Railroad Co. v. Ward, 2 Black, 485, 17 L. Ed. 311; Hewitt v. Story, 64 Fed. 524, 30 L. R. A. 265, 12 C. C. A. 250; Himes v. Johnson, 61 Cal. 259; Union Mining Co. v. Dangberg, 81 Fed. 73. But cf. 20 Harvard Law Review, 242.

25 Biggs v. Utah etc. Co., 7 Ariz. 331, 64 Pac. 494.

When parties claim their rights through the same diversion and from the same ditch, through which the appropriation was originally made by them or by their predecessors in interest, they are tenants in common; and where, in a suit with others on the stream involving rights thereon no issues are framed between such tenants in common, their relative rights may be left undetermined, and only their rights as against other parties to the suit will be decreed. Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

1 Fillmore City v. Fillmore Co. (Utah), 103 Pac. 967.

2 Cal. Stats. 1889, p. 202; Civ. Code, secs. 842, 843; Arroyo D. Co. v. Bequette, 149 Cal. 543, 87 Pac. 10.

3 Smith v. North Canyon etc. Co., 16 Utah, 194, 52 Pac. 283.

4 Biggs v. Utah etc. Co., 7 Ariz. 331, 64 Pac. 494.

poration, they are not tenants in common with the minority who do not come in, and have no right to control or regulate the use of such minority.[5]

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§ 321. **Same.**—Special statutes sometimes govern disputes between tenants in common. In Wyoming there is a special procedure for the appointment of a distributor in disputes between them. On a verified petition to the district court he is appointed by the court, and has an official capacity with exclusive control during the pleasure of the court;[6] but this procedure is not exclusive of other procedure whereby the court may deal with such disputes under general law.[7] In California a statute[8] provides for contribution between co-owners of a ditch for work on the ditch, but this applies only to work which is on a part of the ditch of which the party from whom contribution is demanded has beneficial use, and the work must benefit him; so that work done in fluming and cementing below his point of diversion is not within the statutes.[9]

References to some other statutes are given in the note.[10]

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§ 322. **Riparian Owners.**—Under the Colorado doctrine, where riparian rights are not recognized, the only way a riparian owner can get a water supply is by an appropriation, and so they not only can, but must, be appropriators if they would have any rights, generally speaking.[11]

Under the California doctrine the reverse is true: priority of use by a riparian owner will give no right against other riparian

[5] Bartholomew v. Fayette etc. Co., 31 Utah, 1, 120 Am. St. Rep. 912, 86 Pac. 481.

[6] Mau v. Stoner, 15 Wyo. 109, 87 Pac. 434, 89 Pac. 466.

[7] Stoner v. Mau, 11 Wyo. 366, 72 Pac. 193, 73 Pac. 548.

[8] Stats. 1889, p. 202, c. 168 (Civ. Code, secs. 842, 843).

[9] Arroyo etc. Co. v. Bequette, 149 Cal. 543, 87 Pac. 10.

[10] *California.*—Stats., *supra.*

Colorado.—Rev. Stats. 1908, p. 1027, sec. 4051; Laws 1893, p. 312, concerning lien of co-owner for work done.

Idaho.—McLean's Idaho Rev. Codes, sec. 3311; Laws 1909, p. 108, liability of co-owners for repair and maintenance.

Oregon.—Stats. 1909, c. 216, sec. 61, lien of co-owners for work done after ten days' notice; *Ibid.*, sec. 63, watermaster may take exclusive charge of partnership ditches.

Utah.—Water commissioner, on request, may take charge of works. Stats. 1911, c. 104, p. 145, sec. 12.

Wyoming.—Rev. Stats. 915. See, also, Stats. 1907, p. 138.

In addition to the above, see statutes in Part VIII, below.

[11] Idaho etc. Co. v. Stephenson, 16 Idaho, 418, 101 Pac. 821. *Supra*, sec. 118. See, also, *infra*, sec. 366.

owners, as a general principle.[12] But there is an exception to this general statement, where one riparian owner, an early settler upon the stream, makes an appropriation while the land of the complaining riparian owner is still public.

(3d ed.)

§ 323. Early Riparian Settlers in California.—An early riparian settler on public land in California may get a greater right than the common law gives him against other riparian owners, by appropriating the water before the later riparian settlements were made. Mere priority of settlement is immaterial where not coupled with prior use. But where both settlement and use preceded the settlement of his opponents, he has a public land appropriation against the others, and is not confined to that relative equality of use which prevails between riparian owners generally. This was clearly laid down in Healy v. Woodruff,[13] and approved (on this point) in Cave v. Tyler.[14] In Healy v. Woodruff the riparian proprietor appropriated water from the same stream on public land before other riparian proprietors had taken up riparian land along it, and was protected therein against subsequent settlers, though it was a larger proportion of the stream than the law of riparian rights would have given him against another existing riparian settler.[15] In Smith v. Hawkins[16] the court reached the same result where the defendant was awarded one hundred inches as an appropriator and an additional amount as riparian right. In Van Bibber v. Hilton,[17] all the parties to the action were riparian proprietors and the defendants were also appropriators. The trial court limited the right of the latter to the amount claimed as appropriators. Judgment was reversed by the supreme court for not also making some allowance as riparian right. And in another case plaintiff's right to an injunction was upheld in the alternative.[18] A riparian proprietor has been given three hundred inches as appropriator in addition to his rights as riparian owner.[19]

12 *Infra*, secs. 670, 739.

13 97 Cal. 464, 32 Pac. 528.

14 133 Cal. 566, 65 Pac. 1089.

15 See quotations from this case *supra*, sec. 244. See, also, Kaler v. Campbell, 13 Or. 596, 11 Pac. 301; Porter v. Pettingill (Or.), 110 Pac. 393.

16 127 Cal. 119, 59 Pac. 295.

17 84 Cal. 585, 24 Pac. 308, 598.

18 Huffner v. Sawday (1908), 153 Cal. 86, 94 Pac. 424.

19 Ison v. Nelson Min. Co., 47 Fed. 199. See, also, Barneich v. Mercy, 136 Cal. 206, 68 Pac. 589 *(semble)*; Prentice v. McKay, 38 Mont. 114, 98 Pac. 1081 *(dictum)*; Avery v. Johnson (Wash.), 109 Pac. 1028.

In Lux v. Haggin, 69 Cal. 255, 4 Pac. 919 (not officially reported, being

Against existing riparian owners, one riparian owner can obtain no exclusive right;[20] but it seems clear that an early riparian settler, by diverting water while the land on the stream except his own is public, may acquire by appropriation exclusive rights against riparian settlers subsequently acquiring their lands from the United States, greater than he would himself have had as a riparian owner.

(3d ed.)

§ 324. **Same.**—The foregoing was addressed to the claim of an early riparian settler as a public land appropriator on the stream against other riparian settlers later acquiring their land from the public domain. While this may enlarge his right against other riparian owners, it is wholly immaterial as concerns nonriparian owners. Against nonriparian owners, he will not be restricted to the amount actually used as appropriator, but may insist upon the full, though unused, flow, as any riparian owner may.[21] It is true that in one California case where an appropriation had been made on public land of all the water reasonably needed for use on certain riparian land which the appropriator thereafter purchased from the United States, she was not allowed, against a subsequent diversion by a nonriparian owner[22] to dispute this subsequent diversion on the ground of her riparian rights, the decision being rested on the ground that she had all she could reasonably use already.[23] But the later California decisions lay down the rule

withdrawn on rehearing), it was said: "But an appropriation of the water of a stream flowing upon public lands, and upon lands held in private ownership, does not affect or destroy riparian rights existing in the stream at the time of the appropriation. Both rights—rights of appropriation and riparian rights—may be acquired by original and derivative acquisition; they may exist together and be held in common as property and each is entitled to the protection of the law."

In Kinney on Irrigation, page 452, it is said: "There are a great many cases where the riparian proprietor is also the prior appropriator of the water of a stream. His rights are limited to those of a riparian proprietor only when others whose rights would be injured by the diversion have settled upon the stream before he has made an appropriation of the waters. If a person enters a piece of land through or adjoining which a stream runs and appropriates the water to some useful purpose before other persons have entered any other lands upon the same stream, he stands in the position of a prior appropriator, and may divert all of the water of the stream if it is necessary for the purpose for which he appropriated it, without any obligation upon his part to return any portion of it to the natural channel."

20 *Infra*, sec. 739.

21 *Infra*, sec. 815.

22 Whether the subsequent claimant was a riparian owner or not is not expressly given in the opinion, but he seems to have been a nonriparian owner.

23 Senior v. Anderson, 130 Cal. 290, 296, 62 Pac. 563.

that a riparian proprietor may insist, as against nonriparian diversions subsequent to his patent, upon having the complete flow so far as it is or may be beneficial to his land, whether he uses it or not, and the first riparian settler will not be limited (against later nonriparian diversions) to the flow claimed as appropriator for use.[24]

The California law thus seems to be that against other riparian owners, one of them settling upon a stream while the land of the others is still public may get for use all the rights of an appropriator to an exclusive use of the stream, and at the same time, as against all others (nonriparian owners) subsequent to the date of his settlement, all the rights of a riparian owner to the complete flow of the stream, whether using it or not.[25] As is said in Healy v. Woodruff,[1] this gives great advantage to the first settlers on a stream, but is the advantage which in California necessarily follows prior occupancy of public land when coupled with a prior appropriation of water thereon; the former giving the common-law right of full flow against later nonriparian appropriation; the latter giving the full public land appropriative right against later riparian patentees.[2]

(3d ed.)

§ 325. Corporations.—A corporation may appropriate water, and corporations frequently do.[3] A city owning water-rights as a municipal corporation cannot interfere with private appropriators merely because it is a city.[4] Some cities have succeeded

[24] *Infra*, secs. 452, 815 et seq.

[25] This last was expressly held in Huffner v. Sawday, *supra*, and Miller v. Madera Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A., N. S., 391.

The rule in Oregon seems to be that a riparian proprietor asserting rights under the law of appropriation thereby waives his riparian rights, and after his needs as appropriator are satisfied, he cannot claim as riparian proprietor against nonriparian owners the right to have the excess flow in the channel of the stream. Davis v. Chamberlain, 51 Or. 304, 98 Pac. 154; Williams v. Altnow, 51 Or. 275, 95 Pac. 200, 97 Pac. 539, saying he may elect which right he will claim under, but cannot claim both; Seaweard v. Duncan, 47 Or. 640, 83 Pac. 1043; Low v. Schaffer, 24 Or. 239, 33 Pac. 678.

The authorities are, however, in some confusion because the distinction between riparian and nonriparian claimants has not always been borne in mind. *Infra*, secs. 795, 814, protection of riparian right.

[1] Quoted *supra*, sec. 244.

[2] As to diversions by a riparian owner giving no right, but amounting to wrongful disseisins, see *supra*, sec. 246 et seq., discussing Duckworth v. Watsonville Co.

[3] E. g., Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. 1113; People ex rel. Heyneman v. Blake, 19 Cal. 579; North etc. Co. v. Orient etc. Co., 1 Fed. 522, 6 Saw. 299, 9 Morr. Min. Rep. 529.

[4] Santa Barbara v. Gould, 143 Cal. 421, 77 Pac. 151. See *supra*, sec. 308.

to the old rights of Mexican pueblos, notably Los Angeles, but this right attaches to few cities.[5] A corporation organized under the laws of a Territory may be an appropriator, as well as one organized under the laws of a State.[6] A foreign corporation cannot be an appropriator without complying with the laws of the State by filing articles.[7] A corporation is not bound by water-right agreements of a stockholder with third persons. Thus, a water-right from one company is not a right to water from another company whose stock is held by the first company.[8] In California, a two-thirds vote of stockholders is required to authorize a water company to divide up its water-rights among its stockholders, in some cases.[9] A Colorado case upholds a contract exempting the holder of a water-right from corporation assessments.[10]

A corporation may appropriate water, as an appropriator. It need not own any land nor be a mere combination of landowners;[11] and where it is a combination of some landowners or private appropriators, it has no right to control or regulate the use of owners not in the corporation, though those in the corporation are a majority of all users upon the stream.[12] In the arid States, the corporation is considered an appropriator only in a qualified way, the consumers whom it supplies being regarded as owning the water-rights in the stream for most purposes; but in California, not only are the consumers not appropriators, but even appropriators who incorporate, conveying their rights to a co-operative corporation, cease to be appropriators.[13] This question as to whether consumers from corporations are appropriators is further considered hereafter; as is also the question of the rights and duties of corporations as *quasi* public servants.[14]

Articles of incorporation to divert water do not include building of reservoirs to store it.[15] A director may make a separate

[5] *Supra*, sec. 68.
[6] Gutierres v. Albuquerque etc. Co., 188 U. S. 555, 23 Sup. Ct. Rep. 338, 47 L. Ed. 588.
[7] Telluride etc. Co. v. Rio Grande etc. Co., 187 U. S. 582, 583, 23 Sup. Ct. Rep. 178, 47 L. Ed. 313.
[8] Lanham v. Wenatchee etc. Co., 48 Wash. 337, 93 Pac. 522.
[9] Civ. Code, sec. 309.
[10] Farmers' etc. Co. v. Henderson, 46 Colo. 37, 102 Pac. 1063.
[11] Gutierres v. Albuquerque etc. Co., 188 U. S. 545, 555, 23 Sup. Ct. Rep. 338, 47 L. Ed. 588.
[12] Bartholomew v. Fayette etc. Co., 31 Utah, 1, 120 Am. St. Rep. 912, 86 Pac. 481.
[13] Fuller v. Azuza etc. Co., 138 Cal. 204, 71 Pac. 98.
[14] See *infra*, secs. 1260 et seq., 1324, 1338.
[15] Seeley v. Huntington etc. Assn., 27 Utah, 179, 75 Pac. 367. See Wyo. Stats. 1911, c. 29, p. 43, curing defective articles.

invariably speak only of "running streams," "flowing water," "water in a watercourse." This is also the language of the California Civil Code,[1] providing what can be appropriated (on public land). "The right to the use of running water flowing in a river or stream or down a canyon or ravine, may be acquired by appropriation."

(3d ed.)

§ 333. What Constitutes a Watercourse.—Close questions arise as to what is and what is not a watercourse. In Lux v. Haggin,[2] the court discusses at length the requisites for a watercourse, and concludes that a channel is necessary to the constitution of a watercourse;[3] also a tendency of water to flow in it more or less regularly.[4] The second requisite is not fulfilled by a chance flow in a channel usually dry all year round,[5] though, on the other hand, the channel need not be full all year round, nor flow continuously.[6] It is a question of fact whether there is a tendency to regular flow, and no presumption of continuance can be indulged from proof of a single flow.[7]

"It is not essential to a watercourse that the banks shall be unchangeable, or that there shall be everywhere a visible change in the angle of ascent marking the line between bed and banks. The law cannot fix the limits of variation of these and other particulars. As was said, in effect, by Curtis, J., in Howard v. Ingersoll,[8] the bed and banks or the channel is in all cases a natural object, to be sought after, not merely by the application of any abstract rules, but, 'like other natural objects, to be sought for and found by the

1 Sec. 1410. The 1911 amendment does not affect this. See *infra*, sec. 1432.

2 69 Cal. 255, at 413–419, 10 Pac. 674.

3 Accord, Razzo v. Varni, 81 Cal. 289, 22 Pac. 848.

4 Accord, Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673.

5 Lux v. Haggin, *supra*.

6 Spangler v. San Francisco, 84 Cal. 12, 18 Am. St. Rep. 158, 23 Pac. 1091; Shively v. Hume, 10 Or. 76; Simmons v. Winters, 21 Or. 35, 28 Am. St. Rep. 727, 27 Pac. 7; New York etc. Co. v. Speelman, 12 Ind. App. 372, 40 N. E. 541; Eulrich v. Richter, 37 Wis. 226; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; Wagner v. Long Island R. Co., 5 Thomp. & C. 163, 2 Hun, 633; Huffner v. Sawday, 153 Cal. 86, 94 Pac. 424; Verdugo etc. Co. v. Verdugo, 152 Cal. 655, 93 Pac. 1021.

In one case it is said: "It is true the evidence shows, that toward the end of every dry season, and when the waters fall in the stream, there are places in the channel of this South Fork above the reservoir which are dry, but a watercourse does not lose its character as such because in dry seasons, or under certain climatic conditions its channel may become dry in places." Sierra County v. Nevada County, 155 Cal. 1, 99 Pac. 371.

7 Lux v. Haggin, *supra;* Morrison v. Officer, 48 Or. 569, 87 Pac. 896.

8 13 How. 428, 14 L. Ed. 209.

distinctive appearances it presents.' Whether, however, worn deep by the action of water, or following a natural depression without any marked erosion of soil or rock; whether distinguished by a difference of vegetation, or otherwise rendered perceptible—a channel is necessary to the constitution of a watercourse." And elsewhere in the same case: "A watercourse has been said to consist of 'bed, banks and water.' The water need not flow continually, but it would seem the flow must be periodical—such as may be expected during a portion of each year." And again: "If the water did not flow with regular periodicity, or if, flowing periodically, it had no defined channel (other than the whole swamp), the plaintiffs had no cause of action."[9]

Beside these two requisites given in Lux v. Haggin, of a channel and a flow, a third requisite is usually recognized, viz., a permanent source of supply. To constitute a watercourse it is necessary that there be a permanent source of supply.[10] The source may be springs,[11] or it may be surface water;[12] or a pond formed by surface water.[13]

There are, hence, three essentials requisite to constitute a watercourse, viz.: A channel, a flow, and a source of supply. Two other characteristics are usually found: *(a)* tributaries, surface or subterranean; *(b)* a subflow, seeping with the stream beneath the soaked soil, which subterranean parts of the stream are considered elsewhere.[14]

[9] Lux v. Haggin, 69 Cal. 255, 10 Pac. 674.

[10] Barkley v. Wilcox, 86 N. Y. 140, 40 Am. Rep. 519; Jeffers v. Jeffers, 107 N. Y. 650, 14 N. E. 316; Gregory v. Bush, 64 Mich. 37, 8 Am. St. Rep. 797, 31 N. W. 90. See cases collected in 10 Am. & Eng. Ann. Cas. 1047, note.

[11] Pyle v. Richards, 17 Neb. 180, 22 N. W. 370; Mitchell v. Bain, 142 Ind. 604, 42 N. E. 230; Wolf v. Crothers (Pa.), 21 Pa. Co. Ct. R. 627.

[12] Arthur v. Grand Trunk R. R. Co., 22 Ont. App. 89, 95; Beer v. Stroud, 19 Ont. 10; McKinley v. Union County Freeholders, 29 N. J. Eq. 164; Kelly v. Dunning, 39 N. J. Eq. 482; Eulrich v. Richter, 41 Wis. 320; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; 2 Farnham on Waters, sec. 457; Gould on Waters, 3d ed., sec. 263.

[13] Neal v. Ohio River R. Co., 17 W. Va. 316, 34 S. E. 914.

"The source of a stream is defined to be 'the spring or fountain-head from which its supply of water proceeds; any collection of water within or upon the surface of the earth from which a stream originates.' (New Revised Ency. Dic.) And as said by the trial court in discussing the present objection of appellant on demurrer to the complaint: 'This definition when applied to a torrential stream in the high Sierras makes the said language or the meaning of it, very doubtful. It is but common knowledge that such stream has many and varied sources usually covering a large extent of watershed, and varying in length as it extends into said watershed.'" County of Sierra v. County of Nevada, 155 Cal. 1, 99 Pac. 371.

[14] *Infra*, sec. 1077 et seq.

(3d ed.)

§ 334. Same—Definition.—As summing up the foregoing detailed discussion, the following definition is quoted from Sanguinetti v. Pock:[15]

"A watercourse is defined to be 'a running stream of water: a natural stream, including rivers, creeks, runs, and rivulets.'[16] Further defining the term, this court said: 'There must be a stream, usually flowing in a particular direction, though it need not flow continually. It may sometimes be dry. It must flow in a definite channel, having a bed or banks, and usually discharges itself into some other stream or body of water. It must be something more than a mere surface drainage over the entire face of the tract of land, occasioned by unusual freshets or other extraordinary causes. It does not include the water flowing in the hollows or ravines in land, which is mere surface water from rain or melting snow (i. e., snow lying and melting on the land), and is discharged through them from a higher to a lower level, but which at other times are destitute of water. Such hollows or ravines are not, in legal contemplation, watercourses.'[17] The evidence does not bring the depression or swale in question within this definition. This so-called watercourse is nothing more than a local drainway to a limited amount of land which has neither a definite beginning nor ending, and is like hundreds of similar swales found in land whose surface may be called generally level."[18]

A statutory definition is provided in North Dakota, which, with some other definitions, is given in the note.[19]

[15] 136 Cal. 466, at 471, 89 Am. St. Rep. 169, 69 Pac. 98.

[16] Citing Black's Law Dictionary, title "Watercourses."

[17] Citing Los Angeles etc. Assn. v. Los Angeles, 103 Cal. 466, 37 Pac. 375, citing text-books and cases.

[18] See Pomeroy on Riparian Rights, secs. 6, 62.

"A watercourse is a stream of water flowing in a definite channel, having a bed and sides or banks, and discharging itself into some other stream or body of water. The flow of water need not be constant, but must be more than mere surface drainage occasioned by extraordinary causes; there must be substantial indications of the existence of a stream, which is ordinarily a moving body of water." Hutchinson v. Watson etc. D. Co. (1909), 16 Idaho, 484, 133 Am. St. Rep. 125, 101 Pac. 1059.

[19] "A watercourse entitled to the protection of the law is constituted, if there is a sufficient natural and accustomed flow of water to form and maintain a distinct and defined channel. It is not essential that the supply of water should be continuous or from a perennial living source. It is enough if the flow arises periodically from natural causes, and reaches a plainly defined channel of a permanent character." N. D. Stats. 1907, p. 444.

Following are some additional cases bearing upon what constitutes a watercourse: Pyle v. Richards, 17 Neb. 180, 22 N. W. 370; Morrissey v.

(3d ed.)

§ 335. Same—Examples.—The following are various forms of stating that a watercourse existed: Where a stream usually flows in a continuous current, the fact that the water thereof, on account of the level character of the land, spreads over a large area, without apparent banks, does not affect its character as a watercourse.[20] A watercourse with well-defined banks which is the natural outlet for the waters of lakes, and through which the waters will reach a common place, is a natural watercourse, though it is called a swag or a swamp or a creek, and whether its course is straight or crooked.[21] In one case, A owned lands adjoining a lake. The main outlet becoming choked up with sand, the waters overflowed the lands of B and C on the north of the lake, forming marshes and swales, and escaped into a creek flowing into a bay. They erected a dike to protect their land, which raised the water in the lake, and threw it back upon A's land. Held, that the waters on the lands of B and C could not be considered merely as surface water, but constituted a watercourse, and that they had no right to erect the dike.[22] The fact that a stream having a bed, banks and current has been deepened artificially for drainage purposes, or that it is at times dry, does not deprive it of the character of a watercourse.[23] A valley dry on the surface every summer from June to November, the soil being sandy, and the river-bed varying greatly and changing often, may, nevertheless, constitute a water-

Chicago etc. Co., 38 Neb. 406, 56 N. W. 946; West v. Taylor, 16 Or. 165, 13 Pac. 665; Geddis v. Parrish, 1 Wash. 587, 21 Pac. 314; Rigney v. Tacoma etc. Co., 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425; Town v. Missouri Pac. Ry., 50 Neb. 768, 70 N. W. 402; Mace v. Mace, 40 Or. 586, 67 Pac. 660, 68 Pac. 737; Case v. Hoffman, 84 Wis. 438, 36 Am. St. Rep. 937, 54 N. W. 793, 20 L. R. A. 40; Brown v. Schneider, 81 Kan. 486, 135 Am. St. Rep. 396, 106 Pac. 41; Hill v. Cincinnati etc. Co., 109 Ind. 511, 10 N. E. 410; Larimore v. Miller, 78 Kan. 459, 96 Pac. 852; West v. Taylor, 16 Or. 165, 13 Pac. 665; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; Shively v. Haine, 10 Or. 76; Quinn v. Chicago etc. Ry. Co., 23 S. D. 126, 120 N. W. 884; City of Paola v. Garman (1909), 80 Kan. 702, 103 Pac. 83; Hinkle v. Avery, 88 Iowa, 47, 45 Am. St. Rep. 224, 55 N. W. 77.

Colloquially, "watercourse" is sometimes loosely used to indicate the channel alone. Doe dem. Earl of Egmont v. Williams, 11 Q. B. 688.

In the California Political Code, section 3908, the "mouth of a creek" is defined as follows: "The mouth of a creek, river or slough which empties into another creek, river or slough, is the point where the middle of the channels intersect."

[20] Miller & Lux v. Madera Canal & Irr. Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A., N. S., 391.

[21] Hastie v. Jenkins, 53 Wash. 21, 101 Pac. 495.

[22] West v. Taylor, 16 Or. 165, 13 Pac. 665.

[23] Rigney v. Tacoma Light & Water Co., 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425.

course.[24] Where water, owing to the hilly or mountainous character of the country, accumulates in large quantities from rains and melting snow, and at regular seasons descends through gullies or ravines upon the lands below, and in its flow cuts out through the soil a well-defined channel which bears the unmistakable impress of the frequent action of running water, and through which it has flowed from time immemorial during such seasons, such stream is to be considered a watercourse.[25]

The following are statements of where a watercourse does not exist: When the water is stagnant or spread out with no well-defined current, the current becoming imperceptible or lost, it becomes a lake or pond or swamp.[1] A bog of one-half acre fed by percolations, but no channel entering or leaving, is not a watercourse, and cannot be appropriated as such.[2] To constitute a watercourse there must be a stream, usually flowing in a particular direction, in a definite channel, having a bed, sides, or banks, though it will not flow continually, and must usually discharge itself into some other stream or body of water; there must be more than surface drainage; and it does not include water flowing in hollows or ravines, which is mere surface water, from rain or melting snow.[3] A marsh or swamp is not a watercourse.[4]

Where one builds a ditch to use surface water, a landowner above may nevertheless obstruct it to keep water off his land.[5] Depressions in the prairies due to the rolling character of the ground, where the surface water drains, are not watercourses,[6] and rights of permanent flow and use cannot be predicated thereon. Where the water spreads, having no well-defined current, as into a marsh, it cannot be deemed a watercourse, and accordingly does

[24] Huffner v. Sawday (1908), 153 Cal. 86, 94 Pac. 424, citing Los Angeles Assn. v. Los Angeles, 103 Cal. 461, 37 Pac. 375.

[25] Simmons v. Winters, 21 Or. 35, 28 Am. St. Rep. 727, 27 Pac. 7. See Kroeger v. Twin Buttes Co. (Ariz.), 114 Pac. 553, concerning wet-weather arroyos in Arizona.

[1] Hough v. Porter, 51 Or. 318, 98 Pac. 1083, at 1101. Citing *inter alia*, this book, 2d ed., p. 161.

[2] Dickey v. Maddux, 48 Wash. 411, 93 Pac. 1091.

[3] Robinson v. Shanks, 118 Ind. 125, 20 N. E. 713.

[4] Hayward v. Mason (1909), 54 Wash. 653, 104 Pac. 141.

[5] City of Paola v. Garman (1909), 80 Kan. 702, 103 Pac. 83.

[6] Gibbs v. Williams, 25 Kan. 214, 37 Am. Rep. 349; Rait v. Furrow, 74 Kan. 101, 85 Pac. 934, 6 L. R. A., N. S., 157; Weis v. City of Madison (1886), 75 Ind. 241, 39 Am. Rep. 135; Rice v. City of Evansville, 108 Ind. 7, 58 Am. Rep. 53, 9 N. E. 139; Eulrich v. Richter, 37 Wis. 226. But see Quinn v. Chicago etc. Co. (1909), 23 S. D. 126, 120 N. W. 884, disapproving Gibbs v. Williams, *supra*, and see Parizek v. Hinek (Iowa), 123 N. W. 180, as to a swale.

not come within any rule permitting a claim thereto as a riparian owner.[7]

(3d ed.)

§ 336. **Springs.**—Water from a spring is water in a watercourse, however small, if it runs off in a definite channel, with a tendency to regularity,[8] and may be appropriated as water in a watercourse,[9] even though the appropriator builds a ditch to the very mouth of the spring.[10] The water in the spring itself, however, that is, before it has gathered on the surface, is not water in a surface watercourse, but is treated on the principles of underground water.[11] Water flowing from a well on public land may be appropriated as water in a surface watercourse, though the appropriator takes the stream at its starting point—i. e., ditches to the mouth of the well.[12] This case is very like Ely v. Ferguson *(supra)*, cited therein, and the court expressly declares that the decision does not refer to the percolations supplying the well underground; but only to the water on the surface. Diverting ground water by digging a few feet below the surface of a spring at the spring-head is the same as taking it at the surface, and unlawful against lower claimants to whom the spring water came on the surface.[13] In one case it was decided that a creek having its source in springs, which ran a short distance through a natural surface channel, and then discharged into a large slough, which had no natural surface outlet, was a watercourse, and that the waters running in the surface channel could not be diverted to the injury of the lower owners.[13a] When a spring furnishes a stream of water that rises to the surface, the right of appropriation attaches,[14] but where the admitted quantity is so insignificant that a surface stream is impossible, when spread over the width of ground involved, the use of the water belongs to the person upon whose land it first arises.[15]

[7] Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083.

[8] Brosnan v. Harris, 39 Or. 148, 87 Am. St. Rep. 649, 65 Pac. 867, 54 L. R. A. 628; Pomeroy on Riparian Rights, sec. 62.

[9] Wilkins v. McCue, 46 Cal. 656; Shenandoah etc. Co. v. Morgan, 106 Cal. 409, 39 Pac. 802.

[10] Ely v. Ferguson, 91 Cal. 187, 27 Pac. 587.

[11] Cohen v. La Canada Water Co., 142 Cal. 437, 76 Pac. 47.

[12] De Wolfskill v. Smith, 5 Cal. App. 175, 89 Pac. 1001.

[13] Dudden v. (Clutton Union) Guardians etc. (1857), 1 Hurl. & N. 627.

[13a] Straight v. Brown, 16 Nev. 317, 40 Am. Rep. 497.

[14] Brosnan v. Harris, 39 Or. 148, 87 Am. St. Rep. 649, 65 Pac. 867, 54 L. R. A. 628.

[15] Morrison v. Officer, 48 Or. 569, 87 Pac. 896.

In one case it is held that a spring flowing water immediately absorbed before going any distance from the spring may still be regarded as a surface watercourse so as to be appropriated as such on the surface at the mouth of the spring. The water from the spring never flowed enough to form a surface stream or carry water any distance from the spring, what little there was being immediately taken up by the soil adjacent to the spring, and it was held [16] that the surface flow may be appropriated as against a later surface diversion by another, and that the question is not one of rights in underground water, saying: ". . . . whether the waters are from a well-defined subterranean stream or purely seepage and percolating waters, it nevertheless stands as an admitted fact in the case that they flow to and collect at a definite and certain place and there form what is called by all parties a spring. The fact that the water of this spring in its natural state, before any appropriation or diversion, was lost in the adjacent soil, and did not flow off the land in a definite stream, can make no difference and in no way abridges the right of the first comer to locate and appropriate and develop the same for a useful or beneficial purpose." [17]

(3d ed.)

§ 337. **Surface Tributaries.**—As a matter of point of view, it is proper to look upon the stream as not merely consisting of the channel and flow at the point where the observer is standing, but as a composite body in which the upper branches and tributaries are an integral part. The right to these tributaries is then identical with the right to the stream, on the principle that the whole includes the sum of its parts. The appropriator of a stream has a right to its tributaries and to all its sources, and it merely becomes a question of proof whether the hostile diversion is of water that is or is not tributary on the evidence. (Through the advance of scientific knowledge this proof enables the appropriator to follow and trace the stream even into tributary percolations underground, a matter to be separately considered.)[18] The cases enforce, in favor of a stream claimant, rights to tributaries to his stream on

[16] Much as in Ely v. Ferguson, and Wolfskill v. Smith, *supra*.

[17] Le Quime v. Chambers, 15 Idaho, 405, 98 Pac. 415.

[18] *Infra*, sec. 1082.

The source may be springs, surface water or ponds formed by surface water or underground water, or any permanent source of supply. Rait v. Furrow, 74 Kan. 101, 85 Pac. 934, 6 L. R. A., N. S., 157.

this view of it.[19] Likewise as to a lake that is tributary to or the source of a stream.[20] Likewise as to springs flowing into tributaries that flow into the appropriated stream.[21] And finally, likewise, on the best authorities, as to the underground percolations tributary to the springs.[22] These are all parts of the stream, and rights in them, on proof of the facts, are governed by the law of the stream. The time of appropriation between the stream claimant and the tributary claimant will govern their rights as appropriators.

A judgment and decree adjudicating rights and priorities to the use of the waters of a stream carries with it and adjudicates and decrees the rights and priorities to the waters of the tributaries to such stream above the respective places and points of diversion.[23] "The presumption is that the water of a tributary of a stream, less the evaporation, if not interfered with, will naturally reach the main stream either by surface or subterranean flow."[24] A subsequent appropriator of tributaries must produce clear and convincing evidence that the prior appropriator would not be injured or affected by the diversion, and has the burden of proof.[25] Whether an upper creek is tributary to a lower one is a question of fact.[1]

(3d ed.)

§ 338. Sloughs.—A slough without original water of its own is not a watercourse.[2] Where water flowed in a slough having

[19] Priest v. Union etc. Co., 6 Cal. 170; Stickler v. Colorado Springs, 16 Colo. 61, 25 Am. St. Rep. 245, 26 Pac. 313; Malad etc. Co. v. Campbell, 2 Idaho (378), 411, 18 Pac. 52; Tonkin v. Winzell, 27 Nev. 88, 73 Pac. 593; Low v. Schaffer, 24 Or. 239, 33 Pac. 678; Low v. Rizor, 25 Or. 551, 37 Pac. 82; Boyce v. Cupper, 37 Or. 256, 61 Pac. 642; Salina etc. Co. v. Salina etc. Co., 7 Utah, 456, 27 Pac. 578, among others. Cf. Verdugo W. Co. v. Verdugo (1908), 152 Cal. 655, 93 Pac. 1021. See Miller v. Wheeler (1909), 54 Wash. 429, 103 Pac. 641, 23 L. R. A., N. S., 1065; Petterson v. Payne, 43 Colo. 164, 95 Pac. 301.

[20] Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. 338; Buckers etc. Co. v. Platte etc. Co., 28 Colo. 187, 63 Pac. 305; Cole v. Richards etc. Co., 27 Utah, 205, 101 Am. St. Rep. 962, 75 Pac. 376; City of New Whatcom v. Fairhaven, 24 Wash. 493, 64 Pac. 735, 54 L. R. A. 190; Cole v. Richards Irr. Co., 27 Utah, 205, 101 Am. St. Rep. 962, 75 Pac. 376.

[21] Beaverhead etc. Co. v. Dillon etc. Co., 34 Mont. 135, 85 Pac. 880.

[22] *Infra*, sec. 1076 et seq.

[23] Josslyn v. Daly, 15 Idaho, 137, 96 Pac. 568.

[24] Petterson v. Payne, 43 Colo. 184, 95 Pac. 301.

[25] Josslyn v. Daly, 15 Idaho, 137, 96 Pac. 137.

[1] Wilson v. Collin (1909), 45 Colo. 412, 102 Pac. 20.

[2] Lamb v. Reclamation Dist., 73 Cal. 125, 2 Am. St. Rep. 775, 14 Pac. 625; Hagge v. Kansas etc. Co., 104 Fed. 391.

well-defined banks leading from a river to a creek, such slough constituted a watercourse, though at some points the channel spread out and the water was quite shallow.[3] Where water flows from a river into a slough, or from the slough into the river, as one may be higher than the other at a particular season, it is to be regarded as a part of the river.[4] A slough which carries no water except the overflow waters of a river in times of flood, which, as compared with the volume of water in the river, is insignificant, and which has no original water of its own, but is simply a conduit by which occasionally some of the flood water escapes into the lower lands, is not a watercourse.[5]

B. NAVIGABLE AND INTERSTATE STREAMS.

(3d ed.)

§ 339. Navigable Streams.—The water of navigable streams may be appropriated as well as the water of those not navigable. Thus, for example, a dam in the San Joaquin River at a point where it is navigable, and an appropriation of water there, were upheld against all but the State or someone injured in navigating.[6] Whether the point could be raised by the State or those injured in navigating was not decided. The rights on navigable streams are in general all that can be exercised without being inconsistent with the public easement of navigation.[7] The court says in United States v. Rio Grande Dam and Reservoir Company:[8] "It does not follow that the courts would be justified in sustaining any proceeding by the attorney general to restrain any appropriation of the upper waters of a navigable stream. The question always is one

[3] Cederburg v. Dutra, 3 Cal. App. 572, 86 Pac. 838. See Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Green v. Carotta, 72 Cal. 267, 13 Pac. 685.

[4] Turner v. James Canal Co., 155 Cal. 82, 132 Am. St. Rep. 59, 99 Pac. 520, 22 L. R. A., N. S., 401, 17 Ann. Cas. 823.

[5] Lamb v. Reclamation Dist. No. 108, 73 Cal. 125, 2 Am. St. Rep. 775, 14 Pac. 625.

[6] Miller v. Enterprise Co., 142 Cal. 208, 100 Am. St. Rep. 115, 75 Pac. 770.

[7] Heilbron v. Fowler etc. Canal Co., 75 Cal. 426, at 433, 7 Am. St. Rep. 183, 17 Pac. 535; United States v. Rio Grande etc. Co., 174 U. S. 690, 19 Sup. Ct. Rep. 770, 43 L. Ed. 1136. Affirmed in Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. Rep. 655, 51 L. Ed. 956.

In Hutchinson v. Watson D. Co. (1909), 16 Idaho, 484, 133 Am. St. Rep. 125, 101 Pac. 1059, at 1063, it seems to be said by way of *dictum*, that an appropriation on a navigable stream may be made, *though it obstructs navigation*, "when acting under and by authority of law."

[8] 174 U. S. 690, 709, 19 Sup. Ct. Rep. 770, 43 L. Ed. 1136; Rio Grande etc. Co. v. United States, 215 U. S. 266, 30 Sup. Ct. Rep. 97, 54 L. Ed. 190.

of fact, whether such appropriation substantially interferes with the navigable capacity within the limits where navigation is the recognized fact." If the appropriation interferes with navigation, however, it is invalid.[9]

A lawful mode of ingress and approach is, however, necessary before the public can exercise the privileges appertaining to navigable waters. The public has no right to invade and cross private lands to reach navigable waters that are wholly surrounded by the private land. If such a right of approach becomes a public necessity, the proper course is by condemnation under the eminent domain procedure.[10]

It may be remarked that the title to the bed of navigable streams (in most jurisdictions) is in the State.[11]

Navigable streams are further considered in a later chapter.[12]

(3d ed.)

§ 340. **Interstate Streams.**[13]—Recently, several cases have been decided concerning the rights of appropriators on a stream which crosses a State boundary. Most of the cases say that no innovations in the law of appropriation are necessary on that account. "Water is essential to human life in the same degree as light and air, and no bounds can be set to its use for supplying the natural

[9] *Ibid.*

[10] Bolsa etc. Club v. Burdick, 151 Cal. 254, 90 Pac. 532, 12 L. R. A., N. S., 275.

[11] *Infra*, sec. 898.

[12] *Infra*, sec. 898 et seq.

[13] See, also, *infra*, sec. 727.

See, generally, the following cases: Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. Rep. 655, 51 L. Ed. 956; Kansas v. Colorado, 185 U. S. 125, 22 Sup. Ct. Rep. 552, 46 L. Ed. 838; Hudson W. Co. v. McCarter, 209 U. S. 349, 28 Sup. Ct. Rep. 529, 52 L. Ed. 828, 14 Ann. Cas. 560; Missouri v. Illinois etc. Dist., 180 U. S. 208, 21 Sup. Ct. Rep. 331, 45 L. Ed. 497; Rickey etc. Co. v. Miller, 218 U. S. 258, 31 Sup. Ct. Rep. 11, 54 L. Ed. 1032; Saunders v. Bluefield M. W. Co., 58 Fed. 133; Howell v. Johnson, 89 Fed. 556; Perkins County v. Graff, 114 Fed. 441, 52 C. C. A. 243; Hoge v. Eaton, 135 Fed. 411; Anderson v. Bassman, 140 Fed. 22; Morris v. Bean (Mont.), 123 Fed. 618; Same v. Same, 146 Fed. 428, affirmed in Bean v. Morris, 159 Fed. 651, 86 C. C. A. 519; The Salton Sea Cases, 172 Fed. 820, 97 C. C. A. 242; Miller v. Rickey, 127 Fed. 573; Rickey v. Miller, 152 Fed. 11, 81 C. C. A. 207; Lamson v. Vailes, 27 Colo. 201, 61 Pac. 231; Taylor v. Hulett, 15 Idaho, 265, 97 Pac. 37, 19 L. R. A., N. S., 535; Cline v. Stock, 71 Neb. 70, 98 N. W. 454, 102 N. W. 265; Bigelow v. Draper, 6 N. D. 152, 69 N. W. 570; Conant v. Deep Creek Co., 23 Utah, 627, 90 Am. St. Rep. 627, 66 Pac. 188; Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210; Turley v. Furman (N. M.), 114 Pac. 278; Slack v. Walcott, 3 Mason, 508, Fed. Cas. No. 12,932 (Story, J.); Mannville Co. v. Worcester, 138 Mass. 91, 52 Am. Rep. 261 (Holmes, J.); Ruckman v. Green, 9 Hun (N. Y.), 225; and the articles in 8 Harvard Law Review, 138; 2 Columbia Law Review, 364.

wants of men other than the mighty barriers which the Creator has made on the face of the earth," says Judge Hallett.[14]

In Kansas v. Colorado,[15] in the supreme court of the United States, Mr. Justice Brewer said the decisions of the supreme court of the United States are "practically building up what may not improperly be called interstate common law."

(3d ed.)

§ 341. Same—Controversies Between States—Kansas v. Colorado.[16]—The rule laid down in Kansas v. Colorado is that, between States, an equitable apportionment of benefits should be maintained. Kansas sued Colorado in the supreme court of the United States to enjoin appropriations in Colorado on the Arkansas River, claiming that the loss of the water would irreparably injure Kansas as a State, and as a riparian proprietor, and private riparian proprietors in Kansas (which upholds riparian rights under the California doctrine while Colorado does not). The decision was considered from the point of injury to Kansas as a State, aside from rights of itself or individuals as riparian proprietors, its prosperity as distinguished from its property rights or those of its citizens.

It was held that Colorado would be irreparably injured by an injunction, without corresponding benefit to Kansas. In fact, the ultimate prosperity of Kansas may in fact be increased by the Colorado diversions. There has been no widespread serious injury to Kansas from past diversions, though there was some detriment. Kansas herself recognizes the right of an upper riparian owner to make a reasonable use of a stream against lower proprietors, and it is not shown that the Colorado use is unreasonable, regarding the two States as both great riparian proprietors. "At the same time it is obvious that if the depletion of the waters of the river by Colorado continues to increase, there will come a time when Kansas may justly say that there is no longer *an equitable division of benefits*, and may rightfully call for relief against the action of Colorado, its corporations and citizens, in appropriating the waters of the Arkansas for irrigation purposes."[17]

[14] Hoge v. Eaton (C. C. Colo.), 135 Fed. 411.

[15] 206 U. S. 46, 27 Sup. Ct. Rep. 655, 51 L. Ed. 956.

[16] 206 U. S. 46, 27 Sup. Ct. Rep. 655, 51 L. Ed. 956. Opinion by Mr. Justice Brewer.

[17] Concerning this case, see *supra*, sec. 182.

The threatened pollution of the waters of a river flowing between States, under the authority of one of them, thereby putting the health and comfort of the citizens of the other in jeopardy, presents a cause of action justiciable under the constitution; that is, the supreme court of the United States will have original jurisdiction if one of the States brings suit against the other.[18]

(3d ed.)

§ 342. Between Riparian Owners in One State and Appropriators in Another State.—The general attitude of the Federal courts is to see that there is an equitable apportionment of benefits between the citizens of each State collectively just as between the States themselves; and when the controversy is between riparian owners in one State against appropriators in another, to apportion the water (upon some basis found equitable upon the facts) between the riparian owners as a body and the appropriators as a body, leaving the members of each body among themselves to be governed by their local law. This formed the basis of the decision in Anderson v. Bassman.[19] In another case[20] below referred to, in Wyoming, the matter was mentioned but no decision was given, no riparian rights being actually involved.

In Anderson v. Bassman, a conflict arose among several hundred claimants upon a river flowing from California into Nevada, the claimants in the former being riparian owners under the California law; in the latter, appropriators under the Nevada law, which does not recognize riparian rights. Judge Morrow, in the United States circuit court, simply apportioned the water, giving each side the use of the stream for a specific number of days, the rights of the individuals on each side among themselves to be governed by their local law.[21]

In another case a stream flowed from Nebraska to Kansas and it was said: "It would seem that the fact of plaintiff's residence beyond the border of this State [in Kansas where his mill was], and that his mill is located there, ought not to deprive him of any rights which the laws of our State give to a lower riparian owner. Any attempt of our legislature to discriminate against him as com-

[18] Missouri v. Illinois etc. District, 180 U. S. 208, 21 Sup. Ct. Rep. 331, 45 L. Ed. 497. See this case commented on in Kansas v. Colorado, 185 U. S. 125, 22. Sup. Ct. Rep. 552, 46 L. Ed. 838.

[19] 140 Fed. 22.

[20] Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 211.

[21] See *supra*, sec. 310 et seq., reasonable priority.

pared with resident mill owners would be promptly declared unconstitutional by the Federal courts. Any such determination by the courts would seem to be equally obnoxious to the Federal constitution. It seems clear that the plaintiff should be allowed the same standing as one of our own citizens with a mill on this side of the State line,"[22] both States being followers of the California doctrine recognizing the riparian rights of private land and appropriation for public land.

In the late case of Rickey etc. Co. v. Miller,[23] in the supreme court of the United States, the decision upon a question of procedure below referred to was based upon the principle of Kansas v. Colorado, that riparian owners in California or appropriators in Nevada, upon the Walker River crossing the boundary, must deduce any right they may have from the law of their respective States; and the enforcement of either right beyond the boundary of its State must depend upon the concurrence of the other State. Unless the upper State (California) will voluntarily impose conditions upon its citizens in favor of users in the lower State (Nevada), the latter have no right in the matter other than to complain that the lower State as such (and not merely the plaintiff) is not receiving an equitable share of the benefit of the stream.[24] This seems to make rights upon interstate streams a matter of interstate relation, reachable by creation of joint commissions between the States interested, to establish rules for such streams.

(3d ed.)

§ 343. **Between Appropriators in Different States.**—As in the preceding sections, the supreme court of the United States rules that rights upon interstate streams are a matter of interstate concern (similar to international concerns, regarding the States as each a sovereign).[25] Consequently it is for the States concerned to see that each receives, by joint arrangement, an equitable

22 Cline v. Stock, 71 Neb. 70, 98 N. W. 456, 102 N. W. 265.

23 218 U. S. 258, 31 Sup. Ct. Rep. 11.

24 The private right is "not in his own right, but by reason of and subordinate to the rights of his State," the court says. See Turley v. Furman (N. M.), 114 Pac. 278.

25 It has been said that "The idea that there can arise any international water-right question in the case of an appropriation of waters of an unnavigable stream cannot be maintained." Howell v. Johnson, 89 Fed. 556. That seems to remain true; but there arise interstate questions under the supreme court's decisions.

apportionment of benefit from the stream, opening the way for joint commissions between the States to govern interstate streams.[1]

In no instance yet has such a joint commission been established; and in cases simply between appropriators alone in two States, both recognizing the law of prior appropriation, the courts have so far decided upon the basis that priority governs. Irrespective of State lines, the courts have been following, between appropriators, the ordinary rules applicable to appropriators under the law of prior appropriation.

A chief feature of the law of appropriation generally has been that the water-right is independent of the place of use.[2] Should a State by statute prohibit domestic waters being diverted within it for use beyond its borders, an appropriation for that purpose could not be made,[3] and a declaration of State ownership has been said to have that effect,[4] but that is not the usual way of regarding such a declaration; and aside from an express prohibition, the general ruling has been that a diversion may be made in one State for use in any other State. Thus a case[5] involved the legality of the issuance of certain

[1] Many think the United States should control; but the decisions of the supreme court place the matter with the States.

[2] *Supra*, sec. 281; *infra*, sec. 496.

[3] Hudson County Water Co. v. McCarter, 209 U. S. 349, 28 Sup. Ct. Rep. 529, 52 L. Ed. 828, 14 Ann. Cas. 560, affirming McCarter v. Hudson etc. Co., 70 N. J. Eq. 695, 118 Am. St. Rep. 754, 14 L. R. A., N. S., 197, 65 Atl. 489, 10 Ann. Cas. 116.

In February, 1911, the California legislature passed a joint resolution concerning the water of Lake Tahoe, lying on the boundary of California and Nevada (referring to a proposition to divert the waters to Nevada), that "The State of California claims to own the major portion of the waters of said lake and protests against the diversion of said waters, and will resist the diversion contemplated, as an invasion of the rights of the people of this State." Assembly Joint Resolution No. 8. The project to divert the waters was abandoned. The same legislature enacted a statute forbidding generally the diversion of waters to points outside the State (Cal. Stats. 1911, c. 104, quoted *infra*, sec. 1432); and the Oregon legislature has just enacted that its State engineer may reject appropriations in Oregon for use in a State which would not allow diversions for use in Oregon. Or. Stats. 1911, c. 224, p. 404. But this Oregon act expressly allows appropriations for use outside of Oregon generally. Nevada replied to the California Resolution by itself resolving that diversion of the Lake water to Nevada should be allowed "Notwithstanding the protest of the people of California, whose claim to those waters we do not concede." (Nev. Stats. 1911, p. 453.) Wyoming passed an act authorizing its attorney general to take steps to protect Wyoming's rights upon interstate streams. Wyo. Stats. 1911, c. 43, p. 57.

[4] Bigelow v. Draper, discussed *supra*, sec. 172. See, also, Saunders v. Bluefield W. W. Co., 58 Fed. 133, and see 8 Harvard Law Review, 138, "Power of a State to Divert an Interstate Stream." See, also, 2 Columbia Law Review, 364.

[5] Perkins County v. Graff, 114 Fed. 441, 52 C. C. A. 243 (in the United States circuit court of appeals for the eighth circuit on appeal from the United States circuit court for the district of Nebraska).

bonds by Perkins county, Nebraska, to aid in the construction of an irrigating canal. One paragraph of the syllabus, as prepared by the court, reads as follows: "Drawing water through a canal from one State into another for the purpose of irrigating lands in the latter State is not necessarily a violation of the constitution, laws, or policy of the former State, although that State reserves all the waters for itself and its citizens, so far as they are necessary for the beneficial uses to which the State and its citizens apply them." And in the opinion, "When the proposition of the irrigation company is carefully and rationally considered, it is not obnoxious to the constitution, the laws, or the public policy of the State of Colorado, and these bonds cannot be defeated because the intention of the company was to draw the waters to irrigate the lands of this county from without the State of Nebraska." The court perceived no reason why the appropriation of water might not be made for the irrigation of lands in one State by means of the diversion of water from a stream in another State naturally flowing from the latter State into the former. Likewise in another case[6] a declaration of State ownership was held immaterial. In this case Sand Creek flowed from Colorado into Wyoming. Plaintiff diverted and used the water in Wyoming. Defendant diverted in Colorado and injunction was granted, and the following was held to be the law: "The right to divert running waters for irrigating lands in an arid country is not controlled or affected by political divisions. It is the same in all States through which the stream so diverted may pass. . . . . An appropriation of water in the State of Wyoming from a stream which rises in Colorado for irigating lands in Wyoming is valid as against a subsequent appropriation in Colorado, from the same stream for irrigating lands in Colorado. . . . . In a suit by settlers in Wyoming on a stream which rises in Colorado to restrain the diversion of water from such stream in Colorado, complainants need not aver or prove that they have conformed to police regulations of the State of Wyoming regulating the distribution of water in that State."

A careful examination of the question of conflict of laws as applied to water-rights was made in the valuable case of Willey v. Decker.[7] The facts were that the stream flowed from

[6] Hoge v. Eaton (C. C. Colo.), 135 Fed. 411.

[7] 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210.

Montana to Wyoming, and the appropriations involved were all made while both States were Territories, when there was no divided territorial sovereignty, and before the Wyoming statute[8] covering the subject of irrigation; whence the court found it unnecessary to consider what would be the effect of appropriations made under the present laws. Some of the plaintiffs were both diverting and using the water in Wyoming, others diverting in Wyoming for use in Montana. Some of the defendants (Oberreich) diverted in Wyoming for use in Wyoming, others diverted in Wyoming for use in Montana, and still others diverted in Montana for use in Wyoming. The court takes pains to note that no riparian rights were asserted by the Montana claimants, and that, though they might have made such claim, it was unnecessary to consider such rights because not asserted. The court also notes that it is unnecessary to decide what would be the law of interstate use outside of a State on a stream entirely within it and not an interstate stream. The Wyoming court decided in Willey v. Decker that Wyoming and Montana appropriators may join in a Wyoming diversion to irrigate lands lying in both States; also a Montana diversion for use in Wyoming will be enjoined in Wyoming where it injures other Wyoming users, and likewise a Montana or Wyoming diversion for use in Wyoming will be enjoined in Wyoming where it injures others who divert in Wyoming though their use is on Montana lands. The court states the rule generally as follows: "The separation of the lands capable of irrigation from such streams by State lines is of no consequence, if we are to consider merely the general principles of the doctrine and the reasons that called it into existence. The same necessity applies to the lands on either side of the line, and the water naturally flows in the channel of the stream in disregard of such line above as well as below it. . . . . We find nothing, therefore, in the fundamental principle of the doctrine of prior appropriation that he who is first in time is first in right, nor in the reasons that led to the establishment of the doctrine, which is opposed to the acquirement of a water-right for the irrigation of lands in one State by the diversion of the water at a point in another State from a stream flowing in both States." A declaration of State

[8] Stats. 1886, p. 294, c. 61.

ownership in Wyoming was here also held immaterial, as it likewise was in still another case.[9]

"The relative rights, therefore, of appropriators of the water of an interstate stream are the same, whether the appropriations are all in the same State, or some in one State and the balance in another State." [10]

The National Irrigation Act [11] contains a proviso that "nothing herein shall in any way affect any right of any State or of the Federal government or of any landowner, appropriator, or user of water in, to or from any interstate stream or the waters thereof."

The general principle of substantive law deducible from the authorities is that priority governs between appropriators irrespective of State lines, the validity of each appropriation being governed, in testing its priority, by the law of the State in which the diversion is made, so long as there remains an equitable enjoyment of benefits by both States.[12]

(3d ed.)

§ 344. **Difficulties of Procedure.**—The procedure by which the foregoing general rules are to be enforced gives rise to many difficult questions. Perhaps it may be a fair deduction that any court will grant relief *in personam*, by injunction or personal command, against all parties personally served with process within its jurisdiction, and may, as incidental to the determination of the propriety of granting personal relief, inquire into matters of title to water-rights whose situs is in another jurisdiction; but that no court will grant relief *in rem*, nor relief actually determining title to water-rights whose situs is outside the jurisdiction, such as a decree quieting title.

Relief *in personam*, by injunction, has been granted in Montana enjoining a Montana diversion at suit of an appropriator below stream in another State—Wyoming.[13] A decree apportioning

[9] Morris v. Bean, 146 Fed. 425; Bean v. Morris, 159 Fed. 651, 86 C. C. A. 519.

[10] Taylor v. Hulett, 15 Idaho, 265, 97 Pac. 39. See 19 L. R. A., N. S., 535. It is, however, for the upper State, where the point of diversion lies, to grant permit for its use; not for the lower State. Turley v. Furman (N. M.), 114 Pac. 278.

[11] *Infra*, sec. 1428.

[12] See list of cases *supra*, sec. 340, note 13.

[13] Howell v. Johnson (Mont.), 89 Fed. 556; Morris v. Bean (Mont.). 146 Fed. 425, affirmed in Bean v. Morris, 159 Fed. 651, 86 C. C. A. 519.

water between California and Nevada claimants has been rendered in the United States circuit court for the northern district of California upon a stream where the acts complained of were done in California.[14] In these cases the acts enjoined had been done within the jurisdiction of the court, and to bring cases within that class, it is held that where a ditch runs from one State into another, a diversion in the upper State constitutes, by keeping the ditch dry throughout its course, an injury committed in the lower State also, constituting a wrongful act done in the lower State which the lower court may enjoin as an act done within its own jurisdiction.[15] It seems, however, that it is not necessary that the act to be enjoined be actually one committed within the court's jurisdiction; if it has personal jurisdiction over the parties, it may enjoin even acts committed in another jurisdiction (though punishment for disobedience can be made only by retaining personal custody over the party or his property by sequestration, or by comity of the neighboring court). Thus, in the Salton Sea Cases, arising out of the break of the Imperial Canal in Southern California, the Colorado River had been dammed in Mexico and its waters carried by the canal into California for irrigation. Because of damage from the flooding of California lands owing to a break of the canal, an injunction was awarded in California against the canal owners, restraining them from allowing the water so to flow, though this involved the doing of some affirmative acts in Mexico.[16] A court of equity may issue its commands upon the person of all parties over whom it has obtained actual personal jurisdiction, whether this requires doing or refraining from acts within or outside its territorial jurisdiction, though enforcement in the latter case is more difficult.

But the establishment of the validity of rights, or decrees *in rem*, as distinguished from personal relief, or decrees *in personam*, can be made only in the State where the water-right has its situs. The situs of a riparian right is where the riparian land

[14] Anderson v. Bassman, 140 Fed. 22.

[15] Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210. Cf. Ruckman v. Green, 9 Hun, 225, holding that an action lies in New York for injury to New York lands caused by the passage over them of noxious vapors created in New Jersey.

[16] The Salton Sea Cases, 172 Fed. 820, 97 C. C. A. 242.

lies.[17] The situs of a right by appropriation would seem to be where the point of diversion lies, that being where the appropriator has a right to receive the usufruct of the natural resource.[17a] So it has been held that courts of one State cannot quiet title in favor of water-right diversions made in another State. Though an equitable action to quiet title is only one *in personam*, yet it partakes of the nature of an establishment of right, and is usually for this purpose treated as equivalent to a decree *in rem*, to be rendered only by the court within whose jurisdiction the point of diversion lies.

In Conant v. Deep Creek Co.,[18] all parties both diverted and used the water outside the territorial jurisdiction of Idaho, where the decree under consideration was rendered. The Utah court acknowledged the right of the Idaho court, on obtaining personal jurisdiction, to act by injunction, but denied the efficacy of the decree in question quieting title, saying: "The Idaho courts, therefore, have ample and complete jurisdiction to protect the rights of respondents to have the water which they have appropriated, and which they divert in Utah, flow through the channel of the stream, and to limit and determine the rights of the Idaho proprietors with reference thereto." The substantial effect of the decision was that the Idaho court was not vested with jurisdiction to determine as between themselves the right of the several appropriators who diverted water from the stream in Utah and used the same for irrigating lands in that State, and to quiet their titles thereto. In this connection, affirming the same point, the Wyoming court says in Willey v. Decker: "If, therefore, a decree adjudicating the various priorities of the parties would operate as a decree quieting the title to the lands of plaintiffs Willey and Ellison in another State, it is quite obvious that it would be beyond the jurisdiction of the court. But, for the reasons stated, we shall decline

[17] Under the California constitution, an action to quiet title must be brought in the county where the riparian land lies. Miller v. Madera etc. Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A., N. S., 391.

[17a] The *situs* of an appropriative water-right is in the State where the point of diversion lies (Colorado), and not in the lower State (New Mexico), where lands are to be irrigated, although the stream flows into the latter; and the New Mexico Territorial Engineer has no jurisdiction over licensing such Colorado diversions. That is for Colorado to do, it is held in Turley v. Furman (N. M.), 114 Pac. 278.

[18] 23 Utah, 627, 90 Am. St. Rep. 721, 66 Pac. 188.

at this time to go into the matter further."[19] It has been held that Colorado will not decree rights for use in New Mexico though diverted in Colorado,[20] stating that the question was of first impression in Colorado.

While it is thus generally stated that courts of one jurisdiction will not undertake to establish the validity of water-rights whose situs (the point of diversion, in cases of appropriation) lies in another State, yet it has been held that the court may examine into such rights to inform itself, when called upon to give merely personal or local relief. Thus, where a court (in Nevada) has obtained personal jurisdiction over all parties, and an action is brought to quiet title to rights within its jurisdiction (Nevada) against claims outside its jurisdiction (above stream in California), and the outside claimants file a cross-complaint setting up their rights and asking to have them quieted, the court in Nevada has power to quiet title to the Nevada rights, but not to the California rights; yet, in order to advise its discretion regarding the validity of the Nevada claims it may examine into the California defense, though this involves passing upon the California claims. Such action cannot settle the California rights even if found valid, but can be the basis for granting or refusing a decree quieting title in favor of the Nevada claims. This is the holding in Rickey v. Miller.[21] It was further therein held that after the Nevada Federal court had entertained the case upon this ground, the Californians would be enjoined from beginning a suit in the California State court to get the decree quieting title which the court in Nevada declares itself unable to give him even if entitled thereto. The case was affirmed in the supreme court of the United States.[22]

This case has been followed recently in Idaho. In Taylor v. Hulett[23] appellant's appropriation, diversion, and place of use

[19] Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210.

[20] Lamson v. Vailes, 27 Colo. 201, 61 Pac. 231.

[21] 152 Fed. 14, 81 C. C. A. 207, saying: "Though the Nevada court is not authorized or empowered to settle the rights of the parties in the State of California, it may look, nevertheless, under the defensive answer, to the appropriation in the State of California, to ascertain and determine whether such appropriation is prior and paramount to the complainant's appropriation, and, if not, then to settle and quiet complainant's title and rights thereto." Approved in 218 U. S. 258, 31 Sup. Ct. Rep. 11.

[22] Rickey etc. Co. v. Miller, 218 U. S. 258, 31 Sup. Ct. Rep. 11.

[23] 15 Idaho, 265, 97 Pac. 39, 19 L. R. A., N. S., 535.

were all within Idaho. The respondents were up the stream above appellant, and their diversion and place of use were all within the State of Wyoming. *Held,* the Idaho courts after personal service of process on the respondents and their appearance in the court can determine the priorities between the parties, and adjudicate and decree appellant's rights, and enjoin respondents from interfering with such rights. The fact that respondent's claim lies in Wyoming does not oust the Idaho court of jurisdiction to quiet title to the Idaho rights against him, and to enjoin him, though such injunction can be enforced only by getting an ancillary decree from the courts of Wyoming, where he resides. The court said: "This action, to quiet appellant's title, should be maintained in the jurisdiction to which the *res* or subject matter is situated.[24] If, however, in ascertaining and determining appellant's rights, it becomes necessary to also inquire into and ascertain the rights and priorities of the respondents on the same stream as a defensive issue, that certainly can and will be done by a court of equity, although the *res* or subject matter involved in the issue and constituting the defense be situated beyond the State line and in another jurisdiction."[25]

Unless some such rule were adopted, it would be impossible to decree rights or quiet title upon interstate streams, since the jurisdiction of Federal districts as well as State courts is usually separated by State lines, and there would be no single court having jurisdiction over both sets of claims territorially.

(3d ed.)

§ **345. Conclusions Regarding Interstate Streams.**—The matter is now in a stage of development, and any conclusions must be tentative only. We suggest the following drawn from the foregoing authorities:

(a) Between States, each is entitled to have for its prosperity an equitable apportionment of benefits from an interstate stream. Consequently, control of interstate streams is likely to gravitate toward the formation of joint commissions between the States to supervise their use and make regulations.

[24] Citing Carpenter v. Strange, 141 U. S. 87, 11 Sup. Ct. Rep. 960, 35 L. Ed. 640; Nelson v. Porter, 50 N. J. L. 324, 15 Atl. 375; Lindley v. O'Reilly, 50 N. J. L. 636, 7 Am. St. Rep. 802, 15 Atl. 379, 1 L. R. A. 79.

[25] Citing Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210; Rickey Land etc. Co. v. Miller et al., 152 Fed. 11, 81 C. C. A. 207.

(b) Between riparian owners in one State having rights at common law and appropriators in another State having rights under the law of appropriation, an equitable apportionment will be made between the two as classes, leaving each individual to share in the use apportioned to his class according to the law of the State wherein his right lies.

(c) Between appropriators in different States, priority governs irrespective of State boundaries. The separation of a stream by State lines does not lessen the right to make an appropriation upon it in a State where appropriation is allowed, and an appropriation thus made is, in the absence of express prohibitory statute, independent of the place to which the water is conducted, though it be outside the State; provided there remains an equitable division of benefits between the two States.

(d) Relief of a personal nature (as, for example, injunction) will be given by the court of any State which has obtained personal jurisdiction over the parties to the controversy, whether this requires doing or refraining from doing acts within or without the court's territorial jurisdiction.

(e) Relief of a real nature, or *in rem,* or as final adjudication of rights (and quieting title is so regarded) will not be granted by a court with regard to water-rights whose situs is outside its territorial jurisdiction, but the court will give such relief regarding all rights whose situs is within its jurisdiction. And further, as incidental to quieting title within its jurisdiction, or to granting purely personal relief, the court may inquire into water-rights whose situs is outside, and advise itself thereon; and even though it cannot settle the validity or invalidity thereof, may make its conclusion concerning them the basis of discretionary action regarding the relief to which the inquiry was incidental.

C. STANDING AND DIFFUSED WATER.

(3d ed.)

§ 346. **Lakes and Ponds.**[1]—Whether waters of a lake or pond can be appropriated is seldom discussed. The cases almost invariably speak only of water flowing in watercourses.[2]

The recent statutes in the arid States usually expressly include lakes, or else contain such general words as "all waters of the

[1] See, also, *infra,* sec. 728. See Idaho Stats. 1911, c. 230.

[2] Such also is the language of Cal. Civ. Code, sec. 1410.

State," or "all streams and water sources," which would cover the matter. In California, however, the statute[3] speaks only of streams and running water. However, riparian rights attached at common law to lakes and ponds. The law of appropriation is assumed likewise to apply to them, though the point is not specifically raised.[4] It is probable that lake water may be appropriated in California as elsewhere, though not mentioned in Civil Code, section 1410, for the California court has said (in another connection) that that section is not exhaustive of the kinds of water that can be appropriated.[5] The California court has said since the above was written (in the first edition): "We think the better doctrine in respect to the character of a stream from which the statute provides for appropriations is that it is not necessary that the stream should continue to flow to the sea, or to a junction with some other stream. It is sufficient if there is a flowing stream; and the fact that it ends either in a swamp, in a sandy wash in which the water disappears, or in a lake in which it accumulated upon the surface of the ground, will not defeat the right to make the statutory appropriation therefrom, and we can see no reason why the appropriation, in such a case, may not be made from the lake in which the stream terminates, and which therefore constitutes a part of it, as well as from any other part of the watercourse."[6] Upon a second appeal it was held (modifying the above somewhat) to be a question of fact whether the lake was part of the stream, and not one of law.[7]

[3] Civ. Code, 1410.

[4] Weaver v. Eureka etc. Co., 15 Cal. 271, and Osgood v. El Dorado etc. Co., 56 Cal. 571; a *dictum* to the same effect appears in Baxter v. Gilbert, 125 Cal. 580, 58 Pac. 129, 374.

[5] Katz v. Walkinshaw, 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236. The appropriation of the waters of a lake was upheld in Cole v. Richards Irr. Co., 27 Utah, 205, 101 Am. St. Rep. 962, 75 Pac. 376. See, also, Pomeroy on Riparian Rights, sec. 51. Assumed in Kinney on Irrigation, *passim*.

[6] Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. 338.

[7] Duckworth v. Watsonville Co., 158 Cal. 206, 110 Pac. 927.

In a case involving, not the law of appropriation, but the law of riparian rights, it was said (Turner v. James Canal Co. (1909), 155 Cal. 82, 132 Am. St. Rep. 59, 99 Pac. 520, 22 L. R. A., N. S., 401, 17 Ann. Cas. 823): "In Duckworth v. Watsonville etc. Co., *supra*, the question was suggested whether the right existed to make an appropriation of the waters of a lake, under the code which refers only to 'running water' (Civ. Code, sec. 1410), but as it was held that the finding that there was a running stream was sustained by the evidence, there was no decision further than to hold that it was not necessary to a right of appropriation under the code that the stream should run to the sea or to a junction with some other watercourse. This point has no bearing on riparian rights. It was also held that one owning land upon an outlet of a lake, but not on the lake

As to rights in *artificial* ponds or reservoirs caused by damming a river, reference is made to a previous chapter.[8]

Lakes differ from streams in the feature that one is standing while the other is running. For streams, a *flow* is the chief characteristic; for lakes, a *stand* or head. If the law of priority is to be applied to lakes, subsequent surplus appropriations must rest upon the question how they affect the prior claimant's *stand* or head of water, not its *flow*. He has a right to prevent any subsequent taking which would lower the head below the intake of his pumps or otherwise increase the cost of pumping.[9]

(3d ed.)

§ 347. **Flood or Storm or Surface Waters.**—In many parts of the West—especially in the desert regions—rainfall is scanty while evaporation is great. Most of the rain descends in very heavy local storms (frequently heavy thunderstorms), which give rise to short-lived torrents, sometimes of great volume. As a result a dry wash will suddenly fill with a stream twenty feet deep, advancing in successive high waves, the flow lasting a few hours, then rapidly subsiding; and perhaps the wash would not contain water again for several years. In such occurrences, the water will spread out when it reaches the bottom of the wash and flood much lowland.[10]

The decisions are in conflict upon the subject of whether overflow or flood waters entering a channel carrying a permanent river are to be treated as surface waters or as part of the watercourse, says the Montana court,[11] adding that in Indiana, Missouri, Kansas, Nebraska and Washington the former is held,[12] and in

itself, which outlet was dry for a considerable part of each season, could not take water from the lake above, during such dry period, to use on his land upon the outlet below. This was not, as counsel suggests, based on the fact that there was no flowing water in the outlet at such times, but on the fact that it then contained no water at all."

[8] *Supra*, sec. 32.

[9] Duckworth v. Watsonville Co., 158 Cal. 206, 110 Pac. 927. Unless the subsequent appropriator compensates him (by condemnation under power of eminent domain) for expense of changing apparatus. Salt Lake City v. Gardner (Utah), 114 Pac. 147. Recent statutes require consent of State Engineer before drainage of lakes is permitted. Neb. Stats. 1909, p. 525; S. D. Stats. 1909, c. 102.

[10] The writer witnessed such a flood in Tonopah, Nevada, some years ago, which, after leaving the hills, reached a flat where the town lies and sent a stream of water two feet deep down the main street. It disappeared inside of two days, but it was a week before the railway washouts could be repaired and fresh provisions could be brought into camp.

[11] Fordham v. Northern Pac. Ry. Co., 30 Mont. 421, 104 Am. St. Rep. 729, 76 Pac. 1040, 66 L. R. A. 556.

[12] Citing cases.

Georgia, Ohio, Iowa, Virginia, Minnesota, South Carolina, Wisconsin and Tennessee the latter is held,[13] while in California probably the former.[14] The Montana court holds that it is a question of fact in each case, depending chiefly upon whether continuity is or is not permanently broken. The California rule has, however, been recently held to be the latter—the flood water is part of the stream—though the decisions hitherto conflicted.[15] The California court recently said: "And when such usually recurring floods or freshets are accustomed to swell the banks of a river beyond the low-water mark of dry seasons and overflow them, but such waters flow in a continuous body with the rest of the water in the stream and along well-defined boundaries, they constitute a single natural watercourse. . . . . Where the stream usually flows in a continuous current, the fact that the water of the stream, on account of the level character of the land, spreads over a large area without apparent banks does not affect its character as a watercourse." [16]

The overflow waters of a stream, especially where they run in a well-defined course, and again unite with the stream at a lower point, must be regarded as a part of the watercourse from which the overflow comes, and cannot be regarded or dealt with as surface water.[17] So it has been held that, when surface waters collect into a pond, which is of a permanent character, they cease to be surface waters.[18] Even surface water becomes a natural watercourse at the point where it begins to form a reasonably well-defined channel, with bed, and banks, or sides, and current, although the stream itself may be very small and the water may not flow continuously.[19] The question is not to be determined alone from the origin of the water, for streams may be composed wholly of surface water or that which falls in the shape of rain or snow.[20]

[13] Citing cases.

[14] See the leading English case of Broadbent v. Ramsbotham, 11 Ex. 602.

[15] *Infra*, riparian rights, sec. 825, where the matter is chiefly involved.

[16] Miller v. Madera etc. Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A., N. S., 391; accord, Town of Jefferson v. Hicks, 23 Okl. 684, 102 Pac. 79; Broadway Mfg. Co. v. Leavenworth Co., 81 Kan. 616, 106 Pac. 1034. See Cook v. Seabord etc. Co., 107 Va. 32, 122 Am. St. Rep. 825, 57 S. E. 564, 10 L. R. A., N. S., 966.

[17] Brinegar v. Copass, 77 Neb. 241, 109 N. W. 173.

[18] Schaefer v. Marthaler, 34 Minn. 487, 57 Am. Rep. 73, 26 N. W. 726; Alcorn v. Sadler, 66 Miss. 221, 5 South. 694; Rait v. Furrow, 74 Kan. 101, 85 Pac. 934, 6 L. R. A., N. S., 157.

[19] Churchill v. Lauer, 84 Cal. 233, 24 Pac. 107.

[20] Rait v. Furrow, 74 Kan. 101, 85 Pac. 934, 6 L. R. A., N. S., 157; Palmer v. Waddell, 22 Kan. 352.

"When the surface waters which fall upon the watershed of Pond

The foregoing is given as a matter of definition, upon which cases seem fairly agreed; namely, that after storm or flood waters have once reached the channel of a living stream they are a part of the watercourse, and cannot be taken out of the channel above lower claimants on the watercourse otherwise than any other part of the stream could.

(3d ed.)

§ 348. **Drainage of Surface Water.**—But while, having once reached the channel of a living stream, the storm or flood or seepage waters are a part of the watercourse, yet until they actually so reach it, or if, having reached a natural depression, there is never any regular flow therein so as to constitute a watercourse, the foregoing does not apply; the waters are simply surface water. Such water is not governed by the law of watercourses. With respect to such casual water in no definite channel (or, if in a channel, with no definite flow), the question is usually how to get rid of it. In this respect the rule is different at civil law and at common law; and some jurisdictions adopt one of these rules and some the other.[21] The civil law is that the rights of the parties are determined by natural situation, so that the owner of land at a higher level has an easement, over the lower land of a neighbor, to have the surface water pass off *naturally*, which the lower owner must not obstruct; the common law recognizes no such easement, but calls surface water a "common enemy" which the lower owner may keep from coming from upper lands, and which either owner may get rid of as best he can (provided, under either rule, there is no *artificial* accumulation thereof discharged upon another's land).[22]

Creek ultimately gather and collect in the channel of that stream, they lose their character as surface water and become the waters of a watercourse, and when they overflow the bank opposite the townsite and pursue a general course back into the same watercourse, or into another watercourse, although they do not follow a channel with well-defined banks, they continue flood waters of the watercourse and do not become surface water." Town of Jefferson v. Hicks (1909), 23 Okl. 684, 102 Pac. 79.

Protection of lands from overflow. See Cal. Stats. 1909, chapter 222, providing for the organization of storm water districts.

[21] See Ogburn v. Conners, 46 Cal. 346, 13 Am. Rep. 213, and McDaniel v. Cummings, 83 Cal. 515, 23 Pac. 795, 8 L. R. A. 575, setting this forth.

[22] *Arizona.*—The common law, *semble*, Kroeger v. Twin Buttes etc. Co. (Ariz.), 114 Pac. 553.

California adopts the civil-law rule, having done so by inadvertence, but holding to it now as a rule of property. Ogburn v. Conners, 46 Cal. 346, 13 Am. Rep. 213; McDaniel v. Cummings, 83 Cal. 515, 23 Pac. 795,

The common-law rule that a man may rid himself of surface water as best he may is being to-day modified by a qualification that the mode adopted must be a reasonable use of his own land and not arbitrary or excessive, similarly to the new rule regarding diffused percolating water.[23] Another recent tendency is to give the State Engineer supervision over drainage.[24]

Questions of drainage were formerly of infrequent occurrence in the West.[25] But to-day, paradoxical as it may seem, irrigation is bringing them into importance; for irrigation water accumulates upon lower lands by seepage from higher lands, and in extensively irrigated regions the lower lands are becoming waterlogged, causing a serious problem.[26] Consequently statutes are

8 L. R. A. 575; Wood v. Moulton, 146 Cal. 317, 80 Pac. 92; Cederburg v. Dutra, 3 Cal. App. 572, 86 Pac. 838; Meigs v. Pinkham (Cal. 1910), 112 Pac. 883; Galbreath v. Hopkins (Cal. 1911), 113 Pac. 174.

Colorado.—Which rule is in force in Colorado seems to be left open in Canon City etc. Co. v. Oxtoby (1909), 45 Colo. 214, 100 Pac. 1127.

Idaho.—See Teeter v. Nampa etc. Irr. Dist. (Idaho), 114 Pac. 8.

Kansas.—The common-law rule governs. City of Paola v. Garman (1909), 80 Kan. 702, 103 Pac. 83. See Johnston v. Hayre (Kan.), 109 Pac. 1075.

Nebraska.—See Kane v. Bowden, 85 Neb. 347, 123 N. W. 94.

Oklahoma.—The common-law and not the civil-law rule is adopted in Oklahoma. Chicago Ry. v. Groves, 20 Okl. 101, 93 Pac. 755, 22 L. R. A., N. S., 802; Davis v. Frey, 14 Okl. 340, 78 Pac. 180, 69 L. R. A. 460; Cole v. Missouri Co., 20 Okl. 227, 94 Pac. 540, 15 L. R. A., N. S., 268; Town of Jefferson v. Hicks (1909), 23 Okl. 684, 102 Pac. 79.

Oregon.—Whether the common-law or civil-law rule of surface waters prevails in Oregon has not been decided up to the decision in Price v. Oregon etc. Co., 47 Or. 350, 83 Pac. 843. See Kane v. Littlefield, 48 Or. 299, 86 Pac. 544.

South Dakota.—See Anderson v. Drake (S. D.), 123 N. W. 673.

Washington.—See Peters v. Lewis, 33 Wash. 617, 74 Pac. 815.

Wyoming.—See Ladd v. Redle, 12 Wyo. 362, 75 Pac. 691.

Concerning damage caused by floods, see, also, a later section. *Infra*, sec. 461 et seq.

[23] See Sheehan v. Flynn, 58 Minn. 436, 61 N. W. 462, 26 L. R. A. 632.

[24] E. g., Neb. Stats. 1909, p. 525; S. D. Stats. 1909, c. 102.

[25] "In a dry and arid climate, where irrigation is necessary in order to cultivate the soil, the question as to the rights of the proprietors of upper and lower lands in regard to the waste water has seldom arisen, because, as a general rule, the lower landowner is willing to receive, dispose of, and profit by the use of all water flowing from the upper lands of another in irrigating his own land. It is seldom that any landowner in this State has occasion to complain of too much water." Boynton v. Longley, 19 Nev. 69, 3 Am. St. Rep. 781, 6 Pac. 437.

[26] In the Report of the Secretary of Agriculture for 1909 (page 97) it is said: "Among the most important investigations in drainage are those which are conducted upon irrigated lands. For years it has been known that some irrigated fields easily become swamps, while the productiveness of others is ruined by the accumulation of injurious alkali. The lands which are most easily irrigated by water from the mountain streams, and which are surprisingly productive when first reclaimed from a desert condition, not infrequently become noisome bogs or

being passed for organization of drainage districts upon the same lines as irrigation districts.[1]

Some further consideration of this is given elsewhere.[2]

(3d ed.)

§ 349. **Use of Surface Water.**—Diffused surface water cannot be appropriated against the landowner on whose land it lies.[3] Its presence and movements are too capricious to found any right upon distinct from the land where it is gathered, and such water is owned by the owner of the land where it happens to lie.[4]

alkaline wastes after a few years of cultivation under copious irrigation. This is true of a portion of every irrigated valley in the West. Utah contains not less than 150,000 acres of such land; Colorado, 75,000; California, 100,000; Nevada, 250,000; Wyoming, 50,000; Montana, 60,000; Idaho, 40,000, all having been once cultivated and still having valuable water-rights. These are conservative estimates, showing the gravity of the situation, and when considered from the point of the owners particularly emphasize the importance of using preventive as well as curative measures in the treatment of saturated lands which are under irrigation. . . . . One drain should be placed along the upper edge of the wet land approximately across the surface slope and sufficiently deep to intercept the underflow from the higher land. Frequently this depth must be from five to seven feet. The drain may be a large open ditch, a covered lumber-box drain, or a large pipe, according as may be expedient in such locality. Where the land lies in a series of benches, drains should parallel the upper border of each bench. A few drains are usually required in the lower parts of the fields to remove surplus water which is supplied directly by irrigation or rainfall. These should be located in the depression, but should not be constructed until the intercepting drains have cut off the supply from outside sources." The cost, it is said, will be about fifteen to twenty-five dollars per acre. Other plans for drainage are given. See, also, Farmers' Bulletin, 373, U. S. Dept. of Agriculture.

It has been said that a difficulty has arisen under the national irrigation projects because these sometimes did not provide drainage systems. See 45 Cong. Rec. 2889.

1 *Colorado*, Laws 1909, c. 161, providing for drainage districts; Rev. Stats. 1909, sec. 3188 et seq.; Laws 1903, p. 209 et seq. *Nevada*, Stats. 1911, c. 134. *Oregon*, Stats. 1911, c. 241, p. 424; Stats. 1911, c. 172, p. 256. *Washington*, Stats. 1911, c. 97. *Wyoming*, Stats. 1911, c. 95, p. 139.

2 *Infra*, sec. 462, damage from floods, etc.

3 Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Jacob v. Lorenz, 98 Cal. 332, at 339, 33 Pac. 119; Los Angeles Assn. v. Los Angeles, 103 Cal. 461, 37 Pac. 375; Sanguinetti v. Pock, 136 Cal. 466, 89 Am. St. Rep. 169, 69 Pac. 98.

4 *Ibid.*, and compare the French Law, as given in "Droit Civile Francais," by Aubrey & Rau, 4th ed., vol. 3, p. 43: "Concerning rain water falling on private land. These waters belonged by right of accession and entirely independent of the fact of actual use, to the owner of the land on which they fall. He may dispose of them as he pleases, whether by retaining them on his land, or by letting others take them, or by letting them take their natural course to lower lands." ("Des eaux pluviales tombant sur un terrain privé. Ces eaux appartiennent par droit d'accession, et indépendament de tout fait d'occupation, au propriétaire du terrain sur lequel elles tombent. Il peut en disposer à son gré, soit en les retenant dans son

The English cases have gone into this quite thoroughly. In Rawstron v. Taylor[5] it was held that, in the case of common surface water flowing in no definite channel, the landowner was entitled to get rid of it in any way he pleased, although he cut it off from plaintiff's mill which it had supplied. In Broadbent v. Ramsbotham[6] it was decided that a landowner has a right to impound surface water which flows over his land in no definite channel, although the water is thereby prevented from reaching a brook, the stream of which had for more than fifty years worked the plaintiff's mill. Baron Alderson, in delivering the judgment of the court in that case, says:[7] "No doubt, all the water falling from heaven, and shed upon the surface of a hill, at the foot of whch a brook runs, must, by the natural force of gravity, find its way to the bottom, and so into the brook; but this does not prevent the owner of the land on which this water falls from dealing with it as he may please, and appropriating it. He cannot, it is true, do so if the water has arrived at and is flowing in some natural channel already formed. But he has a perfect right to appropriate it before it arrives at such channel."

All the many cases already cited considering whether there was or was not a *watercourse* held that if there was not a watercourse, but only diffused surface water, neither the law of riparian rights nor the law of permanent rights by priority of appropriation applies. This is because, as set forth in the first part of this book, streams are natural resources of permanent continuance due to nature, while surface water is not a permanent thing nor definite in character. Anyone receiving such water is subject to the paramount right of each landowner to use his land without regard to its effect in cutting off the water's passage to others. The citations just referred to cover this matter very fully. We state the following recent case merely as an illustration. Surface and seepage water gathered upon a man's land in New Mexico. It was held his sole property, to act upon as he chose without needing a permit from the State Engineer. He

fond, soit en les cédant à des tiers, soit enfin les laissant couler sour les fonds inférieurs suivant la pente naturelle du terrain.")

Rain water is classed, like running water, in the "negative community" in the civil law. *Supra*, sec. 5.

5 11 Ex. 369, 382.

6 11 Ex. 602.

7 11 Ex. 602, 615.

may consume it all, or he may grant its use to another, and the lower owner has no cause of action.[8]

True, as between flood-water claimants neither of whom owns any land where the flood waters gather, priorities may exist.[9] So, just as in the case of waste and seepage water, there are statutes in many Western States for priorities in the use of diffused surface or flood waters by priority of appropriation; but, as already considered, these apply only to rivals between themselves, both strangers to the landowner on whose land the floods gather or from which they come.[10] They may have application between rival ditches, even though not against a landowner's right to interrupt the water for the purpose of using it himself, or for keeping his land dry, etc. Such statutes for appropriation of flood or seepage water are usually found only in such regions as New Mexico, the Dakotas, etc., where the landowner is usually the United States, remaining inactive. Accordingly, filings may be there made with the State Engineer for permits to build dams in dry ravines, gulches or coulees *on public land* to store flood waters, and the first permittee will have the better right.[11]

(3d ed.)

§ 350. **Swamp Lands.**—Title to public lands of the character known as "swamp lands" rests in the State and not in the United States, and they are dealt with by special statutes and rules of

[8] Vanderwork v. Hewes (N. M.), 110 Pac. 567.

[9] In Arizona two rival sheepmen watered in the same locality. Defendant first built a dam in a "dry wash" at its lower end to catch storm water, but it was soon washed out. Thereupon plaintiff built a dam at a higher point on the wash. Defendant then went still higher and started a third dam. The court made no final disposition of the case, but allowed both to proceed and each make a beneficial use of the water if he could, and to come into court again later, if necessary. Sullivan v. Jones (Ariz.), 108 Pac. 476.

[10] *Supra*, sec. 55.

[11] See N. M. Laws 1909, p. 371; N. D. Laws 1909, c. 152, p. 179; S. D. Stats. 1911, c. 263, sec. 468; Sullivan v. Jones (Ariz.), 108 Pac. 476; Kelly v. Hynes (Mont. 1910), 108 Pac. 785. The Territorial Engineer of New Mexico says (in Bulletin 215, Office of Experiment Stations, United States Department of Agriculture): "All the streams in this Territory are more or less torrential or intermittent, the floods coming at different seasons of the year, but most of them in July. The necessity for storage becomes an important factor in conserving the water above the normal flow of each stream. It is quite important to construct equalizing reservoirs in order to distribute the water at such times as it is most needed for irrigation."

The South Dakota statute is for posting notice, not requiring permit of State Engineer.

A California Statute of 1911, chapter 406, section 6, concerns licensing flood-water storage for power purposes.

their own.[12] The State of California having been admitted into the Union on the ninth day of September, 1850, on the twenty-eighth of the same September the Congress passed an act "to enable the State of Arkansas and other States to reclaim the swamp and overflowed lands within their limits," known as the Arkansas act, by which the State of California became the owner of swamp lands, on the twenty-eighth day of September, 1850.

Rules for the disposal of swamp lands in California are contained in the Political Code.[13] Section 3446 provides that when-

[12] The law concerning them is discussed in Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Heckman v. Swett, 99 Cal. 303, 33 Pac. 1099. See State v. Warren etc. Co. (Or.), 106 Pac. 780.

[13] Political Code, part 3, title 8, chapter 2. Concerning reclamation districts, reference may be made to the following cases (see, also, cases on irrigation districts, *infra*, sec. 1356 et seq.): Kimball v. Reclamation District Fund Commrs., 45 Cal. 344; Hagar v. Board of Supervisors, 47 Cal. 222; People v. Coghill, 47 Cal. 361; Bachman v. Meyer, 49 Cal. 220; People v. Hagar, 49 Cal. 229; Ferran v. Board of Supervisors, 51 Cal. 307; Hagar v. Board of Supervisors, 51 Cal. 474; Ralston v. Board of Supervisors, 51 Cal. 592; People v. Hagar, 52 Cal. 171; People v. Ahern, 52 Cal. 208; People v. Reclamation Dist., 53 Cal. 346; People v. Houston, 54 Cal. 536; People v. Williams, 56 Cal. 647; Reclamation Dist. No. 124 v. Coghill, 56 Cal. 607; Levee Dist. No. 1 v. Huber, 57 Cal. 41; People v. Haggin, 57 Cal. 579; Williams v. Board of Supervisors, 58 Cal. 237; Cosner v. Board of Supervisors, 58 Cal. 274; Reclamation Dist. No. 3 v. Kennedy, 58 Cal. 124; Bixler's Appeal, 59 Cal. 550; Mitchell v. Hecker, 59 Cal. 558; Bixler v. Board of Supervisors, 59 Cal. 698; Swamp Land Dist. No. 110 v. Feck, 60 Cal. 403; Reclamation Dist. No. 3 v. Goldman, 61 Cal. 205; Reclamation Dist. No. 108 v. Evans, 61 Cal. 104; Newman v. Superior Court, 62 Cal. 545; Swamp Land Dist. No. 121 v. Haggin, 64 Cal. 204, 30 Pac. 634; Williams v. Board of Supervisors, 65 Cal. 160, 3 Pac. 667; Reclamation Dist. No. 3 v. Goldman, 65 Cal. 635, 4 Pac. 676; Reclamation Dist. No. 108 v. Hagar, 66 Cal. 54, 4 Pac. 945; People v. Hagar, 66 Cal. 59, 4 Pac. 951; Reclamation Dist. No. 3 v. Parvin, 67 Cal. 501, 8 Pac. 43; People v. La Rue, 67 Cal. 526, 8 Pac. 84; Swamp Land Dist. No. 307 v. Gwynn, 70 Cal. 566, 12 Pac. 462; People v. Hulbert, 71 Cal. 72, 12 Pac. 43; Standford v. Felt, 71 Cal. 249, 6 Pac. 900; Lamb v. Reclamation Dist. No. 108, 73 Cal. 125, 2 Am. St. Rep. 775, 14 Pac. 625; People ex rel. Attorney General v. Parvin, 74 Cal. 549, 16 Pac. 490; Swamp Land Dist. No. 407 v. Wilcox, 75 Cal. 443, 17 Pac. 241; Hutson v. Woodbridge Protection Dist. No. 1, 79 Cal. 90, 61 Pac. 549, 21 Pac. 435; Lord v. Dunster, 79 Cal. 477, 21 Pac. 865; People v. Gunn, 85 Cal. 238, 24 Pac. 718; Reclamation Dist. No. 124 v. Gray, 95 Cal. 601, 30 Pac. 779; Swamp Land Dist. No. 150 v. Silver, 98 Cal. 51, 32 Pac. 866; Marshall v. Taylor, 98 Cal. 55, 35 Am. St. Rep. 144, 32 Pac. 867; Gwynn v. Diersen, 101 Cal. 563, 36 Pac. 103; Reclamation Dist. No. 542 v. Turner, 104 Cal. 334, 37 Pac. 1038; Lower Kings River Reclamation Dist. No. 531 v. Phillips, 108 Cal. 306, 39 Pac. 630, 41 Pac. 335; Swamp Land Dist. No. 307 v. Glide, 112 Cal. 85, 44 Pac. 451; Barnes v. Glide, 117 Cal. 1, 59 Am. St. Rep. 153, 48 Pac. 804; People ex rel. Sels v. Reclamation Dist. No. 551, 117 Cal. 114, 48 Pac. 1016; Reclamation Dist. No. 551 v. Runyon, 117 Cal. 164, 49 Pac. 131; Tulare County v. May, 118 Cal. 303, 50 Pac. 427; People v. Reclamation Dist. No. 36, 121 Cal. 522, 50 Pac. 1068, 53 Pac. 1085; Hensley v. Reclamation Dist., 121 Cal. 96, 53 Pac. 401; Wein-

ever the owners of more than one-half of any body of swamp land and overflowed lands desire to reclaim the same, they may present to the board of supervisors a petition for the formation of a reclamation district.[14] It is held that this vests in the supervisors absolutely the determination whether the lands are unreclaimed and whether they are subject to independent reclamation; and being so vested, the determination is legislative in its nature, and the courts are powerless to interfere, or to restrain the exercise of the power by the board of supervisors. This holding has since been modified.[15]

The power of the State to legislate for the reclamation of swamp lands is not confined to those lands the title to which was acquired under the Arkansas act, but exists as to all swamp and overflowed lands in the State, and the burden of the charges

reich v. Hensley, 121 Cal. 647, 54 Pac. 254; Reclamation Dist. No. 537 v. Burger, 122 Cal. 442, 55 Pac. 156; Clare v. Sacramento Electric etc. Co., 122 Cal. 504, 55 Pac. 326; People ex rel. Cluff v. City of Oakland, 123 Cal. 598, 56 Pac. 445; Lower Kings River Reclamation Dist. No. 531 v. McCullah, 124 Cal. 175, 56 Pac. 887; California Pastoral Co. v. Whitson, 129 Cal. 376, 62 Pac. 28; Reclamation Dist. No. 108 v. West, 129 Cal. 622, 62 Pac. 272; In re Werner, 129 Cal. 567, 62 Pac. 97; People ex rel. Thisby v. Reclamation Dist., 130 Cal. 607, 63 Pac. 27; People ex rel. Silva v. Levee Dist., 131 Cal. 30, 63 Pac. 676; Adams v. City of Modesto, 131 Cal. 501, 63 Pac. 1083; Reclamation Dist. No. 563 v. Hall, 131 Cal. 662, 63 Pac. 1000; National Bank v. Greenlaw, 134 Cal. 673, 66 Pac. 963; McCord v. Slavin, 143 Cal. 325, 76 Pac. 1104; San Francisco Savings Union v. Reclamation Dist. No. 124, 144 Cal. 639, 79 Pac. 374; Reclamation Dist. No. 551 v. Van Loben Sels, 145 Cal. 181, 78 Pac. 638; Glide v. Superior Court, 147 Cal. 21, 81 Pac. 225 (modified in Inglin v. Hoppin, 156 Cal. 483, 105 Pac. 582); Reclamation District No. 70 v. Sherman, 11 Cal. App. 399, 105 Pac. 277; Swamp Land Reclamation Dist. No. 341 v. Blumenberg, 156 Cal. 532, 106 Pac. 389; Keech v. Joplin, 157 Cal. 1, 106 Pac. 222; Metcalfe v. Merritt, 14 Cal. App. 244, 111 Pac. 505, and other cases.

See, also, Billings etc. Co. v. Fish, 40 Mont. 256, 106 Pac. 571; State v. Warren etc. Co. (Or.), 106 Pac. 780; State v. Superior Court, 42 Wash. 491, 85 Pac. 264.

[14] Prior to the enactment of the Political Code, similar legislation existed in the statutes, and section 3478 of the Political Code allowed reclamation districts formed under laws prior to March 27, 1868, to be reorganized. See San Francisco Savings Union v. Reclamation District, 144 Cal. 639, 79 Pac. 374.

[15] Glide v. Superior Court, 147 Cal. 21, 81 Pac. 225. See Inglin v. Hoppin, 156 Cal. 483, 105 Pac. 582.

As to validity of organization, see Keech v. Joplin, 157 Cal. 1, 106 Pac. 222. Organization of district—collateral attack—description of territory affected, Metcalfe v. Merritt (Cal. App.), 111 Pac. 505. Establishment of district—notice—description of boundaries—constitutionality of law—double taxation—collateral attack, Barnes v. Colusa County Supervisors (Cal. App.), 110 Pac. 820. Fiscal affairs, Keech v. Joplin, 157 Cal. 1, 106 Pac. 222. Assessment of costs of improvements, Reclamation Dist. No. 535 v. Clark, 155 Cal. 345, 100 Pac. 1091. Judicial review officer's acts, Lamb v. McMullen, 157 Cal. 14, 106 Pac. 229; Inglin v. Hoppin, 156 Cal. 483, 105 Pac. 582.

for the work may be placed on specific lands in proportion to the estimated benefits thereto, and the members of the assessing board (the board of drainage commissioners) are not disqualified because they themselves own lands within the district assessed.[16] In this case an act creating a large district in the Sacramento Valley was upheld, and Mr. Justice Henshaw reviews the history of such legislation in California. The act was repealed in 1911.[16a]

It has been said that there are very grave doubts whether, upon a fair interpretation of the State statutes providing for reclamation, the barring of the flow of a regular and defined stream from the lands below, not swamp, is contemplated, or whether the State would have power, by any statute, to authorize such a proceeding. The statute seems to have in view levees along the sides of watercourses, and not across them.[17]

Reclaimed swamp lands come within the same law as to irrigation and riparian rights as other agricultural lands. In one case it was urged that swamp lands are *per se* lands upon which water cannot be beneficially used for irrigation, but the court held that the legal effect of such use depends on the facts presented in each case, saying: "Merely because the land may have been reclaimed as swamp land does not necessarily deprive it of the need of irrigation. The circumstance that it has been reclaimed may raise a presumption that at a particular time it required no water for irrigation; and testimony to that effect may be admitted in evidence for the purpose of ascertaining the quantity of water essential to its productiveness. But when it appears that the land has in fact been reclaimed sufficiently to entitle its possessor to a deed from the State, if in an arid section, it implies that the land has been deprived of its excessive moisture, and thereby restored to the same condition as other agricultural lands in the vicinity, and subject to the same rights in respect to the stream flowing through it, or in an appropriation from any source of water supply for its irrigation."[18]

16 People ex rel. Chapman v. Sacramento Drainage District (1909), 155 Cal. 373, 103 Pac. 207.

16a Stats. 1911, c. 8.

17 Lux v. Haggin, 69 Cal. 255, 10 Pac. 674.

18 Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

See, also, concerning swamp lands, Morrow v. Warner etc. Co. (Or.), 101 Pac. 171; Dixon v. Same (Or.), 101 Pac. 189; Harrington v. Same (Or.), 101 Pac. 189; Forkett v. Same (Or.), 101 Pac. 190; Dryden v. Pelton-Armstrong Co., 53 Or. 418, 101 Pac. 190.

(3d ed.)

§ 351. **Underground Water.**—How far the law of appropriation applies to underground water is considered elsewhere. It is thought best to consider all aspects of the law of underground water together in a single place.[19]

[19] *Infra*, secs. 1039 et seq., 1106, 1158.

§§ *352–360. (Blank numbers.)*

CHAPTER 17.

HOW AN APPROPRIATION IS MADE. THE ORIGINAL METHOD.

§ 361. The original method.
§ 362. Possessory origin of this method.
§ 363. Ownership of land unnecessary, and water need not be returned to the stream.

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§ 364. Distinguished from the statutory method.
§ 365. The statutes do not apply.
§ 366. Settlement on stream banks not alone enough—No preference to riparian owners.
§ 367. Same.

B. TO SECURE THE BENEFIT OF RELATION.

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§ 369. Provisions chiefly declaratory only.
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C. NOTICE.

§ 371. Form of notice.
§ 372. Contents and recording of notice.
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§ 374. The notice operates as a warning.
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D. BENEFICIAL PURPOSE.

§ 377. Necessity for *bona fide* intention.
§ 378. What constitutes a beneficial purpose.
§ 379. Motive.
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E. DILIGENCE.

§ 382. Necessity for diligence.
§ 383. What constitutes diligence.
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F. COMPLETION OF CONSTRUCTION WORK.

§ 386. Completion of work preparatory to use of water.
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§ 389. Diversion alone.
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§ 392. Changes in the course of construction.

G. RELATING BACK.

§ 393. Origin of the doctrine.
§ 394. Effect of relation.

H. ACTUAL APPLICATION.

§ 395. Necessity for actual application and use under the possessory origin of the law.
§ 396. Same—Under the view now developing.
§ 397. Federal requirements.
§ 398. Recapitulation.
§§ 399–407. (Blank numbers.)

(3d ed.)

§ 361. The Original Method.—Using the California Civil Code[1] as a model for legislation, and, consequently (as the California code is chiefly only declaratory of the early decisions), basing their method upon the early California decisions, the following method was up to recent years followed throughout the West by statute, or in the absence of statute, by decision of the courts.[2] But in recent years, especially since the legislative sessions of 1903, most of the States have adopted the "water

[1] Secs. 1410–1422.

[2] *Arizona.*—Rev. Stats. 1901, p. 1042, sec. 4169.

Colorado.—Sieber v. Frink, 7 Colo. 148, 2 Pac. 901; Farmers' etc. Co. v. Southworth, 13 Colo. 111, 21 Pac. 1028, 4 L. R. A. 767.

Idaho.—2 Idaho Codes, sec. 2583; McLean's Rev. Codes, sec. 3242 et seq.; Laws 1901, p. 191; Sand Point etc. Co. v. Panhandle etc. Co., 11 Idaho, 405, 83 Pac. 347. In Speer v. Stephenson, 16 Idaho, 707, 102 Pac. 365, the original Idaho law was said to be: "An appropriation was initiated by posting a notice at or near the point of intended diversion, stating certain facts; and an inchoate right thereby arose which would ripen into a legal and complete appropriation upon the final delivery of the waters to the place of intended use."

Kansas.—See next note.

Montana.—See next note.

Nevada.—Comp. Laws, 1900, secs. 856 et seq., 424.

Nebraska.—Comp. Stats. 1891, c. 93a, p. 844.

Oregon.—Hills' Ann. Laws, p. 1930, secs. 1–9. A more enlarged treatment, still based on the California method, was provided later. Stats. 1899, p. 172, Am. 1901, p. 136, 1903 (Sp. Sess.), p. 25. But the statute of 1905 (Stats. 1905, p. 401) was based rather upon the new statutory or "water code" method described in the next chapter. In 1909 the full water code procedure was adopted, as in the next chapter.

Texas.—Act of March 19, 1889.

Utah.—Rev. Stats. 1898, secs. 1261–1275.

Washington.—See next note.

Wyoming.—Laws 1869, p. 310.

code" system described in the next chapter, which originated in Wyoming, as a kind of systematization of the California principles, and the older statutes and decisions are thus, so far as the water code method differs from that in this chapter, superseded; though that method is founded at the bottom on the ideas of the method described in this chapter. At the present day, the method here set forth remains substantially in California, Kansas, Montana and Washington.[3] (An exception was made in 1911, in California, providing a new system for power uses only, as set forth in the next chapter.)

Under the California doctrine these rules apply only to waters upon public domain (to which the doctrine of appropriation is in California restricted);[3a] under the Colorado doctrine, to all waters wherever situated. All rights acquired upon public land under these rules are protected, so far as the United States is concerned, by the act of 1866, sections 2339, 2340, of the Revised Statutes of the United States.

In the following, decisions from all jurisdictions are given, since, until recently changed by statute, the rules were the same in all, following the California decisions. The method described in this chapter might be called the original method; and that, in the next chapter, the new method.

(3d ed.)

§ 362. Possessory Origin of This Method.—Having found water that can be appropriated and a proper place to appropriate it (in California it must be on or flowing by public land), the right to the water is not complete until the water is actually taken into one's possession, or rather, until all work preparatory to the actual use of the water is completed, since that is the equivalent of taking possession; it is the nearest to possession

[3] *California.*—Civ. Code, secs. 1410–1422.

Kansas.—Gen. Stats. 1901, secs. 3609–3613; Gen. Stats. 1905, sec. 3791 et seq.; Gen. Laws 1909, sec. 4405.

Montana.—Stats. 1907, p. 489; Civ. Code 1895, secs. 1880–1892; Am. Stats. 1901, p. 152.

Washington. — Ballinger's Codes 1897, sec. 4092; Pierce's Code 1905, sec. 5132 et seq. Appropriations for mining and manufacture. See secs. 1540, 1541.

The statutes of Texas are a compromise between the two methods.

In Alaska, there being no statutes hereon, the district rules usually follow the California Civil Code. See, for example, those quoted in Thorndyke v. Alaska Perseverance Co. (Oct. 5, 1908), 164 Fed. 657.

[3a] *Supra*, secs. 111 et seq., 151 et seq., 227 et seq.

that the nature of the right makes possible.[4] The appropriator acquires no right until he actually takes possession.[5]

The rules developed in the early days upon the public lands in California, and (upon the public land) still prevail in California (so far as State law prevails) substantially as laid down in the early decisions of the court. The proposition around which these rules center is, it should be repeated, that the requisites are those furnishing an equivalent to taking possession of the flow of the water, the right having arisen as a possessory right on the public domain. It is an illustration of the possessory origin of the law of appropriation.[6]

(3d ed.)

§ 363. Ownership of Land Unnecessary and Water Need not be Returned to the Stream.—It has previously been pointed out that there are no personal requisites concerning the appropriator. It is immaterial whether he is an alien, minor, riparian proprietor, etc.[7] It will be well to repeat here that ownership of any land is not a requisite either; the appropriator need not locate any land.[8] That is a distinguishing feature of the law of appropriation. Water may be appropriated for use any place[9] by anyone, and often is diverted by companies who own no land, to supply distant people. The supreme court of the State of Washington says that "the right of appropriation, as defined by the best authorities, is not controlled by the location of the stream with reference to the premises which are irrigated."[10] The Colorado court says in the case last cited: "The appropriator, though he may not own the land on either bank of a running stream, may divert the water therefrom, and carry the

[4] Conger v. Weaver, 6 Cal. 548, 65 Am. Dec. 528, 1 Morr. Min. Rep. 594 (quoted *infra*, sec. 393); Thompson v. Lee, 8 Cal. 275, 1 Morr. Min. Rep. 610.

[5] Bybee v. Oregon etc. Co., 139 U. S. 663, 11 Sup. Ct. Rep. 641, 35 L. Ed. 305.

[6] See *supra*, sec. 139.

[7] *Supra*, sec. 318 et seq.

[8] *Supra*, sec. 281. Except as recent water codes change the rule, sec. 282, *supra*, and sec. 509, *infra*. And it must also be noted that if the appropriator *does* have land along the stream, he has, under the California doctrine, further rights as a riparian proprietor.

[9] In New Mexico by statute an appropriation cannot be made for use beyond the watershed. *Infra*, sec. 1440.

[10] Offield v. Ish, 21 Wash. 277, 57 Pac. 809. See, also, Long on Irrigation, 50; Thomas v. Guiraud, 6 Colo. 530; Hammond v. Rose, 11 Colo. 524, 7 Am. St. Rep. 258, 19 Pac. 466; Oppenlander v. Left Hand Ditch Co., 18 Colo. 142, 31 Pac. 854. And see *supra*, sec. 319, appropriation by trespasser.

But see Avery v. Johnson (Wash.), 109 Pac. 1028.

same whithersoever necessity may require for beneficial use, without returning it, or any of it, to the natural stream, in any manner." The supreme court of Utah says: "In order that the appropriator may be entitled to the use of such water, it is not essential that he should have located or taken possession of any tract or parcel of the public domain bordering upon the stream or lake from which the appropriation is made, or that he even have an interest in or to the lands proposed to be irrigated, if such be the beneficial purpose of the appropriation. An appropriation may be made of such water for the irrigation of lands not situated upon or near the stream or lake from which it is taken, and the water may be conducted by means of ditches or channels, or otherwise, across the intervening public lands, to irrigate lands possessed by the appropriator or others, or he may sell and dispose of the water thus conducted to others to use it for a beneficial purpose on claims or lands possessed or owned by them, or in which they have an interest, and upon which the water may be and is applied for a beneficial purpose." [11]

As elsewhere considered, the transition from a "possessory" to a "specific use" system now going on in the law of appropriation tends to modify this characteristic, and, by making the appropriation inhere in the specific use first made of it, tends to require that an irrigator own land of his own before he can appropriate water for irrigation. But that is as yet only a *tendency* in the law; as already pointed out the original view still strongly prevails in making the right independent of the place or purpose of use.[12]

A. BY ACTUAL DIVERSION.

(3d ed.)

§ 364. Distinguished from the Statutory Method.—An appropriation may be made by a completed actual diversion for a beneficial purpose (without following the statute) or else by proceeding under the statute. The difference is that in the latter case the appropriator can claim the benefit of the doctrine of relation, while in the former he cannot. The difference, however, existed from the earliest times, and the statute merely fixed the details of the method by which an appropriator could secure the benefit of the doctrine of relation.[13]

11 Sowards v. Meagher (Utah), 108 Pac. 1113.

12 *Supra*, secs. 139, 281.

13 De Necochea v. Curtis, 80 Cal. 397, 20 Pac. 563, 22 Pac. 198; Wells v. Mantes, 99 Cal. 583, 34 Pac. 324.

These two are the only methods. Unless there is a right by actual diversion as below set forth, or by compliance with the statute, it cannot be spoken of as an appropriation.[14] There can be no such thing as a constructive appropriation, resting as the matter does so largely upon actual intent.[15] There can be no appropriation by prescription, as an appropriation is an original acquisition from the government (in California, the United States, the doctrine of appropriation being there confined to the public lands; under the Colorado doctrine, from the State), against whom the statute of limitations does not run.[16] This rule precludes an appropriation improperly made, but continued for five years, from being of any force, the land having been public land part of that time.[17]

(3d ed.)

§ 365. **The Statutes Do not Apply.**—Where one does not seek the benefit of the doctrine of relation,[18] and actually completes his construction work, and diverts the water for a beneficial purpose before others intervene, his claim as an appropriator is valid, and always has been. An appropriation is merely the acquisition of a right from the government (in California, on public land) initiated by taking possession of the stream for a beneficial purpose. If there are rival claimants, the government demands compliance with the statutory formalities, which formalities originally rested upon custom, and now upon State legislation; but if there are no rival claimants, the government is alone concerned, and acquiesces (the act of 1866), because such was the rule under the early customs. Possession is a good title against a later possessory claimant.[19] As between the government and the appropriator there are only two requisites for this—the actual diversion of the water and that the diversion is for a beneficial purpose. If there are no rival claimants of any kind up to such completion of work, and actual possession, that is enough to satisfy the government, who is then alone concerned,

[14] Senior v. Anderson, 115 Cal. 496, at 505, 47 Pac. 454.

[15] Kelly v. Natoma etc. Co., 6 Cal. 105, 1 Morr. Min. Rep. 592.

[16] Matthews v. Ferrera, 45 Cal. 51; Wilkins v. McCue, 46 Cal. 656; Jatunn v. Smith, 95 Cal. 154, 30 Pac. 200; Smith v. Hawkins, 110 Cal. 122, 42 Pac. 453; State v. Quantic, 37 Mont. 32, 94 Pac. 491; Jackson v. Indian etc. Co., 18 Idaho, 251, 110 Pac. 251.

[17] *Ibid.* See *infra*, sec. 591.

[18] *Infra*, sec. 393.

[19] Evans Ditch Co. v. Lakeside D. Co., 13 Cal. App. 119, 108 Pac. 1027.

and the right is complete against later attack on the ground of failure to comply with the statutes.[20] The leading case is Wells v. Mantes.[21] In another case it was held that where there has been an actual application and use of water, the right of the appropriator is not impaired by the fact that there has been no compliance with the provisions of the Civil Code for the acquisition of water-rights.[22] And in a more recent case [23] Mr. Justice Shaw said: "In order to make a valid appropriation, it was not necessary for Duncan to post and record a notice of appropriation as provided in the Civil Code.[24] The method of acquiring a right to the use of water as there prescribed is not exclusive. One may, by a prior, actual, and completed appropriation and use, without proceeding under the code, acquire a right to the water beneficially used, which will be superior and paramount to the

[20] Mitchell v. Canal Co., 75 Cal. 464, 17 Pac. 246; Wells v. Mantes, 99 Cal. 583, 34 Pac. 324; De Necochea v. Curtis, 80 Cal. 397, 20 Pac. 563, 22 Pac. 198; Burrows v. Burrows, 82 Cal. 564, 23 Pac. 146; Watterson v. Saldunbehere, 101 Cal. 107, 35 Pac. 432; Taylor v. Abbott, 103 Cal. 421, 37 Pac. 408; Senior v. Anderson, 115 Cal. 496, 47 Pac. 454; Duckworth v. Watsonville Co., 158 Cal. 206, 110 Pac. 927.

[21] The headnote to Wells v. Mantes, *supra*, sums up the decision as follows: "The scope and purpose of the provisions of the Civil Code upon water-rights were merely to establish a procedure for the claimants of the right to the use of the water whereby a certain definite time might be established as the date at which their title should accrue by relation; and a failure to comply with the rules there laid down does not deprive an appropriator by actual diversion of the right to the use of the water as against a subsequent claimant who complies therewith." The decision was that section 1419 of the Civil Code providing for forfeiture for non-compliance with the code formalities does not apply to such a case, the court saying: "To defeat the respondent's rights, appellants invoke section 1419 of the Civil Code, which reads: 'A failure to comply with such rules deprives the claimants of the right to the use of the water as against a subsequent claimant who complies therewith.' We think this provision does not refer to an appropriator by actual diversion, but only to claimants seeking the right to the use of water under the provisions of this chapter of the code. This is made apparent by an examination of the preceding sections. Section 1415 provides: 'A person desiring to appropriate water must post a notice, in writing, in a conspicuous place at the point of intended diversion, stating therein that he claims the water there flowing to the extent,' etc. Section 1416 reads: 'Within sixty days after the notice is posted the claimant must commence the excavation or construction of the work, etc.' Section 1418 reads: 'By a compliance with the above rules the claimant's right to the use of the water relates back to the time the notice was posted.' It thus becomes apparent from these provisions that the word 'claimants' as used in section 1419 refers to a party posting and recording the notices required by the provisions of section 1415, and does not apply to an appropriator by actual diversion."

[22] Watterson v. Saldunbehere, 101 Cal. 107, 35 Pac. 432.

[23] Lower Tule etc. Co. v. Ahgiola etc. Co., 149 Cal. 496, 86 Pac. 1081. In this case the appropriation was made by cutting a hole in a river levee and letting the water run by the side of the levee down to his land.

[24] Secs. 1415–1421.

title of one making a subsequent appropriation from the same stream in the manner provided by that statute."[25]

One who had long been using the water on public land as appropriator was protected in De Necochea v. Curtis[1] against a later homesteader claiming as a riparian owner, though the appropriator had not complied with the formalities required by the code.[2] In Wells v. Mantes[3] he was likewise protected against a later appropriator who did comply with the code. In Utt v. Frey[4] the appropriator died, and his son in law entered and took possession without any formal transfer. The latter's right was upheld as a new appropriation by actual diversion and use. In Griseza v. Terwilliger[5] it was held that a transferee under a parol sale of the water-right takes no title by virtue of the sale, because of the statute of frauds, but if he actually takes possession and uses the water, he has a good title as a new appropriator by actual diversion, though the code formalities were not performed. In Idaho it has been held that one having actually used the water is an appropriator by actual diversion, and the fact that he thereafter posted a notice does not impair his right to claim as such instead of under the notice.[6]

In other States, while following the original method of appropriation, the same result was reached. The Montana court said (after quoting from De Necochea v. Curtis and Wells v. Mantes, *supra*): "We think the construction of the statute by the supreme court of California is logical and correct, and are of the opinion that the Montana act should be construed in the same manner."[7] Likewise in Alaska, Colorado, Idaho, Nevada, Utah, Washington and Wyoming.[8]

[25] Citing (in addition to the cases cited in note above) McGuire v. Brown, 106 Cal. 672, 39 Pac. 1060, 30 L. R. A. 384; Cardoza v. Calkins, 117 Cal. 112, 48 Pac. 1010, 18 Morr. Min. Rep. 689; McDonald v. Bear R. etc. Co., 13 Cal. 238, 1 Morr. Min. Rep. 626; Kimball v. Gearhart, 12 Cal. 29, 1 Morr. Min. Rep. 615; Kelly v. Natoma W. Co., 6 Cal. 105, 1 Morr. Min. Rep. 592; Hill v. King, 8 Cal. 336, 4 Morr. Min. Rep. 533; Hoffman v. Stone, 7 Cal. 46, 4 Morr. Min. Rep. 520.

[1] 80 Cal. 397, 20 Pac. 563, 22 Pac. 198.

[2] Affirmed in Burrows v. Burrows, 82 Cal. 564, 23 Pac. 146.

[3] 99 Cal. 583, 34 Pac. 324.

[4] 106 Cal. 392, 39 Pac. 807.

[5] 144 Cal. 456, 77 Pac. 1034; *infra*, sec. 555.

[6] Brown v. Newell, 12 Idaho, 166, 85 Pac. 385.

[7] Murray v. Tingley, 20 Mont. 260, 50 Pac. 724, 19 Morr. Min. Rep. 137. See, also, Salazar v. Smart, 12 Mont. 395, 30 Pac. 676; Morris v. Bean (Mont.), 146 Fed. 425.

[8] *Alaska.*—"Inasmuch as the statutes of Alaska make no provision respecting the necessity of either the posting or recording of notices of appropriation of waters upon the public land, we think no such notice essential to the validity," etc.; Van Dyke

(3d ed.)

§ 366. Settlement on Stream Banks not Alone Enough—No Preference to Riparian Owners.—While the statutory formalities are thus dispensed with in favor of an appropriator by actual diversion, that is as far as the law goes in dispensing with formalities. The law of appropriation recognizes no right flowing from merely settling on the banks of a stream. A settlement on the banks does not constitute an appropriation where nothing more is done. A riparian owner may have riparian rights in California, but must proceed like anyone else if he wishes a water-right in jurisdictions following the Colorado doctrine where riparian rights are not recognized.[9] Aside from the question of riparian rights, elsewhere considered, the settlement does not *per se* give any right to the water.[10] In one case,[11] the land

v. Midnight Sun Co. (Alaska C. C. A.), 177 Fed. 90.

California.—Cases cited *supra.*

Colorado.—Sieber v. Frink, 7 Colo. 148, 2 Pac. 901; Water Supply Co. v. Larimer Co., 24 Colo. 322, 51 Pac. 496, 46 L. R. A. 322; Denver Co. v. Dotson, 20 Colo. 304, 38 Pac. 322; Hoge v. Eaton, 135 Fed. 411.

Idaho.—Sand Point etc. Co. v. Panhandle etc. Co., 11 Idaho, 405, 83 Pac. 347; Brown v. Newell, 12 Idaho, 166, 85 Pac. 387; Pyke v. Burnside, 8 Idaho, 487, 69 Pac. 477.

Montana.—Murray v. Tingley, 20 Mont. 260, 50 Pac. 723, 19 Morr. Min. Rep. 137; Morris v. Bean, 146 Fed. 425, affirmed in 159 Fed. 651.

Nevada.—Ophir etc. Co. v. Carpenter, 4 Nev. 534, 97 Am. Dec. 550, 4 Morr. Min. Rep. 640. See, also, S. C., 6 Nev. 393.

Utah.—"Any person, however, who actually used the water for a useful or beneficial purpose, acquired the right to take the water so used as against all subsequent claimants, regardless of whether the user had posted notices or not." Patterson v. Ryan (Utah), 108 Pac. 1118, speaking of the method before the present statutes requiring application to the State Engineer. See, also, Sowards v. Meagher (Utah, 1910), 108 Pac. 1113, citing Murray v. Tingley, *supra.*

Washington.—Kendall v. Joyce, 48 Wash. 489, 93 Pac. 1091.

Wyoming.—Morris v. Bean (Mont., but construing Wyoming law), 146 Fed. 425, affirmed in 159 Fed. 651.

Miscellaneous.—See, also, 60 Am. St. Rep. 800, note.

[9] "In order to acquire a prior or superior right to the use of such water, it is as essential that a riparian owner locate or appropriate the waters and divert the same as it is for any other user of water to do so." Hutchinson v. Watson D. Co. (1909), 16 Idaho, 484, 133 Am. St. Rep. 125, 101 Pac. 1059.

"Some contention is made that said act of the legislature does not apply to persons who own the land on both sides of the stream, and therefore own the bed of the stream, and for that reason a riparian owner is not required to pay the fees provided in said act. There is nothing in that contention." Idaho etc. Co. v. Stephenson (1909), 16 Idaho, 418, 101 Pac. 821.

[10] Walsh v. Wallace, 26 Nev. 299, 99 Am. St. Rep. 692, 67 Pac. 914; Leggat v. Carroll, 30 Mont. 384, 76 Pac. 805; Robinson v. Imperial etc. Co., 5 Nev. 44, 10 Morr. Min. Rep. 370; Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210, saying: "Under the decisions of this court that fact alone confers upon them no title to a right to the use of the waters of the stream." Van Dyke v. Midnight Sun Co. (Alaska), 177 Fed. 90, 100 C. C. A. 503; McFarland v. Alaska etc. Co., 3 Alaska, 308; Snyder v. Colorado etc. Co. (Colo. C. C. A.), 181 Fed. 62.

[11] Walsh v. Wallace, cited *supra.*

was settled upon for agricultural purposes, but the water was not diverted, and as riparian rights are not recognized in Nevada, the settler was held to have no right to the water. In another [12] the land was taken up for a millsite and the court said: "The digging of a ditch on public land is not an appropriation of the land for a millsite, nor is the mere appropriation of a millsite an appropriation of water for purposes of milling." "It would be as absurd to say that the digging of a ditch is an appropriation of land sufficient for a millsite, as to say that to appropriate a millsite would be an appropriation of water for milling purposes." Location of a placer mining claim in the bed of a stream is not an appropriation of the water in the stream.[13] Nor is a *patented* placer mine.[14]

In Schwab v. Beam,[15] Judge Hallett did hold that the location of a placer claim gave a right to the water thereon. The court used the following words: "Nothing in the constitution of this State or in the law relating to irrigation in any way modifies or changes the rules of the common law in respect to the diversion of streams for manufacturing, mining or mechanical purposes. In Colorado, as elsewhere in the United States, the law is now as it has been at all times, that for such purposes each riparian owner may use the waters of running streams on his own premises, allowing such waters to go down to subsequent owners in their natural channel." This seems to show that the decision rested not on the principles of appropriation, but on those of riparian rights. The placer claimant under the California doctrine has a right to the water in that way,[16] but not by appropriation. Schwab v. Beam would seem to be an attempt to apply the California doctrine in Colorado, a position which

[12] Robinson v. Imperial etc. Co., *supra*. One of these passages is quoted from the headnote and the other is from the opinion.

[13] Van Dyke v. Midnight Sun Co. (Alaska), 177 Fed. 90; 100 C. C. A. 503; McFarland v. Alaska etc. Co., 3 Alaska, 308; Snyder v. Colorado etc. Co. (Colo. C. C. A.), 181 Fed. 62; Leggatt v. Carroll, 30 Mont. 384, 76 Pac. 805.

But see Schwab v. Beam (C. C. Colo.), 86 Fed. 41, 10 Morr. Min. Rep. 279; Madigan v. Kougarok M. Co., 3 Alaska, 63; Cascade Co. v. Empire Co. (Colo.), 181 Fed. 1011.

[14] Snyder v. Colorado etc. Co., *supra*.

[15] (C. C. Colo.), 86 Fed. 41, 19 Morr. Min. Rep. 279. Cited with approval in Madigan v. Kougarok Co., 3 Alaska, 63; Cascade Co. v. Empire Co. (Colo.), 181 Fed. 1011; with disapproval in Snyder v. Colorado etc. Co. (Colo. C. C. A.), 181 Fed. 62.

[16] Crandall v. Woods, 8 Cal. 136, 1 Morr. Min. Rep. 604; Leigh v. Independent Ditch Co., 8 Cal. 323, 12 Morr. Min. Rep. 97.

the State court repudiates.[17] The case has been criticised;[18] is contrary to the weight of more recent authority just cited, and is probably overruled.[19]

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§ 367. **Same.**—There are hardships in the strict enforcement in this rule, and they will increase as settlement increases. Riparian lands have certain benefits from the natural flow itself even when not diverting the water, and also, because of their favorable situation, afford opportunities for uses requiring no diversion, such as domestic use, fishing, etc. How, in States rejecting riparian rights, shall these natural benefits be preserved against others appropriating the water for sale for their own profit, or some appropriators who are largely but wasting the water? If they are not preserved, then ownership of riparian land would be an absolute disadvantage; so favorably situated that domestic use or natural irrigation requires no diversion, its use could be destroyed, while distant unfavorably situated land requiring diversion, would be protected in use.

To meet the situation, statements are appearing in the reports to the effect that proof of benefit to the land by natural subirrigation will constitute such natural subirrigation an appropriation by actual use, though without diversion. Thus in an Idaho case[20] it is said: "So far as the record shows, appellants' land may produce crops by subirrigation, hence, never necessary to make an appropriation of any of the waters of the streams"; and in the same court it was held[21] that while the fact that a stream in its original native condition was dammed so as to cause the waters to percolate through and subirrigate adjacent meadow lands will not of itself justify the owner of such lands in maintaining the stream dammed in such condition to the injury of other appropriators, yet it may, on the other hand, be sufficient to initiate a right for a quantity of the waters of such

17 *Supra*, sec. 118.

18 Morrison's Mining Rights, eleventh edition, page 180, saying: "This is an extreme holding on what seems to us a very doubtful position." In the twelfth edition: "This is an extreme holding, and seems to us an indefensible position." And recently doubted whether tenable as a proposition under the law of appropriation aside from riparian rights. Mill's Irrigation Manual, p. 39.

19 See Snyder v. Colorado etc. Co., *supra*. But see Cascade Co. v. Empire Co., 181 Fed. 1011.

20 Hill v. Standard Min. Co., 12 Idaho, 223, 85 Pac. 907.

21 Van Camp v. Emery, 13 Idaho, 202, 89 Pac. 752.

stream adequate for the surface irrigation of the lands previously so subirrigated therefrom. So in Colorado there is a statute that natural overflow or natural subirrigation benefiting land may be converted into a ditch diversion with priority as of the time of the first cultivation of the land.[22]

Such a rule, if generally adopted, would be a long step toward a return to the rule of riparian rights. The natural advantage of the riparian land of being washed by the stream in this respect (as well as others) is the foundation of the common-law riparian right. In fact, in Idaho a solution has more recently been sought by a partial return to the common law of riparian rights itself.[23] Under this decision it seems to be the Idaho rule that a riparian settler actually using the water may, if not making his use by means of a diversion, be deprived of all of it by a *bona fide* diversion by someone else, but may question the *bona fides* of such other person.[24] Somewhat similarly in

[22] Colo. Rev. Stats. 1908, sec. 3176; Gen. Stats., sec. 1723; Laws 1879, p. 176, sec. 37. Compare Washington, Pierce's Code (1905), sec. 5830.

Under this Colorado statute, called the "Meadow Act," the riparian subirrigative appropriation must be claimed upon the rendition of any decree settling rights upon the stream, or is barred by the decree like other rights, even if the loss of subirrigation is not at that time such as to indicate the necessity for a change from the natural to a ditch irrigation and such necessity does not arise until several years later. If, however, the riparian owner constructs a ditch while the adjudication proceedings are pending and applies to the court for recognition thereof in the pending proceedings, his ditch will be allowed a right dating back, by relation, "to the time when they first enjoyed the benefits of the natural overflow of the stream." Broad Run etc. Co. v. Deuel etc. Co., 47 Colo. 573, 108 Pac. 755. See, also, Humphreys T. Co. v. Frank, 46 Colo. 524, 105 Pac. 1093.

Compare Hilger v. Sieben, 38 Mont. 93, 98 Pac. 881.

[23] *Supra*, sec. 185. Under this recent ruling, when no use is made by the appropriator (or when the appropriator using the water has not complied with the statutes for making an appropriation) the riparian owner has a kind of residuum of right which then will (as riparian right) entitle him to an injunction to protect his domestic use and his natural subirrigation, irrespective of appropriation. Hutchinson v. Watson D. Co. (1909), 16 Idaho, 484, 133 Am. St. Rep. 125, 101 Pac. 1059. The court held that a showing by a riparian proprietor that he has been for more than seventeen years using the water of a stream for domestic, culinary and household purposes and for the use of his livestock, and that the water of the stream has continuously flowed through his land "moistening the same," does not amount to an appropriation of any of the water of the stream; but that, at the same time, the rights of this riparian proprietor to use the water for domestic and culinary purposes and watering stock, and to have the water flow by or through his premises, as at common law, are superior and paramount to the rights of a stranger or intermeddler who does not assert or establish any right to the use of water by beneficial appropriation.

[24] What, if any, is the bearing upon this point of the preference to domestic use in the Idaho Constitution?

See *supra*, sec. 308.

Oregon, under the recent abrogation there of riparian rights, the law still gives a limited right as riparian owner, extending to the preservation of a flow (though unused) for possible domestic use.[25]

A late case furnishes an excellent illustration of the difficulty of the situation, and how the law of appropriation is being strained to meet it. A waterfall in a canyon in Colorado made a natural garden. The spray and seepage watered ferns and foliage which added to the beauty of the falls. Drawn by these natural attractions, plaintiff acquired the surrounding land, built a hotel and established a health and pleasure resort, which acquired patronage and name. Defendant, a light and power company, started to divert the stream above the falls to generate electric power without returning the water. Although the owner of the resort had made no diversion, nor done any work beyond building houses and improving the banks of the stream, yet he was held to have actually appropriated the water, and the power diversion was enjoined.[1] Although the court, in words, strenuously denies the existence of the riparian doctrine in Colorado, yet a clearer application of it in fact is difficult to imagine.

B. TO SECURE THE BENEFIT OF RELATION.

(3d ed.)

§ 368. Object of Statutory Provisions.—The early customs out of which the law of appropriation grew were based (as has been already discussed) on the principle that rights on the public domain were open to all, the first possessor being protected; and that all, also, should have an equal chance. As is said in Nevada etc. Co. v. Kidd,[2] they did not countenance anyone acting "the dog in the manger." Many attempted to secure monopoly of

25 *Supra*, sec. 129, holding that settlement upon land bordering upon or through which a stream may flow, or to which a natural source of water supply may be adjacent, or upon which it may be situated, in itself, gives a riparian right for a flow of sufficient water for domestic uses and requirements incident thereto which, even though not now in actual use, may continue to be demanded (though riparian rights are held abrogated for other purposes as to all land patented since 1877, and to constitute an appropriation for mining, irrigation, or power purposes, some steps toward a diversion thereof, or other good and sufficient notice, is necessary). Hough v. Porter, 51 Or. 318, 95 Pac. 782, 98 Pac. 1083, 102 Pac. 728.

1 Cascade Co. v. Empire Co. (Colo.), 181 Fed. 1011, citing Schwab v. Beam, *supra*. Contrast Schodde v. Twin Falls Co. (Idaho), 161 Fed. 43, 88 C. C. A. 207.

2 37 Cal. 282, and in Union Mining Co. v. Dangberg, 81 Fed. 73.

waters by merely posting notices or making a pretense at building canals, ditches, etc., and tried by this means to hold a right to the water against later comers who *bona fide* sought to construct the necessary works for its use.[3] From those conditions grew up a method of making an appropriation to apply specially to rival claimants while the construction work, often prolonged, was going on. If the first comer *bona fide* and diligently prosecuted his work, his right on its completion related back to the very beginning of it;[4] otherwise the others were preferred. This method of making the appropriation was, under the early decisions, substantially the same as that now provided for this purpose, in the Civil Code of California.[5] The provisions of the Civil Code of California are merely to fix the procedure whereby a certain definite time might be established as the date at which title should accrue by relation.[6]

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§ 369. Provisions Chiefly Declaratory Only.—In codifying the rules governing this method in California (and the early statutes of other States based thereon), the rules laid down in the decisions of the court were not materially changed; for the whole code upon this subject is substantially only declaratory of the pre-existing law.[7]

The innovations consist in the following: A notice expressing certain details in writing is required.[8] Before the code, notice was a requisite, but it did not have to be a written notice,[9] nor, conse-

[3] "These water-right cases are peculiar in their nature, in that the parties are obliged to depend to so great an extent upon the memories of those who came to a new country in the early days. . . . . This record seems to disclose the fact that there existed in the minds of those who first went upon Flatwillow Creek for the purpose of locating, a sort of general plan to take up large areas of the public lands, together with the water necessary to irrigate the ground, so that they might afterward dispose of the same to the larger landowners. Almost every person whose name is mentioned in the testimony located a claim and took out a ditch." Wright v. Cruse, 37 Mont. 177, 95 Pac. 370.

[4] Conger v. Weaver, 6 Cal. 548, 65 Am. Dec. 528, 1 Morr. Min. Rep. 594; Nevada etc. Co. v. Kidd, 37 Cal. 282.

[5] Secs. 1410–1422.

[6] De Necochea v. Curtis, 80 Cal. 397, 20 Pac. 563, 22 Pac. 198; Wells v. Mantes, 99 Cal. 583, 34 Pac. 324; Duckworth v. Watsonville Co., 158 Cal. 206, 110 Pac. 927.

[7] De Necochea v. Curtis, 80 Cal. 397, 20 Pac. 563, 22 Pac. 198; Wells v. Mantes, 99 Cal. 583, 34 Pac. 324; Pomeroy on Riparian Rights, sec. 96; Blanchard and Weeks on Mining Claims and Water Rights, p. 696; Kinney on Irrigation, sec. 351.

[8] Cal. Civ. Code, 1415.

[9] De Necochea v. Curtis, 80 Cal. 397, at 406, 20 Pac. 563, 22 Pac. 198; Norman v. Corbley, 32 Mont. 195, 79 Pac. 1059.

quently, did it have to express the present required details. Acts such as would put a man on inquiry—some unequivocal outward acts, such as making a preliminary survey—were notice enough.[10] It became customary, however, to post a written notice, even before the code.[11] The other point was where the code specifies that work must be begun within sixty days after posting a notice,[12] whereas before the code it was a question to be decided by the jury whether the delay was unreasonable, and no number of days was fixed.[13] The time for commencing in the absence of statute is any reasonable time.[14]

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§ 370. **Essential Requisites.**—There are four requisites in all that must be complied with, to secure the benefit of the doctrine of relation under the California method and the statutes of other States based thereon, viz.: First, a notice must be posted at the start; second, there must be an intention to apply the water to a beneficial purpose; third, the work must be prosecuted with diligence; fourth, it must be actually completed. We proceed to consider each of these separately.[15]

10 Parke v. Kilham, 8 Cal. 77, 68 Am. Dec. 310, 4 Morr. Min. Rep. 522; Kimball v. Gearhart, 12 Cal. 27, 1 Morr. Min. Rep. 615.

11 See Weaver v. Eureka etc. Co., 15 Cal. 271, 1 Morr. Min. Rep. 642; and statement of reporter, in Titcomb v. Kirk, 51 Cal. 288, 5 Morr. Min. Rep. 10.

12 Cal. Civ. Code, 1419.

13 *Infra*, sec. 382 et seq.

14 Cruse v. McCauley (Mont.), 96 Fed. 369.

15 In Oregon the requisites are summed up: "The rule is settled in this state that to constitute a valid appropriation of water there must be (1) an intent to apply it to some beneficial use, existing at the time or contemplated in the future; (2) a diversion thereof from a natural stream; and (3) an application of it within a reasonable time to some useful industry." Beers v. Sharpe, 44 Or. 386, 75 Pac. 717, citing Simmons v. Winters, 21 Or. 35, 28 Am. St. Rep. 727, 27 Pac. 7; Hindman v. Rizor, 21 Or. 112, 27 Pac. 13; Low v. Rizor, 25 Or. 551, 37 Pac. 82; Nevada etc. Co. v. Bennett, 30 Or. 59, 60 Am. St. Rep. 777, 45 Pac. 472. Another summing up of the rules is as follows: "It seems the settled law in the States where irrigation problems have been dealt with that, in order to acquire a vested right in the use of water for such purposes from the public streams, three things must concur: There must be the construction of ditches or channels for carrying the water; the water must be diverted into the artificial channels, and carried through them to the place to be used; and it must be actually applied to beneficial uses, and he has the best right who is first in time." Gates v. Settlers Co., 19 Okl. 83, 91 Pac. 856.

As to actual application to use as an element, see *infra*, sec. 495.

C. NOTICE.

(3d ed.)

§ 371. Form of Notice.—In the California Civil Code,[16] it is provided that a notice must be posted at the point of intended diversion, stating the amount and purpose and place and means of use, and be recorded within ten days. Section 1415 is as follows:

"NOTICE OF APPROPRIATION.—A person desiring to appropriate water must post a notice, in writing, in a conspicuous place at the point of intended diversion, stating therein:

"1. That he claims the water there flowing to the extent of (giving the number) inches measured under a four-inch pressure;

"2. The purposes for which he claims it, and the place of intended use;

"3. The means by which he intends to divert it, and the size of the flume, ditch, pipe, or aqueduct in which he intends to divert it. A copy of the notice must, within ten days after it is posted, be recorded in the office of the recorder of the county in which it is posted.

"After filing such copy for record, the place of intended diversion or the place of intended use or the means by which it is intended to divert the water, may be changed by the person posting said notice or his assigns if others are not injured by such change. This provision applies to notices already filed as well as to notices hereafter filed.".[17]

[16] Sections 1415, 1421.

[17] En. March 21, 1872; Amd. 1903, 361. A form of notice under this section that has been upheld by decision is given in the part of this book containing forms. *Infra*, sec. 1460.

In Montana (Statutes of 1907, chapter 185, page 489) the statute provides: Sec. 4. "Any person desiring to appropriate water in any stream, creek, canyon, river or ravine, wherein the rights of water therein have been adjudicated and decreed, shall post a notice in writing in a conspicuous place at the point of the intended diversion, stating therein: 1. The flow claimed, expressed in cubic feet per second; 2. The purpose for which said water is claimed, and the place of intended use; 3. The name of the stream, creek, spring, canyon, river or ravine; 4. The name of the appropriator or appropriators; 5. The date of posting said notice."

In Washington the statute is almost identical with the California section (See *infra*, sec. 741), and also provides: "A copy of the notice must, within ten (10) days after it is posted, be filed for record in the office of the county auditor of the county in which it is posted." Pierce's Code, sec. 5132.

In Alaska, an act of Congress (Alaska Act June 6, 1900, 31 Stats. at Large, 321, sec. 15) provides for the record of "waters and declara-

located its site for a dam and canal and claimed the waters of the South Yuba River and commenced the construction of the dam and canal, but in consequence of the magnitude of the work, was unable for several years to divert or use the water, and in the meantime the defendants, being men of greater pecuniary ability, should consequently locate another claim above or near the plaintiff's and a canal running parallel with the plaintiff's and be in a condition to divert and use the water in half the time; their acts, provided there was no interference with plaintiff's site and location, or obstruction to the prosecution of its work, would be no injury to plaintiff or cause of action in its favor. The plaintiff in such case has, as yet, no right to the water so far perfected that a diversion or use by other parties is any interference or injury. But if the plaintiff's work should be prosecuted with diligence and completed, so as to entitle it to divert and use the waters, its right to the waters thenceforth would date by relation from the commencement of the work, and, should defendants *thereafter* continue to divert the waters and deprive the plaintiff of their use, an injury to their water-rights then vested and perfected would result, and a right of action for the injury to such right accrue." The case so held and has been quoted and affirmed on this point.[13] In the latter case just cited this principle was affirmed by the Federal court, the court saying: "It is obvious that a person who intends to become an appropriator under these sections cannot acquire the exclusive right to the use of the water he intends appropriating, nor maintain any suit, either at law or in equity for its diversion, until all the steps requisite to an appropriation have been made." In Montana,[14] affirming the same point, the court says that the appropriator need take no notice of intervening claimants who make temporary appropriations in the meantime.

During the prosecution of the construction work the right does exist to use so much of the water as is necessary in the construction work, to keep the ditch or flume, etc., in repair,[15]

[13] Salt Lake City v. Salt Lake etc. Co., 24 Utah, 249, 67 Pac. 672, 61 L. R. A. 648; Rincon etc. Co. v. Anaheim etc. Co. (C. C. S. Dist. Cal.), 115 Fed. 543.

[14] Woolman v. Garringer, 1 Mont. 535, 1 Morr. Min. Rep. 675. See, also, Miles v. Butte etc. Co., 32 Mont. 56, 79 Pac. 549.

[15] Weaver v. Conger, 10 Cal. 233, 6 Morr. Min. Rep. 203.

but that is all. For all purposes except to make the temporary use of the water by others actionable, however, the right to the use of water on completion relates back to the posting of the notice, if the work has been prosecuted diligently, and dates from the posting of the notice as against those who come later.[16]

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§ 375. **Failure to Post Notice.**—The failure to post a notice, or the posting of a faulty notice,[17] constitutes a waiver of all advantages that such a warning gives. As seen above, it is not fatal if the work is nevertheless completed before others intervene, and the appropriator may claim as an appropriator by actual diversion.[18] As against interveners, however, the failure is fatal.[19] Beginning a ditch without posting notice gives no right against another who does post notice before the completion of the former ditch, and works diligently to his own completion.[20] As between rival claimants, neither of whom has posted a notice, probably the result will be the same, giving the better right to the first who actually diverts and uses the water.[21] It may be, however, that they will be on the same footing as rivals before the code (when written notice was not needed),[22] on the ground that the code provisions were enacted for their benefit, and they, refusing to take advantage of them, waived them. In this view, the better right would, by relation, be in him who began first in a way that gave notice from his acts, provided he prosecuted the work with diligence.[23] The view of the code taken in De Necochea v. Curtis and Wells v. Mantes,[24] however, would lead one to think that no claim to the benefit of the doctrine of relation can be made whatsoever, unless the code provisions are strictly complied with.[25]

[16] Cal. Civ. Code, 1414, 1418; Maeris v. Bricknell, 7 Cal. 261, 68 Am. Dec. 257, 1 Morr. Min. Rep. 601; Nevada etc. Co. v. Kidd, 37 Cal. 282; Wells v. Mantes, 99 Cal. 583, 34 Pac. 324.

[17] Taylor v. Abbott, 103 Cal. 421, 37 Pac. 408.

[18] Wells v. Mantes, 99 Cal. 583, 34 Pac. 324.

[19] *Ibid.*, and De Wolfskill v. Smith, 5 Cal. App. 175, 89 Pac. 1001.

[20] *Ibid.*

[21] Compare Cordoza v. Calkins, 117 Cal. 106, 48 Pac. 1010, 18 Morr. Min. Rep. 689; Wishon v. Globe etc. Co., 158 Cal. 137, 110 Pac. 290.

[22] *Supra*, sec. 369.

[23] See 60 Am. St. Rep. 801, note; as, for example, in Maeris v. Bricknell, 7 Cal. 261, 68 Am. Dec. 257, 1 Morr. Min. Rep. 607, and Kimball v. Gerhardt, 12 Cal. 27, 1 Morr. Min. Rep. 615.

[24] *Supra.*

[25] Such was the result in the case of Murray v. Tingley, 20 Mont. 260, 50 Pac. 724, 19 Morr. Min. Rep. 137.

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§ 376. **Notice Alone not Enough.**—It need hardly be said that merely posting a notice is not enough unless the other requisites of a *bona fide* intent, diligence and completion, are also complied with. It is well settled that the posting of a notice gives no rights if the other requisites are not complied with.[1]

D. BENEFICIAL PURPOSE.

(3d ed.)

§ 377. **Necessity for Bona Fide Intention.**—There must be an intention to use the water for a beneficial purpose. This was a requisite from the earliest days, for all appropriations, however

[1] "The right to the water does not exist when the notice is given and it may never vest. The most that is *in esse* is a right to acquire, by reasonable diligence, a future right to the water." Mitchell v. Canal Co., 75 Cal. 482, 483, 17 Pac. 246.

"The amount claimed in the notice is no measure of the right." Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. 338.

"Appropriation is a much-abused word. It is often loosely spoken of as the preliminary step—such as filing a notice, making a claim to the water, or the like—but in its legal significance it embodies not only the claim to the water, but the consummation of that claim by actual use." Morris v. Bean (Mont.), 146 Fed. 425.

"The notice of Laird's claim was of no validity. . . . . A declaration of a claim to water, unaccompanied by acts of possession, is wholly inoperative as against those who shall legally proceed to acquire a right to the same." Columbia Min. v. Holter, 1 Mont. 296, 2 Morr. Min. Rep. 14.

"My intention was that, knowing that a good location was wanted for a smelter-site, to hold it for that purpose." Having from 1889 to 1902 taken no steps beyond posting a notice, a nonsuit was granted against him in a suit by him against one who in the meantime had diverted and used the water. Miles v. Butte etc. Co., 32 Mont. 56, 79 Pac. 549.

"The filing of the notice of appropriation did not alone establish the appropriation nor determine either the time or amount thereof; but the necessity, the actual diversion, and the use were all essential in acquiring title to the water by prior appropriation. If these existed, title to it was acquired without notice; and, if not, the notice could not give title. Notice shows *prima facie* an intention from the date of its posting to appropriate, and, if followed by diligence in the construction of the ditch and diversion of the water, the right will date from the time of giving the notice." Ison v. Sturgill (Or. 1910), 109 Pac. 579.

That notice alone is not enough is held in the cases *passim*, throughout the subject. The following additional specific examples are cited: Thompson v. Lee, 8 Cal. 275, 1 Morr. Min. Rep. 610; Weaver v. Eureka Lake Co., 15 Cal. 271, 1 Morr. Min. Rep. 64; Nevada etc. Co. v. Kidd, 37 Cal. 282; Mitchell v. Amador etc. Co., 75 Cal. 464, 17 Pac. 246; Cordoza v. Calkins, 117 Cal. 106, 48 Pac. 1010, 18 Morr. Min. Rep. 689; De Wolfskill v. Smith, 5 Cal. App. 175, 89 Pac. 1001; Conley v. Dyer, 43 Colo. 22, 95 Pac. 304; Hilger v. Sieben, 38 Mont. 93, 98 Pac. 881; Smyth v. Neal, 31 Or. 105, 49 Pac. 850; Patterson v. Ryan (Utah), 108 Pac. 1118; Kendall v. Joyce, 48 Wash. 489, 93 Pac. 1091; Miocene D. Co. v. Campion D. M. Co., 3 Alaska, 572; Sullivan v. Jones (Ariz.), 108 Pac. 476, O'Reilley v. Noxon (Colo.), 113 Pac. 486.

made.[2] In one case it is said: "He did not appropriate in a legal sense any water except such as he used beneficially—turning more water from a stream than he used was waste, not appropriation."[3] In another case: "If the proposed appropriator is not able to complete and finally establish his appropriation by applying the water to, and using it for, the beneficial purpose for which it was proposed to be appropriated, either by himself or through the agency of some user, his appropriation fails."[4] In another: "The intention of the claimant is therefore a most important factor in determining the validity of an appropriation of water."[5] The intention must be *bona fide* and not for speculation, such as an intention to store water for monopoly,[6] or for irrigation of one's own land when one has no lands to be irrigated,[7] but, as appropriation may be made for use on other lands than one's own, it is not necessary to have any irrigable land when the intention is in good faith to supply water to others.[8]

(3d ed.)

§ 378. What Constitutes a Beneficial Purpose.—What constitutes a beneficial purpose will best be seen from examples.[9]

A passive acceptance of water as it flows into one's ditch when another appropriator does not wish to use it is not an appropriation if not taken into the ditch with any intent to a use at all.[10]

[2] See Pomeroy on Riparian Rights, sec. 47. Citing Dick v. Caldwell, 14 Nev. 167; Dick v. Bird, 14 Nev. 161; Crane v. Winsor, 2 Utah, 248, 11 Morr. Min. Rep. 69; Munroe v. Ivie, 2 Utah, 535, 8 Morr. Min. Rep. 127; Woolman v. Garringer, 1 Mont. 535, 11 Morr. Min. Rep. 675; Cal. Civ. Code, sec. 1411.

See, also, North Am. Co. v. Adams (Colo.), 104 Fed. 404, 45 C. C. A. 185, 21 Morr. Min. Rep. 65; Nevada D. Co. v. Bennett, 30 Or. 59, 60 Am. St. Rep. 777, 45 Pac. 472; Smith v. Duff, 39 Mont. 382, 133 Am. St. Rep. 587, 102 Pac. 984; Snyder v. Colorado etc. Co. (Colo. C. C. A.), 181 Fed. 62; Cascade Co. v. Empire Co. (Colo.), 181 Fed. 1011.

[3] Dick v. Caldwell, 14 Nev. 167.

[4] Sowards v. Meagher (Utah, 1910), 108 Pac. 1113.

[5] Power v. Switzer, 21 Mont. 523, 55 Pac. 32.

[6] Weaver v. Eureka Co., 15 Cal. 271, 1 Morr. Min. Rep. 642. But it has been held that an allegation in a complaint that defendant's claim was for speculative purposes is a conclusion of law, and insufficient pleading without a statement of the evidence to sustain it. Sternberger v. Seaton etc. Co. (1909), 45 Colo. 401, 102 Pac. 168, *sed qu.*

[7] Miles v. Butte etc. Co., 32 Mont. 56, 79 Pac. 549.

[8] Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728. Cf. *supra*, sec. 281 and *infra*, sec. 395.

[9] For an interesting discussion of the point, see Cascade Co. v. Empire Co. (Colo.), 181 Fed. 1011.

[10] Smith Co. v. Colorado etc. Co., 34 Colo. 485, 82 Pac. 940, 3 L. R. A., N. S., 1148.

A ditch for drainage does not appropriate the water in it, because of the absence of intent to use the water.[11] Where water draining from a tunnel finds its way to a stream, the tunnel owner cannot claim as an appropriator the right to reclaim the water from another part of the stream.[12] Where water drains from an abandoned well drilled for oil, the driller of the well is not an appropriator of the water, from lack of intent to use the water at the time the well was abandoned.[13] But the drainage may be only incidental to a beneficial use. or there may be a dual intent. "There was some testimony indicating a dual intent on the part of Duncan—that is, a purpose not only to get water to irrigate his land, as stated, but also to draw off the flood water from, and prevent it flowing to, some other land owned by him on which he then had growing a crop of grain. This purpose to drain one tract of land did not vitiate or destroy the right to take the water for irrigation of other tracts, nor impair the right, acquired by such appropriation and use, to take and use it for the latter purpose. The two purposes are not inconsistent."[14]

When making no application of water, *quaere* whether flowing it through a ditch to flush it and keep it open is beneficial use.[15]

Irrigation is a useful purpose, and water may, of course, be appropriated for irrigation.[16] What is contemplated by the term

[11] Eddy v. Simpson, 3 Cal. 249, 58 Am. Dec. 408, 15 Morr. Min. Rep. 175; Maeris v. Bicknell, 7 Cal. 261, 68 Am. Dec. 257, 1 Morr. Min. Rep. 601.

[12] Farmers' etc. Co. v. Rio Grande etc. Co., 37 Colo. 512, 86 Pac. 1042; *supra*, sec. 38 et seq., "Recapture."

[13] De Wolfskill v. Smith, 5 Cal. App. 175, 89 Pac. 1001.

[14] Lower Tule etc. Co. v. Angiola etc. Co., 149 Cal. 496, 86 Pac. 1081.

[15] Mann v. Parker, 48 Or. 321, 86 Pac. 598. Cf. Weaver v. Conger, 10 Cal. 233, 6 Morr. Min. Rep. 203.

Regarding appropriations in Wyoming for floating logs, see Wyo. Stats. 1903, c. 16, sec. 1.

[16] Basey v. Gallagher, 87 U. S. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683; Rupley v. Welch, 23 Cal. 453, 4 Morr. Min. Rep. 243 (approved in Natoma etc. v. Hancock, 101 Cal. 42, 31 Pac. 112, 35 Pac. 334); Cave v. Crafts, 53 Cal. 135; Anaheim etc. v. Semi-Tropic Co., 64 Cal. 185, 30 Pac. 623; Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Yunker v. Nichols, 1 Colo. 551, 8 Morr. Min. Rep. 64; Schilling v. Rominger, 4 Colo. 100; Sieber v. Frink, 7 Colo. 148, 2 Pac. 901; Larimer Co. Res. Co. v. People, 8 Colo. 614, 9 Pac. 794; Platte Water Co. v. Northern Colo. Irr. Co., 12 Colo. 525, 21 Pac. 711; Farmers' etc. Co. v. Southworth, 13 Colo. 111, 21 Pac. 1028, 4 L. R. A. 767; Geertson v. Barrack, 3 Idaho, 344, 29 Pac. 42; Kirk v. Bartholomew, 3 Idaho, 367, 29 Pac. 40; Pyke v. Burnside, 8 Idaho, 487, 69 Pac. 477; Thorp v. Freed, 1 Mont. 651; Murray v. Tingley, 20 Mont. 260, 50 Pac. 723; Sayre v. Johnson, 33 Mont. 15, 81 Pac. 389; Barnes v. Sabron, 10 Nev. 231, 4 Morr. Min. Rep. 673; Dick v. Bird, 14 Nev. 161; Dick v. Caldwell, 14 Nev. 167; Nevada etc. Co. v. Bennett, 30 Or. 59, 60 Am. St. Rep. 777, 45 Pac. 472; Brown v. Baker, 39 Or. 66, 65 Pac. 799, 66

"irrigation" appears from the following: Water increasing the growth of grass for pasturage is a beneficial purpose if turned on the land with that intent;[17] and the water thus used may be claimed in addition to that used for crops and grain;[18] but it is otherwise where the increase in growth of hay was merely incidental, and irrigation had not been intended,[19] or where there was but a purposeless flooding of land.[20] Cutting wild grass produced by the overflow of a river, that is, by the water of a river coming down and spreading over the land, is not an appropriation of that water within the meaning of that term.[21]

Culinary use and watering horse by a settler, being intended permanent, is a beneficial use, but use by driving sheep or cattle to a spring sporadically and intermittently is not an appropriation, being too uncertain, and not intended as an appropriation.[22] Appropriations may be made for domestic use.[23]

The following is an extreme case: "The ground assumed is that the diversion of water for the mere temporary purpose of stranding fish is not converting it to a useful or profitable purpose, and therefore the party thus diverting it acquires no rights. Had the water been diverted by the Indians for the mere purpose of catching fish upon one occasion, this position might have been right. But, as I understand the testimony, it was a permanent diversion of the water, so as to run it over flat meadows, thus enabling the Indians at any time to catch fish among the grass of the meadow-land, which they could not catch while the waters were confined in a narrow channel. I cannot see but that it is just as legitimate for an Indian to turn water over meadow-land to enable him to

Pac. 193; Lone Tree Co. v. Rapid City Co., 16 S. D. 451, 93 N. W. 650; Crane v. Winsor, 2 Utah, 248, 11 Morr. Min. Rep. 69; Munroe v. Ivie, 2 Utah, 535, 8 Morr. Min. Rep. 127; Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

[17] Sayre v. Johnson, 33 Mont. 15, 81 Pac. 389; Smyth v. Neal, 31 Or. 105, 109, 49 Pac. 850; Kleinschmidt v. Gneiser, 14 Mont. 484, 497, 43 Am. St. Rep. 652, 37 Pac. 5, 6; Rodgers v. Pitt, 129 Fed. 932. Or the growth of hay. Pyke v. Burnside, 8 Idaho, 487, 69 Pac. 477.

[18] Rodgers v. Pitt, 129 Fed. 932.

[19] Power v. Switzer, 21 Mont. 523, 55 Pac. 32.

[20] Millheiser v. Long, 10 N. M. 99, 61 Pac. 111.

[21] Walsh v. Wallace, 26 Nev. 299, 99 Am. St. Rep. 692, 67 Pac. 914.

[22] Patterson v. Ryan (Utah, 1910), 108 Pac. 1118.

[23] As defined in Idaho (McLean's Rev. Codes, sec. 3250): "The phrase 'domestic purposes' as contained in this title shall be construed to include water for the household, and a sufficient amount for the use of domestic animals kept with and for the use of the household." See *infra*, sec. 740, for definition of "domestic use."

Regarding stock-watering purposes, there is a Federal statute granting lands for reservoir purposes upon filing maps with the Secretary of the Interior. A. C. Jan. 13, 1897, 29 Stats. at Large, 484. See *infra*, sec. 433.

catch fish for his subsistence as for a white man to turn it over the same land to increase the growth of grass."[24] It has, however, more lately been held that water may not be appropriated to fill a series of small reservoirs or lakes in which to propagate fish.[25] Another extreme holding is that building a summer hotel is an appropriation of a near-by waterfall which lends beauty to the resort.[1]

Storage as an aid to irrigation or other use (as opposed to speculation) is a useful purpose, and water may be appropriated for storage.[2] Articles of incorporation to divert water do not include building of reservoirs to store it.[3]

Mining and power are useful purposes for which appropriation may be made.[4] Prospecting a placer claim, though it yields no profit, is a beneficial use.[5] Sale or public supply likewise.[6] The original case of Irwin v. Phillips[7] was such a case. Manufacture and generation of light, heat, power or electricity is beneficial use, for which an appropriation can be made.[8]

But mere speculation is not allowed; e. g., a reservoir built to hold water indefinitely, without any definite use in mind,[9] or for

[24] Lobdell v. Hall, 3 Nev. 507.

[25] Windsor Res. Co. v. Lake Supply Co., 44 Colo. 214, 98 Pac. 729.

[1] Cascade Co. v. Empire Co. (Colo.), 181 Fed. 1011.

[2] Water Supply Co. v. Larimer Irr. Co., 24 Colo. 322, 51 Pac. 496, 46 L. R. A. 322; Cache La Poudre Co. v. Windsor Co., 25 Colo. 53, 52 Pac. 1104; Windsor Res. Co. v. Lake Supply Co., 44 Colo. 214, 98 Pac. 729. See 17 L. R. A., N. S., 329, note.

[3] Seeley v. Hunting etc. Assn., 27 Utah, 179, 75 Pac. 367.

[4] Irwin v. Phillips, 5 Cal. 140, 63 Am. Dec. 113, 15 Morr. Min. Rep. 178; McDonald v. Bear River Co., 13 Cal. 220, 1 Morr. Min. Rep. 626, 15 Cal. 145, 1 Morr. Min. Rep. 639; Platte Water Co. v. Northern Colo. Irr. Co., 12 Colo. 525, 21 Pac. 711; Woolman v. Garringer, 1 Mont. 535, 1 Morr. Min. Rep. 675.

[5] Madigan v. Kougarok M. Co., 3 Alaska, 63.

[6] Wilterding v. Green, 4 Idaho, 773, 45 Pac. 134; Albuquerque etc. Co. v. Guitterez, 10 N. M. 177, 61 Pac. 357; Gutierres v. Albuquerque etc. Co., 188 U. S. 545, 23 Sup. Ct. Rep. 338, 47 L. Ed. 588; Salt Lake City v. Salt Lake etc. Co., 24 Utah, 249, 67 Pac. 672, 61 L. R. A. 648; Platte Water Co. v. Northern Colo. Irr. Co., 12 Colo. 525, 21 Pac. 711; Lone Tree D. Co. v. Rapid City etc. Co., 16 S. D. 451, 93 N. W. 650; Strickler v. Colorado Springs, 16 Colo. 61, 25 Am. St. Rep. 245, 26 Pac. 313; Yuba Co. v. Cloke, 79 Cal. 239, 21 Pac. 740; Senior v. Anderson, 130 Cal. 290, at 297, 62 Pac. 563; Souther v. San Diego etc., 112 Fed. 228; Cal. Const., art. 14, sec. 1. See note in 60 Am. St. Rep. 804, 816. Regarding public service, see *infra*, sec. 1245 et seq.

[7] 5 Cal. 140, 63 Am. Dec. 113, 15 Morr. Min. Rep. 178.

[8] Speer v. Stephenson (1909), 16 Idaho, 707, 102 Pac. 365; Sternberger v. Seaton etc. Co. (1909), 45 Colo. 401, 102 Pac. 168; Thompson v. Pennebaker (Wash.), 173 Fed. 849, 97 C. C. A. 591; Cascade Co. v. Empire Co. (Colo.), 181 Fed. 1011; Neb. Stats. 1893, c. 40, p. 378, Cobbey's Ann. Stats., sec. 6754. But see Shodde v. Twin Falls Co., *supra*, sec. 313.

[9] Weaver v. Eureka etc. Co., 15 Cal. 271, 1 Morr. Min. Rep. 642; Miocene D. Co. v. Campion M. Co., 3 Alaska, 572.

monopoly.[10] An appropriation can be made for a purpose contemplated in the future, such as the irrigation of land to be later acquired, if there will be no unreasonable delay, and speculation is not intended.[11]

Regarding appropriations for storage under Colorado statutes, the Colorado constitution allows an appropriation either by means of a ditch or canal for immediate irrigation, or by a reservoir for storage of whatever flow is diverted or stored for future beneficial use, but an appropriation for storage includes only one filling of the reservoir each season unless expressly intended and initiated for several fillings. In the absence of an express appropriation for more than one filling, only a priority for a single filling can be awarded to such appropriation; and a subsequent appropriator may build another reservoir to store the surplus over the one filling of the prior reservoir.[12]

That all pursuits are on an equal footing, whether miners, agriculturists, manufacturers, or other occupations, is a matter previously set forth. The law here again follows out the idea of "free development" upon which it is founded. The following passage from Basey v. Gallagher[13] is frequently quoted: "Water is diverted to propel machinery in flourmills, and sawmills, and to irrigate land for cultivation, as well as to enable miners to work their mining claims, and in all such cases the right of the first appropriator, exercised within reasonable limits, is respected and enforced." An appropriation may be made for any beneficial purpose.[14]

(3d ed.)

§ 379. **Motive.**—Malice and ill-will toward another do not enter into the question.[15] It is usually said that an act otherwise lawful does not become unlawful merely through a malicious motive to injure another. The question is more or less an open one, however, under the new decisions concerning underground water and in that connection will be discussed later.

[10] Revenue etc. Co. v. Balderston, 2 Alaska, 363.

[11] Sowards v. Meagher (Utah, 1910), 108 Pac. 1113. See *infra*, sec. 483, future needs.

[12] Windsor Res. Co. v. Lake Supply Co., 44 Colo. 214, 98 Pac. 729.

[13] 87 U. S. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683 (per Justice Stephen Field).

[14] Thompson v. Pennebaker (Wash.), 173 Fed. 849, 97 C. C. A. 591; Silver Peak Mines v. Valcalda, 79 Fed. 886.

[15] Correa v. Frietas, 42 Cal. 339, 2 Morr. Min. Rep. 336; Stone v. Bumpus, 46 Cal. 218, 4 Morr. Min. Rep. 278; Fisher v. Feige, 137 Cal. 39, 92 Am. St. Rep. 77, 69 Pac. 618, 59 L. R. A. 333.

(3d ed.)
§ 380. **Evidence of Intention.**—How is the intention shown? First, of course, from the notice; but it may be drawn also from the appropriator's acts, the manner in which they work, the general size of the ditch, etc.[16] They aid in interpreting the notice. "But as every appropriation must be for a beneficial or useful purpose, it becomes the duty of the courts to try the question of the claimant's intent by his acts, and the circumstances surrounding his possession of the water, its actual or contemplated use, and the purpose thereof."[17]

Where the appropriation is by actual diversion without notice, such evidence of surrounding circumstances is the sole evidence of the intent that is possible.[18]

(3d ed.)
§ 381. **Intention Alone not Enough.**—It need hardly be repeated that the intent alone by itself, is not enough; the other requisites we are considering must also be complied with.[19] A design two years before to appropriate a certain creek as a connecting link in a long canal was held[20] not to prevent another man from coming in the meantime and building a dam. In extensive operations of this kind, involving several streams, each, it appears, must be separately appropriated. The same has been held of the intention to build a reservoir in a river-bed.[21]

E. DILIGENCE.

(3d ed.)
§ 382. **Necessity for Diligence.**—There must be diligence in prosecuting the construction work. This was a requisite from the earliest days for all appropriators claiming the benefit of the doctrine of relation, and remains to the present day wherever the law of appropriation is in force.[22]

[16] White v. Todd's etc. Co., 8 Cal. 443, 68 Am. Dec. 338, 4 Morr. Min. Rep. 536.

[17] Toohey v. Campbell, 24 Mont. 13, 60 Pac. 396.

[18] "Such intention, unless established by notice, or in some other public manner, could in no way be known to or control others wishing to take water from the same stream, and such intention could only be inferred or deduced, first, from the capacity of the ditch at its head, and perhaps, second, the amount of irrigable land of the ditch proprietors upon which it could reasonably be supposed that they intended to apply it." Taughenbaugh v. Clark, 6 Colo. App. 235, 40 Pac. 153.

[19] Ortman v. Dixon, 13 Cal. 33.

[20] Kelly v. Natoma etc. Co., 6 Cal. 105, 1 Morr. Min. Rep. 592.

[21] New Loveland etc. Co. v. Consolidated etc. Co., 27 Colo. 526, 62 Pac. 366, 52 L. R. A. 266.

[22] Cal. Civ. Code, sec. 1416, and cases herein cited below. Also Highland D. Co. v. Mumford, 5 Colo. 325,

(3d ed.)

§ 383. What Constitutes Diligence.—The California code has specified that the work must commence within sixty days after posting of notice, and must continue thence diligently and uninterruptedly unless prevented by rain or snow.[23]

Upon the point of delay because of pecuniary inability the decisions seem to conflict. In California,[24] Nevada[25] and Ore-

2 Morr. Min. Rep. 3; Sieber v. Frink, 7 Colo. 148, 2 Pac. 901; Farmers' Highline C. & Res. Co. v. Southworth, 13 Colo. 111, 21 Pac. 1028, 4 L. R. A. 767; Colo. Land & W. Co. v. Rocky Ford C. R. L. L. & T. Co., 3 Colo. App. 545, 34 Pac. 580; Beaver Brook Res. & C. Co. v. St. Vrain Res. & Fish Co., 6 Colo. App. 130, 40 Pac. 1066; Taughenbaugh v. Clark, 6 Colo. App. 235, 40 Pac. 153; 3 M. A. S., 1905 ed., 2265f; Gates v. Settlers' Co., 19 Okl. 83, 91 Pac. 856; Rodgers v. Pitt, 129 Fed. 932; Kelly v. Hynes (Mont.), 108 Pac. 785; Avery v. Johnson (Wash.), 109 Pac. 1028.

See the California Statute of 1911, chapter 406, section 4, reading: "All water or the use of water which has been heretofore appropriated and which has not been put, or which has ceased to be put to some useful or beneficial purpose, or which is not now in process of being put to some useful or beneficial purpose with due diligence in proportion to the magnitude of the work necessary properly to utilize for the purpose of such appropriation such water or such use of water, is hereby declared to be unappropriated."

After reviewing certain authorities, an early case says: "The principles established in the cases cited are founded in reason. The doctrine is that no man shall act upon the principle of the dog in the manger, by claiming water by certain preliminary acts, and from that moment prevent others from enjoying that which he is himself unable or unwilling to enjoy, and thereby prevent the development of the resources of the country by others. Anybody else may divert and use all the water, be it more or less, that a prior claimant is not in a present condition to use, and by lack of diligence on his part in pursuing and perfecting a prior inchoate right, may acquire rights even superior to his." Nevada C. & S. C. Co. v. Kidd, 37 Cal. 282, at 314.

[23] Civ. Code, sec. 1416. As amended in 1911 (Stats., c. 730), it further provides that the sixty days, on mining debris projects, shall run only from completion of the dam required by the Debris Commission; and on municipal water projects, issuance of bonds within sixty days shall be equivalent to beginning work. Quoted *infra*, sec. 1432. See, also, the 1911 Water Power Act of California, in the next chapter, section 422.

In Kansas (Gen. Stats. 1901, sec. 3501 et seq.) work must commence within sixty days and be prosecuted diligently.

In Montana (Stats. 1907, p. 489): "The work in the construction and completion of the means of diverting and conveying water to place of use, shall be prosecuted with reasonable diligence, otherwise no rights shall be acquired by such appropriator."

In Oregon, for power appropriations, it is provided that, in deciding the question of diligence there shall be considered "the cost of the appropriation and application of such water to a beneficial purpose, the good faith of the appropriator, the market for water or power to be supplied, the present demands therefor, and the income or use that may be required to provide fair and reasonable returns upon the investment." Or. Stats. 1909, c. 216, sec. 70, subd. 6.

In Washington (Pierce's Code 1905, sec. 5133), purpose being storage, work must be commenced within three months after posting notice of appropriation; if diversion, six months. Must be diligently prosecuted.

[24] Nevada etc. Co. v. Kidd, 37 Cal. 282; Kimball v. Gearhart, 12 Cal. 27, 1 Morr. Min. Rep. 615.

[25] Ophir etc. Co. v. Carpenter, 4 Nev. 534, 97 Am. Dec. 550, 4 Morr. Min. Rep. 640.

gon[1] lack of funds will not excuse delay; but it seems otherwise in Colorado[2] and Idaho.[3] In these latter cases the courts lay stress upon the fact that the public lands have usually been taken up by poor men. In the Colorado case it is said: "Men of limited means, pioneers in a new territory, who have not only to 'grub' and clear land, but erect houses and provide means of living while making a home, should not be held to the same rule with those more favored and having abundant capital. As long as the settler in the desert does not abandon, but continues in good faith to prosecute his construction of a ditch and the application of water to his land as rapidly as his means will permit, he should be held to be within the limit of 'a reasonable time.'"

Interruptions by sickness are not an excuse for delay.[4]

If a ditch breaks before the water reaches the land intended to be irrigated by it, the delay is not necessarily lack of diligence; it is open to explanation.[5] The fact that another began later than you and finished sooner is evidence of lack of diligence on your part,[6] but is not conclusive.[7]

What constitutes diligence must be determined on the facts of each case. It is a question of fact for the jury.[8] In an early case[9] the court says that the following statements, among others, are an accurate statement of the law: "In appropriating unclaimed water on public lands only such acts are necessary, and only such

[1] Cole v. Logan, 24 Or. 304, 33 Pac. 568.

[2] Taughenbaugh v. Clark, 6 Colo. App. 235, 40 Pac. 153.

[3] Hall v. Blackman, 8 Idaho, 272, 68 Pac. 19; Conant v. Jones, 3 Idaho, 606, 32 Pac. 250. See, however, United States v. Whitney (Idaho), 176 Fed. 593, difficulty of financing a large project no excuse.

[4] Kimball v. Gearhart, 12 Cal. 27, 1 Morr. Min. Rep. 615; Nevada etc. Co. v. Kidd, 37 Cal. 282; Mitchell v. Amador Canal etc. Co., 75 Cal. 464, 17 Pac. 246.

[5] Wells v. Kreyenhagen, 117 Cal. 329, 49 Pac. 128.

[6] Nevada etc. Co. v. Kidd, 37 Cal. 282.

[7] De Necochea v. Curtis, 80 Cal. 397, 20 Pac. 563, 22 Pac. 198; Wells v. Kreyenhagen, 117 Cal. 329, 49 Pac. 128.

[8] Weaver v. Eureka etc. Co., 15 Cal. 271, 1 Morr. Min. Rep. 642; Conley v. Dyer, 43 Colo. 22, 95 Pac. 304; McFarland v. Alaska etc. Co., 3 Alaska, 308.

"What shall constitute such reasonable time is a question of fact depending upon the circumstances connected with each particular case." Sieber v. Frink, 7 Colo. 148, 2 Pac. 901.

"As to what constitutes reasonable diligence must be governed by the circumstances of each particular case, and necessarily varies with each particular case. It is a question of fact, and must be determined from all the evidence in the case." Gates v. Settlers' Co., 19 Okl. 83, 91 Pac. 856.

Evidence of diligence considered. Thorndyke v. Alaska etc. Co. (C. C. A., Alaska, 1908), 164 Fed. 657, 90 C. C. A. 473; Beckwith v. Sheldon (1908), 154 Cal. 393, 97 Pac. 867.

[9] Kimball v. Gearhart, 12 Cal. 27, 1 Morr. Min. Rep. 615.

indications and evidences of appropriation are required as the nature of the case and the face of the country will admit of and are under the circumstances and at the time practicable; and surveys, notice, stakes and blazing of trees, followed by work and actual labor without any abandonment, will in every case where the work is completed, give title to water over subsequent claimants." "In determining the question of the plaintiffs' diligence in the construction of their ditch, the jury have a right to take into consideration the circumstances surrounding them at the date of their alleged appropriation, such as the nature and climate of the country traversed by said ditch, together with all the difficulties of procuring labor and materials necessary in such cases."

Diligence does not require unusual or extraordinary efforts, but only such constancy and steadiness of purpose or of labor as is usual with men engaged in like enterprises. Matters incident to the person and not to the enterprise are not such circumstances as will excuse great delay in the work.[10] In one case, for two years work was done on the ditch for three months only, and the court said: "Diligence is defined to be the 'steady application to business of any kind, constant effort to accomplish any undertaking.' The law does not require any unusual or extraordinary effort, but only that which is usual, ordinary, and reasonable. The diligence required in cases of this kind is that constancy and steadiness of purpose or labor which is usual with men engaged in like enterprises, and who desire a speedy accomplishment of their designs. Such assiduity in the prosecution of the enterprise as will manifest to the world a *bona fide* intention to complete it within a reasonable time. It is the doing of an act, or series of acts, with all practical expedition, with no delay, except such as may be incident to the work. . . . . Rose during this time may have dreamed of his canal completed, seen it with his mind's eye yielding him a great revenue; he may have indulged the hope of providential interference in his favor, but this cannot be called a diligent prosecution of his enterprise."[11]

On the facts involved, there was held to be diligence in the construction work in the following cases: Where the time elapsed

[10] Ophir etc. Co. v. Carpenter, 4 Nev. 534, 97 Am. Dec. 550, 4 Morr. Min. Rep. 640. See, also, Oviatt v. Big Four etc. Co., 39 Or. 118, 65 Pac. 811.

[11] Ophir etc. Co. v. Carpenter, 4 Nev. 534, 97 Am. Dec. 550, 4 Morr. Min. Rep. 640.

was from December to February, during which a survey (but nothing more) had been made.[12] Where three years had been consumed by a colonization company not desiring to complete the work before securing settlers.[13] Where one year elapsed.[14] On the other hand, it was held not diligence where two years and six months had elapsed with little done on the facts presented,[15] and a sale was held to pass nothing.[16]

Concerning diligence in applying the water to use after completing construction work, reference is made to a later chapter.[17]

(3d ed.)

§ 384. **Delay During Legal Proceedings.**—The California legislature in 1907 enacted[18] in a somewhat ambiguous amendment to the code that if the proposed appropriation will conflict with existing rights, the appropriator must within sixty days after posting notice, bring suit to have those rights settled, or to condemn them under the power of eminent domain, and that he shall have sixty days after final judgment in which to proceed with the construction work. A somewhat similar provision appears in the Montana act of the same year.[19] This new California provision was probably intended to favor new appropriators in case of delay due to litigation; but it would probably hinder them by forcing such litigation upon them whenever a possible conflict appears. The Montana act seems aimed expressly at the latter result, rather than the former; that is, to favor existing owners by making new appropriations more difficult, rather than to favor new appropriators by an extension of time. In 1911 the California section was amended, dropping the above provision.[19a]

Delay due to proceedings before the Forest Service to get a Federal right of way over a forest reserve is not lack of diligence

[12] Dyke v. Caldwell, 2 Ariz. 394, 18 Pac. 276.

[13] Nevada etc. Co. v. Bennett, 30 Or. 59, 60 Am. St. Rep. 777, 45 Pac. 472. Four years: Whited v. Cavin (Or. 1909), 105 Pac. 396, at 398. Two years in Nevada D. Co. v. Canyon etc. Co. (Or.), 114 Pac. 86.

[14] Oviatt v. Big Four Co., 39 Or. 118, 65 Pac. 811. See, also, Gates v. Settlers' etc. Co., 19 Okl. 83, 91 Pac. 856.

[15] Colorado etc. Co. v. Rocky Ford etc. Co., 3 Colo. App. 545, 34 Pac. 580.

[16] See, also, Stickney v. Hanrahan, 7 Idaho, 424, 63 Pac. 189, fourteen years in building a sawmill.

[17] *Infra*, sec. 483 et seq.

[18] Civ. Code, 1416, as amd. in Stats. 1907, c. 429, quoted *infra*, sec. 1432.

[19] See statutes in a later part of this book. Stats. 1907, c. 185, p. 289.

[19a] Civ. Code, sec. 1416, as amended by Stats. 1911, c. 730. The new amendment concerns appropriations by cities, counties or towns, and makes it sufficient diligence if bonds are issued within six months. Quoted *infra*, sec. 1432.

in California. In a California case, within a forest reserve, plaintiff posted notice April 18, 1903, applied for forest permit (not stated), received permit August 30, 1906, did no work thereafter. Began suit September 21, 1906. Defendant posted notice September 26, 1902, commenced work within sixty days diligently, applied for permit March 5, 1903, stopped by forest officer April 17, 1903, received permit July 28, 1906, worked diligently thereafter. It was held that defendant was first in time, and always diligent. Delay caused by Forest Service, of three years, is not lack of diligence, being protected by Civil Code, section 1422. That section covers such delay though the notice did not in words say that the point of diversion was in a forest reserve, for the court will take judicial notice of the boundaries of forest reserves.[20]

(3d ed.)

§ 385. **Failure to Use Diligence.**—The failure to use diligence is like the failure to post notice, and deprives the claimant of the benefit of the doctrine of relation. It is not fatal if the work is nevertheless completed before others intervene, and the former may claim as an appropriator by actual diversion.[21] Against interveners, however, it is fatal.[22] As between rival claimants neither of whom is diligent, probably the result will be the same as discussed under the matter of notice, and both will be deprived of any benefit of the doctrine of relation, not having complied with the code.[23]

[20] Wishon v. Globe etc. Co., 158 Cal. 137, 110 Pac. 290.

See *infra*, sec. 430, et seq. as to appropriations in forest reserves.

[21] Wells v. Mantes, 99 Cal. 583, 34 Pac. 324.

[22] Nevada etc. Co. v. Kidd, 37 Cal. 282; Wells v. Mantes, 99 Cal. 583, 34 Pac. 324; Cal. Civ. Code, 1419; Cruse v. McCauley, 96 Fed. 369; Bear Lake etc. Co. v. Garland, 164 U. S. 1, 17 Sup. Ct. Rep. 7, 41 L. Ed. 327; New Loveland etc. Co. v. Consolidated etc. Co., 27 Colo. 525, 62 Pac. 366, 52 L. R. A. 266; Colorado etc. Co. v. Rocky Ford etc. Co., 3 Colo. App. 545, 34 Pac. 580; Cole v. Logan, 24 Or. 304, 33 Pac. 568; Kenney v. Carillo, 2 N. M. 493; Rodgers v. Pitt, 129 Fed. 932.

"If, however, the work be not prosecuted with diligence, the right does not so relate, but generally dates from the time when the work is completed or the appropriation is fully perfected." Ophir etc. Co. v. Carpenter, 4 Nev. 534, 4 Morr. Min. Rep. 640.

[23] Such is the principle on which De Necochea v. Curtis, 80 Cal. 397, 20 Pac. 566, 22 Pac. 198, and Wells v. Mantes, 99 Cal. 583, 34 Pac. 324, were decided. It may, however, be that they will be on the same footing as rivals before the code, where the better right existed in the one who was last diligent; that is, the right would relate back to the time when (if any) a new start was first made, and the work thereafter diligently carried on. See 60 Am. St. Rep. 801, note.

Where A started work in 1897 but not diligently, and then sold to B in

F. COMPLETION OF CONSTRUCTION WORK.

(3d ed.)

§ 386. Completion of Work Preparatory to Use of Water was a requisite from the earliest days.[24] "However, he never completed his ditch, but abandoned it, and it remained unused for several years. No water-rights ever became vested in him on account thereof."[25] There is no appropriation without the completion of the actual labor necessary to take the water into possession.[1] As we have seen, the completion of the preparatory work, followed by actual diversion for a beneficial purpose, is alone enough where the doctrine of relation is not involved; the requisites of notice and diligence being merely supplementary to this, the prime factor, in order to apply the doctrine of relation between rival claimants.

(3d ed.)

§ 387. What Constitutes Completion.—The California code definition of completion is that "by completion is meant conducting the waters to the place of intended use."[2]

It is sometimes said that there must be an actual diversion of the waters; but this is too narrow a term, since in peculiar cases the appropriation may be accomplished without any diversion at all. Thus, straightening out a bed of a stream by dikes or dams constitutes an appropriation, though there is no diversion at all.[3] So, simply putting a large current water-wheel in the stream itself would doubtless be an appropriation of enough water to run it. It has been said, however, that domestic use made in the stream itself without diversion cannot be protected under the law of appropriation.[4] In another case simply putting current-

1903, who then used diligence, B has a better right than one seeking to initiate an appropriation in 1905. Thorndyke v. Alaska Perseverance Co. (Alaska), 164 Fed. 657, 90 C. C. A. 473.

24 Kimball v. Gearhart, 12 Cal. 50, 1 Morr. Min. Rep. 615. Now required by sec. 1416, Cal. Civ. Code. Also Cal. Stats. 1911, c. 406, sec. 4.

25 Watts v. Spencer, 51 Or. 262, 94 Pac. 39.

1 Bear Lake etc. Co. v. Garland, 164 U. S. 1, 17 Sup. Ct. Rep. 7, 41 L. Ed. 327.

2 Civ. Code, sec. 1417. Copied in McLean's Idaho Rev. Codes, sec. 3251.

3 Kelly v. Natoma etc. Co., 6 Cal. 105, 1 Morr. Min. Rep. 592; Hoffman v. Stone, 7 Cal. 46, 4 Morr. Min. Rep. 520; Suisun v. De Freitas, 142 Cal. 350, 75 Pac. 1092; McCall v. Porter, 42 Or. 49, 70 Pac. 820, 71 Pac. 976. Cf. Cascade Co. v. Empire Co. (Colo.), 181 Fed. 1011.

4 Hutchinson v. Watson D. Co. (1909), 16 Idaho, 484, 133 Am. St. Rep. 125, 101 Pac. 1059, which case protected such use under the common law of riparian rights, which theretofore had been regarded as rejected *in toto* in Idaho.

wheels in a stream was held not to be an appropriation so as to secure a continuance of conditions necessary to running them, saying that there can be no appropriation without diversion in a ditch or similar visible structure. This decision, however, is, in reality, based upon a modification of the law of appropriation, and in that aspect has been already considered.[5] A recent case holds that building a health and pleasure resort near a waterfall appropriates the waterfall, which is going pretty far in the opposite direction.[5a]

Usually, however, there will be no completion without diversion; and usually the diversion consists in carrying the water to distant lands, wherein the doctrine of appropriation has a leading departure from the common law of riparian rights.[6]

(3d ed.)

§ 388. **Means of Diversion.**—Any means adapted to the *bona fide* consummation of the intention to apply the water to the beneficial use intended will be sufficient.

A person making an appropriation of water from a natural stream need not construct any headgate at the place of diversion, and if a simple cut will accomplish the purpose of diverting the water from the stream, it is, if accompanied with a beneficial use, a good appropriation as against others making a subsequent diversion and use.[7]

(3d ed.)

§ 389. **Diversion Alone.**—Where the doctrine of relation is not invoked, the diversion for a beneficial purpose is alone enough, constituting the claimant an appropriator by actual diversion as against later claimants.[8]

But simple diversion, if not for a beneficial purpose, is ineffectual in any case. Where water is diverted from the bed of a stream not for use, but to clear out and drain the channel, a mere drainage ditch, there is no appropriation.[9] Likewise where

[5] *Supra*, secs. 310 et seq., 313.

[5a] Cascade Co. v. Empire Co. (Colo.), 181 Fed. 1011.

[6] See Pomeroy on Riparian Rights, sec. 48; Kinney on Irrigation, sec. 162.

[7] Lower Tule etc. Co. v. Angiola etc. Co., 149 Cal. 496, 86 Pac. 1081; Simmons v. Winters, 21 Or. 35, 28 Am. St. Rep. 727, 27 Pac. 7; Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

[8] *Supra*, sec. 364 et seq.

[9] Eddy v. Simpson, 3 Cal. 249, 58 Am. Dec. 408, 15 Morr Min. Rep. 175; Maeris v. Bicknell, 7 Cal. 261, 68 Am. Dec. 257, 1 Morr. Min. Rep. 601.

more water is diverted than can be put to any purpose, no right vests in the surplus diverted over what is beneficially used.[10]

(3d ed.)

§ 390. Use of Existing Ditches.—What means may be used in making the diversion being immaterial, existing ditches or other works may be used, if lawfully obtained. They may be used and enlarged with the consent of their owner,[11] or may be abandoned ditches, to which their owner makes no claim, or any other works where the owner himself does not contest their use, and the use of which will afford no ground for opposition by strangers to such owners.[12] Such use is revocable by the owner, but good against all others.[13] In a recent case in the supreme court of California, Mr. Justice Shaw said:[14] "A person who is making an appropriation of water from a natural source or stream is not bound to carry it to the place of use through a ditch or artificial conduit, nor through a ditch or canal cut especially for that purpose. He may make use of any natural or artificial channel, or natural depression, which he may find available and convenient for that purpose, so long as other persons interested in such conduit do not object, and his appropriation so made will, so far as such means of conducting the water is concerned, be as effectual as if he had carried it through a ditch or pipe-line made for that purpose and no other."[15]

10 Riverside etc. v. Sargent, 112 Cal. 230, 44 Pac. 566; Senior v. Anderson, 115 Cal. 496, 47 Pac. 454; Smith v. Hawkins, 120 Cal. 86, 52 Pac. 139, 19 Morr. Min. Rep. 243; Bledsoe v. Decrow, 132 Cal. 312, 64 Pac. 397.

To constitute an appropriation of water there must not only be a diversion from the stream and a carrying of it to the place of use, but it must be beneficially applied, and the measure of appropriation does not depend alone upon the amount diverted and carried, but the amount which is applied to a beneficial use must also be considered. Woods v. Sargent, 43 Colo. 268, 95 Pac. 932.

See *infra*, sec. 481 et seq.

11 Water Supply Co. v. Larimer etc. Co., 24 Colo. 322, 51 Pac. 496, 46 L. R. A. 322; North Point Co. v. Utah Co., 16 Utah, 246, 67 Am. St. Rep. 607, 52 Pac. 168, 40 L. R. A. 851; Lehi Irr. Co. v. Moyle, 4 Utah, 327, 9 Pac. 867.

In Colorado, consumers from a company's canal are regarded as appropriators from the natural stream through the intermediate agency of that canal. *Infra*, sec. 1338 et seq.

12 Utt v. Frey, 106 Cal. 392, 39 Pac. 807. *Supra*, sec. 246.

13 Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

14 Lower Tule etc. Co. v. Angiola etc. Co., 149 Cal. 496, 86 Pac. 1081.

15 Citing Hoffman v. Stone, 7 Cal. 49, 4 Morr. Min. Rep. 520; Butte C. & D. Co. v. Vaughan, 11 Cal. 150, 70 Am. Dec. 769, 4 Morr. Min. Rep. 552; Simmons v. Winters, 21 Or. 35, 28 Am. St. Rep. 727, 27 Pac. 9; McCall v. Porter, 42 Or. 56, 70 Pac. 822, 71 Pac. 976; Richardson v. Kier, 37 Cal. 263. See, also, Evans D. Co. v. Lakeside D. Co., 13 Cal. App. 119, 108 Pac. 1027.

Where existing works of others are used, the statutes for posting notices need not be followed where there is no delay in the diversion; for no claim is then made to the doctrine of relation; nor, in Colorado, need the statutes for filing maps be followed.[16] But the appropriation, whether notice is posted or not, is a new one by actual diversion, standing in its own shoes, and can claim nothing from the original appropriation through the same works.[17] The appropriator in such case has no need to invoke the doctrine of relation, since no time needs to be lost in construction work. His appropriation need not proceed under the statutory formalities in such a case; he claims as an appropriator by actual diversion.[18] But the appropriation consequently dates from the new use, not from the original building of the ditch. The new appropriation cannot claim to tack on to the old one.[19] In Utt v. Frey,[20] the court said: "If one animated by a like desire to appropriate water under like circumstances finds a ditch already constructed to hand, takes peaceable possession thereof, and appropriates the water for a like or similar useful purpose, he thereby acquires a like right as against all the world, except the true owner or those holding under or through him. If nature or art has furnished the medium of appropriation he may avail himself of the gift or labor, without being held liable to those having no interest therein and in nowise connected therewith. To the owner of a ditch thus possessed and used, such appropriator must account until his possession and user ripens into a title by prescription or adverse user. His right in such case will depend for priority as against other appropriators of water from the same stream, upon the date of his possession and appropriation, and not upon the date of the original construction of the ditch, and appropriation by some other person under whom he does not hold, and between whom and himself there is no privity of estate. His appropriation in such a case is a new and independent one, and must stand or fall upon its own merits."[21]

[16] Water Supply Co. v. Larimer etc. Co., 24 Colo. 322, 51 Pac. 496, 46 L. R. A. 322.

[17] Union etc. Co. v. Dangberg (Nev.), 81 Fed. 73.

[18] *Ante*, sec. 364 et seq.; Brown v. Newell, 12 Idaho, 166, 85 Pac. 385; Utt v. Frey, 106 Cal. 392, 39 Pac. 807; Wood v. Etiwanda etc. Co., 122 Cal. 152, 54 Pac. 726; Tubbs v. Roberts, 40 Colo. 498, 92 Pac. 220.

[19] McGuire v. Brown, 106 Cal. 660, 39 Pac. 1060, 30 L. R. A. 384.

[20] 106 Cal. at 396, 39 Pac. 807.

[21] Cf., however, McRae v. Small, 48 Or. 139, 85 Pac. 505.

In Chiatovich v. Davis, 17 Nev. 133, 136, 28 Pac. 239, 240, the court, in

Where one uses an existing ditch abandoned by the original appropriator, his right does not succeed to the old one, but stands upon the extent of his own actual use. Any surplus in the ditch may be appropriated by others, or they may take the surplus from the natural stream before it reaches the ditch.[22]

Special reference is made to a preceding section.[23]

(3d ed.)

§ 391. **Same.**—The use of existing works against the will and objection of the owner *when contested by him* raises an entirely different question, however, and as to him the appropriation is invalid, in the absence of condemnation proceedings. The Oregon court recently said:[24] "Plaintiff in error also forgets that it is just as necessary to the creation and preservation of a water-right to provide means for the continual diversion of the water from its natural channel and for conducting it to the place where it is applied to some beneficial purpose, as it is to apply it to the beneficial purpose. And he cannot arbitrarily seize and use another's ditch, or interest in a ditch, for that purpose." "No consent to divert the water from the ditch was ever secured, but Gage arbitrarily seized and used the conduit constructed across patented land, and hence plaintiff, as his successor in interest, never acquired any right by appropriation to the use of water from Reeves' Creek." The question here is the same as that involved in the discussion of whether an appropriation can be made by entry on private land, which need not here be repeated. To enlarge a ditch on another's land, like building a new one thereon, is a taking of an interest in his property, and can only be done *against his protest* by condemnation for a public use, or otherwise acquiring a valid easement.[25]

considering this question, said: "The plaintiff testified that early in the year 1876 he appropriated all of the waters of the creek. Before that time these waters had been used to irrigate plaintiff's land, but as he has not in anywise connected himself in interest with those who first cultivated the land and appropriated the water, his own appropriation in 1876 must be treated as the inception of his right." To the same effect, see Salina Creek Irr. Co. v. Salina Stock Co., 7 Utah, 456, 27 Pac. 578; Smith v. O'Hara, 43 Cal. 371, 1 Morr. Min. Rep. 671; Burnham v. Freeman, 11 Colo. 601, 606, 19 Pac. 761; Gould on Waters, sec. 234; Black's Pomeroy on Water Rights, sec. 60; Kinney on Irrigation, sec. 253; Union M. Co. v. Dangberg, 81 Fed. 73; Sternberger v. Seaton etc. Co. (1909), 45 Colo. 401, 102 Pac. 168; Head v. Hale, 38 Mont. 302, 100 Pac. 222.

See *infra*, sec. 555, parol sale.

[22] Tubbs v. Roberts, 40 Colo. 498, 92 Pac. 220.

[23] *Supra*, sec. 246.

[24] McRae v. Small, 48 Or. 139, 85 Pac. 503; citing McPhall v. Forney, 4 Wyo. 556, 35 Pac. 773.

[25] *Supra*, sec. 221, et seq.

Under the recent decision of the supreme court of the United States in Clark v. Nash,[1] the statute of Utah permitting condemnation to enlarge another's ditch to carry water to one's own private estate for irrigation was held constitutional. Similar statutes have for some time stood on the statute books of other States. These and possibly similar statutes, enacted to declare the doctrine of Yunker v. Nichols,[2] will probably be held valid by construing them as providing for condemnation. At all events, statutes under the permission of Clark v. Nash are likely to be passed hereafter similar to the Utah statute, and the result will be general in the arid regions that an irrigator may build his ditch over the land of another or enlarge another's ditch, without his consent, after due notice and payment of compensation. A further discussion may be left to the chapter upon eminent domain.[3]

(3d ed.)

§ 392. **Changes in the Course of Construction.**—Slight changes may be made, and the original surveyed line departed from.[4]

G. RELATING BACK.

(3d ed.)

§ 393. **Origin of the Doctrine.**—The question at what date the right accrues as between rival claimants was first before the court in Conger v. Weaver.[5] The court said: "But, from the nature of these works, it is evident that it requires time to complete them, and from their extent, in some instances, it would require much time; and the question now arises, at what point of time does the right commence, so as to protect the undertaker from the subsequent settlements or enterprises of other persons. If it does not commence until the canal is completed, then the license is valueless, for after nearly the whole work has been done, anyone, actuated by malice or self-interest, may prevent its accomplishment; any small squatter settlement might effectually destroy it. But I apprehend that, in granting the license which we have presumed for the purpose before us, the State did not intend that it should be turned into so vain a thing but designed

[1] 198 U. S. 361, 25 Sup. Ct. Rep. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1171.
[2] *Supra*, sec. 223.
[3] *Infra*, sec. 607 et seq.
[4] Conger v. Weaver, 6 Cal. 548, 65 Am. Dec. 528, 1 Morr. Min. Rep. 594; Parker v. Kilham, 8 Cal. 77, at 80, 68 Am. Dec. 310, 4 Morr. Min. Rep. 522; Cal. Civ. Code, sec. 1415.
[5] 6 Cal. 548, 1 Morr. Min. Rep. 594.

that it should be effectual for the object in view; and it consequently follows that the same rule must be applied here to protect this right as in any other. Possession and acts of ownership are the usual indications of a right of property, and these must be judged according to the nature of the subject matter. One is in possession of an empty house who has the key to its door in his pocket; of a horse, when he is riding it; of cattle pasturing upon his ground; so a miner, who has a few square feet for his mining claim which he cannot directly occupy, has possession, because he works it, or because he has staked it off to work it, if his acts show no intention to abandon; building a dam is taking possession of water as a usufruct. So, in the case of constructing canals, under the license from the State, the survey of the ground, planting stakes along the line, and actually commencing and diligently pursuing the work, is as much possession as the nature of the subject will admit, and forms a series of acts of ownership which must be conclusive of the right."

In Sieber v. Frink the Colorado court said:[6] "We accept the rule adopted in California and Nevada in this connection. This rule is stated as follows: 'Although the appropriation is not deemed complete until the actual diversion or use of the water, still if such work be prosecuted with reasonable diligence, the right relates to the time when the first step is taken to secure it.'" In Alaska there appears to be no statute governing the making of an appropriation, but the right is held to relate back to the commencement of the work, nevertheless, since the rule always existed under the decisions of courts from the beginning of the doctrine of appropriation, before the passage of statutes.[7]

[6] 7 Colo. 148, 2 Pac. 901.

[7] Miocene Ditch Co. v. Jacobsen, 146 Fed. 680, 77 C. C. A. 106; McFarland v. Alaska etc. Co., 3 Alaska, 308. See Van Dyke v. Midnight Sun Co. (Alaska), 177 Fed. 90, 100 C. C. A. 503.

The doctrine of relation was also applied *inter alia* in Irwin v. Strait, 18 Nev. 436, 4 Pac. 1215; Nevada etc. Co. v. Bennett, 30 Or. 59, 60 Am. St. Rep. 777, 45 Pac. 472; Water Supply Co. v. Larimer etc. Co., 24 Colo. 322, 51 Pac. 496, 46 L. R. A. 322; Whited v. Cavin (Or. 1909), 105 Pac. 396; Beckwith v. Sheldon, 154 Cal. 393, 97 Pac. 867; Sandpoint etc. Co. v. Panhandle Co., 11 Idaho, 405, 83 Pac. 347; Head v. Hale, 38 Mont. 302, 100 Pac. 222; Wright v. Cruse, 37 Mont. 177, 95 Pac. 370; Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728; and cases cited throughout this section.

"In determining the question of the time when a right to water by appropriation commences, the law does not restrict the appropriator to the date of his use of the water, but, applying the doctrine of relation, fixes it as of the time when he begins his dam or ditch or flume, or other appliance by means of which the appropriation is effected, provided the enter-

The doctrine is enacted in the California Civil Code [8] and in the statutes of all the Western States in one form or another.[9]

With regard to the doctrine of relation under the Federal Right of Way Acts, reference is made to a later chapter.[10]

(3d ed.)

§ 394. **Effect of Relation.**—The doctrine of relation is invoked to protect *bona fide* appropriators during the time they are building ditches and other preparatory works; and at the same time to give no comfort to those who, not *bona fide*, try to monopolize water for speculative purposes. It gives a qualified protection to the former. His right in any case comes into existence only on completion of the work. But his claim is a preferred one. The fact that he posted his notice first and worked diligently gave him a preference over others; a kind of option, though his title did not ripen until the option was with diligence exercised by a complete diversion. This was decided after much discussion in the case of Nevada etc. Co. v. Kidd,[11] holding in effect that the doctrine of relation does not vest a water-right at the time of posting notice, with a condition subsequent, as is often thought, but vests the right upon actual diversion, with a preference to him who first posted notice and worked diligently.[12]

It gives a preference to certain appropriators from the time of completion, thence into the future; it does not completely carry

prise is prosecuted with reasonable diligence." Union Min. Co. v. Dangberg, 81 Fed. 73, citing: Ophir Silver Min. Co. v. Carpenter, 4 Nev. 534, 544, 97 Am. Dec. 550, 4 Morr. Min. Rep. 640; Irwin v. Strait, 18 Nev. 436, 4 Pac. 1215; Kimball v. Gearhart, 12 Cal. 28, 1 Morr. Min. Rep. 615; Canal Co. v. Kidd, 37 Cal. 283, 311; Osgood v. Mining Co., 56 Cal. 571, 578, 5 Morr. Min. Rep. 37; Sieber v. Frink, 7 Colo. 149, 154, 2 Pac. 901; Woolman v. Garringer, 1 Mont. 535, 1 Morr. Min. Rep. 675; Kinney on Irrigation, secs. 160, 161; Black's Pomeroy on Water Rights, sec. 55.

[8] Sec. 1418, below quoted.

[9] In Washington, Pierce's Code, section 5134, provides that the right relates back to posting of notice. South Dakota Statutes of 1907, chapter 180, section 2, does the same as to rights, before passage of the act. In Texas, Sayles' Civil Statutes, articles 3120, 3121, provides that upon compliance with the statute the date of priority relates back to the time when the work, excavation or construction commenced. The rule is much the same under State Water Codes in the next chapter. See statutes in Part VIII, below.

[10] *Infra*, sec. 435.

[11] 37 Cal. 282. Quoted *supra*, sec. 374.

[12] Accord, De Necochea v. Curtis, 80 Cal. 398, 20 Pac. 563, 22 Pac. 198, and Wells v. Mantes, 99 Cal. 583, 34 Pac. 324.

"The possession of the unfinished dam and canal, or of the site, is not the possession and enjoyment of the water, but merely the possession of the means of acquiring, by the exercise of due diligence, a right to the water in the future. This is the doctrine of this court, as established by a long series of decisions. The right

title as owner of the water-right back to the date notice is posted. Consequently, in the interim between posting notice and actual completion (which may be a considerable time) anyone else may divert the water. There is no right of action for such diversion; there is as yet no water-right acquired.[18] But after completion, the rights of the rival claimants for future purposes are considered as relating back to the date of notice. The priority of appropriation for future purposes is determined by looking back to that date. All of these propositions are laid down in Nevada etc. Co. v. Kidd,[14] a case since frequently cited and approved.[15]

The appropriator need not take notice of the interveners. His right relates back and he is not under a duty to prevent others from attempting to acquire temporary rights in the meantime.[16]

If an appropriator, after duly posting a notice, and while prosecuting his work with diligence, posts a second notice of appropriation of the same water, the right may still relate back to the first notice.[17]

to the water, or water-right, as it is commonly called, is only acquired by an actual appropriation and use of the water. The property is not in the *corpus* of the water, but is only in the use. The latter doctrine was laid down in Eddy v. Simpson, 3 Cal. 249, 15 Morr. Min. Rep. 175, and has been often repeated since. In Kidd v. Laird, 15 Cal. 179, 4 Morr. Min. Rep. 571, our predecessors said: 'Until a claimant is himself in position to use the water, the right to the water, or water-right, does not exist in such sense that the mere diversion and use of the water by another, is a ground of action either to recover the water, or for damages for the diversion.'" Nevada C. & S. C. Co. v. Kidd, 37 Cal. 282, at 310, 311.

[18] "A party may to-day take up a site for a dam and canal, and claim the waters of a river, to be diverted at that point, and immediately commence work with a view of appropriating the water to his use for mining purposes, and yet, although laboring with all diligence, be unable actually to use the water for any purpose for years to come. Until he can use it, another party may divert the whole water and use it, provided he can do so without injury to the plaintiff's dam or canal, or the progress of his work"; but adding that, after the former is ready to use the water, then his right will thereupon "for the purposes of priority and of redressing any injuries that may thereafter accrue, date by relation from the first act in selecting the location and making the claim." Nevada C. & S. C. Co. v. Kidd, 37 Cal. 282, at 310.

"We have before seen, that until plaintiff is in a condition to use the water, the defendants are entitled to divert and use it, provided they can do so without obstructing the plaintiff in the construction of its own works with an intention to make a future actual appropriation and use; and that there can be no right of action against defendants for diverting the water in its own ditch, which does not interfere with plaintiff's work, till the plaintiff is itself in a condition to divert and use it." Nevada C. & S. C. Co. v. Kidd, 37 Cal. 282, at 319.

[14] 37 Cal. 282.

[15] See *supra*, sec. 374.

[16] Woolman v. Garringer, 1 Mont. 535, 1 Morr. Min. Rep. 675.

[17] Pomeroy on Riparian Rights, sec. 51; Norman v. Corbley, 32 Mont. 195, 79 Pac. 1059; Osgood v. Eldorado etc. Co., 56 Cal. 571, 5 Morr. Min. Rep. 37.

The doctrine of relation is enacted in the Civil Code of California:[18] "By a compliance with the above rules the claimant's right to the use of the water relates back to the time notice was posted." There is no reason to think that this will not be construed in accordance with the decision in Nevada etc. Co. v. Kidd,[19] as to intervening use, though the point of temporary intervening use has not been under actual decision since the adoption of the code. The doctrine of relation was also applied in an early Nevada case,[20] with a *dictum* that relation was to the commencement of actual work—not necessarily to the notice.[21] The point is settled in California by the code provision quoted above, and in the arid States by statutes dating priority from the date of filing application with the State Engineer.[22]

Notice by relation prevails over the riparian rights of an intervening settler, both as to water-rights and ditch-rights.[23] Where an appropriator posted notice, and thereafter a settler homesteaded the land on which the stream arose (from artesian wells), it was held that the appropriator, with diligence, was entitled to continue building his ditches, though not entitled to develop any new water by digging new wells.[24] Relation back may preserve a ditch-right over a mining claim interveningly located before the ditch was completed.[25] But it will not put the ditch under an intervening mortgage.[1]

The doctrine of relation as applied to the acquisition of rights of way and reservoir sites has been held inapplicable against the United States, which may hence withdraw the reservoir site from acquisition any time before the completion of the reservoir, though preliminary filings had been made.[2]

[18] Sec. 1418.

[19] See De Necochea v. Curtis, 80 Cal. 396, 20 Pac. 563, 22 Pac. 198; Burrows v. Burrows, 82 Cal. 564, 23 Pac. 146; Wells v. Mantes, 99 Cal. 583, 34 Pac. 324.

[20] Irwin v. Strait, 18 Nev. 436, 4 Pac. 1215.

[21] The *dictum* is disapproved by Pomeroy on Riparian Rights, sec. 54, note, and Kinney on Irrigation, sec. 168. See Whited v. Cavin (Or. 1909), 105 Pac. 396.

[22] *Infra*, sec. 421.

[23] De Wolfskill v. Smith, 5 Cal. App. 175, 89 Pac. 1001.

[24] De Wolfskill v. Smith, 5 Cal. App. 175, 89 Pac. 1001.

[25] Miocene etc. Co. v. Jacobsen, 146 Fed. 680, 77 C. C. A. 106. As to relation back of a ditch on public land when conflicting with a townsite location, see Baker etc. Co. v. Baker City (Or.), 113 Pac. 9.

[1] Bear Lake etc. Co. v. Garland, 164 U. S. 1, 17 Sup. Ct. Rep. 7, 41 L. Ed. 327.

[2] United States v. Rickey, 164 Fed. 496.

H. ACTUAL APPLICATION.

(3d ed.)

§ 395. Necessity for Actual Application and Use Under the Possessory Origin of the Law.—Water must be continually applied to a beneficial use under the doctrine of appropriation. It was the theory on which the law arose, however, that actual use was not itself an element in the creation of the right, but that nonuse would defeat a right; that actual application was not a condition precedent, but matter subsequent, operating by way of abandonment.

Historically, an appropriation was simply the taking possession of the stream (a "possessory right" on the public domain), so that diversion was the last step to such possession, and the last step in completing the appropriation. Consequently the California Civil Code says:[3] "By completion is meant conducting the waters to the place of intended use," ignoring actual application as an element of completion of the right.

This is but one illustration of the possessory origin of the law of appropriation. As a possessory right upon the public domain (though turned into a freehold on the public domain by the act of 1866, and California still confines the law of appropriation to the public domain), the right took on typical possessory characteristics. It consisted in possession of the flow of the stream; diversion constituted the appropriation because it constituted possession, whence the rule protecting appropriators "by actual diversion" and likewise the enforcement of the doctrine of relation upon completion of construction work and diversion; capacity of ditch, as the amount in possession, measured the right; the right, as one to possession of the stream, was independent of place or mode of use; nonuse did not cause loss of right without voluntary abandonment of possession; injunctions were granted to protect the flow in possession though no damage to use had arisen.[4] Beneficial use was represented in the acquisition of the right by the requisite of *bona fide intention*, already set forth. The actual accomplishment of this intention was necessary, but the lack of its accomplishment was regarded as matter subsequent, working by way of defeasance, on the principles of abandonment; the right being complete on diversion, that completing

[3] Section 1417.

[4] See cross-references *supra*, sec. 139.

the formalities equivalent to taking possession of the stream. The actual application and use of the water need not follow immediately. The appropriator had a reasonable time in which to prepare his fields or the place of use. An unreasonable delay was simply evidence of abandonment of a right acquired by a diversion made in good faith.[5]

It is necessary to appreciate this historical view, for otherwise it is not possible to understand many early decisions in this and other connections (such as those measuring the amount appropriated by the capacity of the ditch as well as by beneficial use).[6]

(3d ed.)

§ 396. Same—Under the View Now Developing.—But the law of appropriation in recent years (especially under the Colorado doctrine, where it is the sole law of the State and not confined, as under the California doctrine, to the public domain), has been throughout departing its possessory origin and characteristics. It is rapidly changing from a possessory to a specific use system, regarding less the possession of a definite part of the flow of the stream, than the requirements of a specific use, such as the irrigation of a specific tract of land. In some respects this change is fairly well established; the Colorado doctrine no longer regards the right as springing from a possessory right on the public domain, but usually considers it obtained from the State; capacity of ditch has been almost wholly displaced by beneficial use as measuring the right; nonuse *ipso facto* is causing loss of right without regard to any question of intention not to abandon the flow; injunctions are not granted to protect the flow, but only where use is damaged.[7] In these matters the change is fairly well established; in others not quite so established; that is, the possessory characteristic of being independent of place or mode of use is still rather strongly maintained; although there is a strong movement at the same time to make the right (for irrigation) inhere in the land irrigated.

With regard to the present matter, the change is about in a middle course; in some respects actual application to use is fully held an element in creating a right. The Colorado court, which has very largely departed from the possessory origin of the law,

[5] See *infra*, sec. 483, future needs; and sec. 567 et seq., abandonment; and sec. 575 et seq., forfeiture.

[6] See, generally, *supra*, sec. 139.

[7] See cross-references, *supra*, sec. 139.

specific use made; and likewise it is held, as quoted in the opening sections of this chapter, that an appropriation may be made by one who owns no land of his own. So, also, former Colorado decrees were measured by capacity of ditch, leaving nonuse to operate by abandonment (though recent rulings read the qualification of beneficial use into them as a condition precedent to the right).

In appropriations for *future* use (which are generally upheld if *bona fide*), also, this divergence of views will probably cause difficulty. The original theory, considering the appropriation complete on completion of the construction work and diversion (the taking of possession of the water) necessitates the enforcement of the doctrine of relation from that time, whereas, when the acquisition of the right is delayed until actual application, it will keep open and uncertain for years (under frequent decisions) the doubt whether an appropriation exists, as some States allow years to pass (if a reasonable time) before the application need be made;[16] and after those years of uncertainty, will cut off the intervening rights of other claimants.[17]

These matters are mentioned to bring out that while actual application to the use intended is generally to-day stated as an element in creation of the right as well as the *bona fide* intention, yet it is a departure now going on from the possessory origin of the law, not yet complete, and consequently leaving inconsistent decisions.

In view of the California code section above quoted, it is difficult to see how it can be denied that the possessory test of completion of the right remains in force in California and that diversion (with a *bona fide intention*) there completes the right, the question of *consummation* of the use operating as matter subsequent, by abandonment or forfeiture of possession.

The question of actual application of the water will be matter for consideration again, in discussing the amount an appropriator can divert for future needs, without any present application thereof.[18]

(3d ed.)

§ 397. **Federal Requirements.**—In California, the law of appropriation is confined to waters upon the public lands, and the

16 *Infra*, sec. 483, future needs.

17 See Seaweard v. Pacific etc. Co., 49 Or. 157, 88 Pac. 963.

18 *Infra*, sec. 483.

foregoing rules grew up under the permission of the act of Congress of 1866.[19] That act is still upon the statute books. But the Federal departments are building a new system based upon rights of way, in numerous matters affecting the foregoing, especially within the forest reserves. In California, nearly all the remaining streams on public land are in whole or part within forest reserves, and section 1422 of the California Civil Code requires that a permit from the Forest Service be obtained. Also on unreserved public land the new Federal System governing rights of way is of great importance. Consequently, as the law of appropriation in California applies only to waters on public lands, and as settlement and other private acquisition have taken out of the public domain the greater portion of the agricultural lands in California, and as the remaining public land along streams is subject to the new Federal System governing rights of way, it seems that the method of acquiring water-rights described in this chapter is of rapidly diminishing importance in California.

Regarding the Federal requirements, reference is made to a later chapter.[20]

(3d ed.)

§ 398. **Recapitulation.**—To sum up: The doctrine of appropriation in California applies only to water on public land. An appropriation may be made under the California method (the original method) by actual diversion of the water for a beneficial purpose without more, and is good against all claimants (appropriators or riparian patentees in California) who seek to initiate a title subsequent to the date of diversion; but no claim can be made to the benefit of the doctrine of relation so as to found any right antecedent to the diversion.

To secure the benefit of the doctrine of relation, there must be posted a notice of appropriation (which must be recorded), there must be a *bona fide intention* to use the water for a beneficial purpose, there must be diligence in the construction work, and the work must be completed (that is, the waters conducted to the place of intended use). These requisites, as at present prevailing under the California method, are substantially the same as those established in the early days by the customs of miners and decisions of

[19] See historical chapters.

[20] *Infra*, sec. 430 et seq.

the courts. They are founded upon the proposition that the right to water by appropriation was a member of the large class of possessory rights on the public domain (and in California still is confined to the public domain), and these requisites are the equivalent of taking possession. Actual application of the water is not a prerequisite, under the orginal theory, to the vesting of the right. The right is complete when possession has been taken. The water must be actually applied to a beneficial use within a reasonable time or the right will cease by abandonment; but application is not a prerequisite to invoking the doctrine of relation under the orginal theory. But in most States actual use has been added as itself an element in the creation of the right, as well as the *bona fide* intention; that is, the intention must be actually consummated by use within a reasonable time before an appropriation has any existence as such.

When the requisites stated have been completed, the right to the water relates back to the date of posting notice, in order to determine priority between conflicting claims, and gives the appropriator a better right than all claimants subsequent to the notice. It does not, however, carry back any right to complain of intervening use by others in the meantime—such temporary use by others is allowed; it establishes priority against them only for future purposes. If the requisites stated have not been strictly complied with, all benefit of the doctrine of relation is forfeited, and the claimant will have no right against those who actually divert the water before he does, and will have only a temporary right against those who have posted a notice and are working diligently; a temporary right which ceases when the others have completed their construction work and are themselves in a position to divert and use the water.

If the appropriation is within (or must cross) a forest reserve or other withdrawn public land, compliance with rules and regulations of Federal departments is required.

§§ *399–407. (Blank numbers.)*

CHAPTER 18.

HOW AN APPROPRIATION IS MADE—UNDER STATE WATER CODES.

§ 408. The Wyoming method.
§ 409. Authority of State Engineer.
§ 410. Vested rights protected.
§ 411. Exclusiveness of the statutory method.
§ 412. Application for permit.
§ 413. Fees and royalties.
§ 414. Examination of application and issuance of permit.
§ 415. Rejection of applications.
§ 416. Same.
§ 417. Nature of a permit.
§ 418. Prosecution of the work.
§ 419. Cancellation of permits for failure of work.
§ 420. Issuance of certificate of appropriation.
§ 421. Date of right.
§ 422. California Water-power Act of 1911.
§ 423. Federal requirements.
§§ 424–429. (Blank numbers.)

(3d ed.)

§ 408. **The Wyoming Method.**—One of the essential features of the new legislation is the adoption of a comprehensive method of making appropriations hereafter. The statutes in this respect are all much alike, though varying in detail. This method is to-day enacted in Idaho, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, and Wyoming, and to some extent in Colorado. (It is not in force in California, Montana or Washington, except for the 1911 Water-power Act in California, set forth at the end of this chapter.)

This method arose in Wyoming,[1] and is, with the administrative law centering about the office of the State Engineer, called "the Wyoming system." It is based on the original principles set forth in the preceding chapter, merely adapting them to a methodical system of filings and records. In the main, the essentials of this method consist in (1) an application for a permit; (2) an examination thereof and issuance of permit; (3) provisions governing the prosecution of the work; (4) issuance of a certificate of appropriation on completion of the work; (5) numbering of the certi-

[1] See Pool v. Utah etc. Co., 36 Utah, 508, 105 Pac. 289.

ficates successively according to the date of the application for permit, and dating priority by relation to that date. In some States the matter is carried one step further, providing for the actual application and beneficial use of the water before the final certificate issues. This method must be followed whatever the purpose of the appropriation—whether for irrigation or other uses.

The method prescribed sometimes applies likewise to changing or enlarging an appropriation, or else a similar method is specially provided; while in Colorado a change of point of diversion must be made in a method similar to that provided for determination of priorities.[2]

Whether necessary for an irrigator to own or locate land under these statutes before appropriating has been discussed elsewhere.[3]

Reference should also be made to later chapters upon Administrative Systems and Adjudication of Rights.[4]

(3d ed.)

§ 409. Authority of State Engineer.—These statutes give the State Engineer a general authority over the making of appropriations (except in Colorado where the office is merely to receive and keep filings, without power of rejection).[5] As between private parties the State legislature has power to confer this authority upon the State Engineer.[6] This authority exists over riparian owners as well as others in States rejecting riparian rights.[7] What will be their effect upon riparian owners in States upholding riparian rights is elsewhere considered.[8]

As considered in another place, the power of the State Engineer is held to be ministerial, and hence the statutes are not unconstitutional as conferring upon him judicial powers; and likewise his acts may be contested in court like those of any adminis-

2 *Infra*, c. 22, change of mode of enjoyment.

3 *Supra*, sec. 282; *infra*, sec. 509.

4 *Infra*, Part VI.

5 The first Colorado act for maps and filings was held unconstitutional because of a defective title. Lamar etc. Co. v. Amity etc. Co., 26 Colo. 370, 77 Am. St. Rep. 261, 38 Pac. 600; Rio Grande etc. Co. v. Prairie etc. Co., 27 Colo. 225, 60 Pac. 726; Beaver etc. Co. v. St. Vrain etc. Co., 6 Colo. App. 130, 40 Pac. 1066. See Colo. Rev. Stats. 1908, sec. 3323, laws 1889, p. 372, sec. 3, requiring approval of State Engineer for dams over ten feet high.

6 Idaho etc. Co. v. Stephenson (Idaho, 1909), 16 Idaho, 418, 101 Pac. 821.

As to how far this State legislation will prevail on public lands should Congress hereafter pass statutes upon the matter, reference is made to a preceding chapter. *Supra*, secs. 151–157.

7 Idaho etc. Co. v. Stephenson, 16 Idaho, 418, 101 Pac. 821.

8 *Supra*, sec. 126.

trative officer acting in excess of authority. Not only may a party aggrieved by his decision appeal therefrom in the method provided by the statute, but he may be heard in court in the other usual ways, such as by injunction against the permit holder. The action of the State Engineer is held not to control the courts further than the acts of other administrative officers. Reference in this regard is made to a later chapter.[9]

(3d ed.)

§ 410. **Vested Rights Protected.**—A permit from the State Engineer is of no avail against existing owners if it infringes their rights. Holders of such infringing permits may be enjoined; the permit grants nothing as to them. In this regard, also, reference is made to a later chapter, where the matter is considered in chief and authorities cited.[10]

(3d ed.)

§ 411. **Exclusiveness of the Statutory Method.**—Under the original method of appropriating, discussed in the last chapter, the statutory method by posting notice is not exclusive; an appropriation by actual diversion without notice may be as valid as one with notice. Will this principle be applied under the new water-code method?

The statutes for applications and filings have been held in Colorado[11] not to apply to a ditch taking water from an existing ditch;[12] nor to apply between rivals neither of whom has made filings, holding it no defense to a wrongdoer (at least one diverting the water in another State) that plaintiff has not complied with the laws for filings and other matters, so long as plaintiff was in possession of the water for beneficial use. Possession is enough against a wrongdoer showing no better right.[13] In the Federal court for Montana, construing Wyoming law, the court also applies the rule of appropriation by actual diversion, though Wyoming to-day has these statutes varying from the California method, which seem to negative this. Judge Whitson supports appropriation by actual diversion on principle, saying that actual diversion is as much notice to later

[9] See *infra*, Part VI, where the matter is considered in chief and authorities cited. See especially sec. 1192 et seq.

[10] *Infra*, Part VI, especially sec. 1153.

[11] Under sec. 2265, M. A. S.

[12] Water Supply Co. v. Larimer etc. Co., 24 Colo. 322, 51 Pac. 496, 46 L. R. A. 322.

[13] Hoge v. Eaton, 135 Fed. 411, and cf. Morris v. Bean, 146 Fed. 425; affirmed in 159 Fed. 651, 86 C. C. A. 519; Denver Co. v. Dotson (Colo.), 20 Colo. 304, 38 Pac. 322.

comers as is the statutory notice or the application for permit.[14] In Idaho and Utah it has been left open "whether the right to appropriate water from the streams of this State can be acquired in any method other than that pointed out by the statute."[15]

These holdings seem to follow in the line of cases cited in the preceding chapter upholding appropriations by actual diversion. It is probable that the new statutes intended to prevent that. The older statutes, based on the California Civil Code, were merely to regulate the doctrine of relation, while the new statutes described in this chapter are not limited to that purpose, and seem to aim at a comprehensive and exclusive method of appropriating. But it would seem necessarily, upon general principles of law, that between two parties, *neither* of whom has a permit, prior possession must prevail, at least until one or the other is approved by the State Engineer.[16] That, also, was the basic principle upon which the law of appropriation originally arose upon public lands, where neither party had a patent from the United States.[17] These new statutes, consequently, may possibly come to be construed in conformity with the old decisions, so that the new method of appropriating will differ from the original one in form only, and not in substance.

Other exceptions are that the statutes requiring permit do not apply to rights initiated (though not completed) before the acts were passed, but such rights are governed by the law at the time of their initiation;[18] nor do they, in South Dakota, apply to "dry draws" flowing less than twenty miner's inches, as to which the old method of posting and recording notice remains;[19] nor do they apply in New Mexico to water-tanks or wells for watering stock.[20] And it has been held in general terms that they apply only to watercourses and not to diffused surface or percolat-

[14] Morris v. Bean (Mont.), 146 Fed. 425, affirmed in 159 Fed. 651, 86 C. C. A. 519, affd. in —— U. S. ——, May 29, 1911. Followed in Nielson v. Parker (Idaho, 1911), 115 Pac. 488. But statutes usually say: "Rights shall be acquired under this act and not otherwise"; and fees for permit would otherwise be lost by the State.

[15] Speer v. Stephenson (1909), 16 Idaho, 707, 102 Pac. 365. See Sowards v. Meagher (Utah, 1910), 108 Pac. 1113.

[16] *Infra*, sec. 626 et seq.; except where statute makes diversion without permit a *crime*. Then, being *in pari delicto*, neither could get relief.

[17] *Supra*, sec. 82 et seq.

[18] See Lockwood v. Freeman, 15 Idaho, 395, 98 Pac. 295. The statutes themselves usually so provide; e. g., Utah Laws 1909, c. 62, p. 84, sec. 2; Or. Laws 1909, c. 216, sec. 70, subd. 7.

[19] S. D. Stats. 1907, c. 180, sec. 31, Stats. 1911, c. 263, p. 468. So, in Idaho, of lakes on private land under five acres. Stats. 1911, c. 230.

[20] N. M. Stats. 1909, p. 149.

ing water;[21] and that the State Engineer has no control over waters until they enter his State.[21a]

(3d ed.)

§ 412. **Application for Permit.**—In all these States application in duplicate must be filed with the authorities. In all but one the application must be made before beginning any work. The exception is Colorado, where it must be filed within sixty days after beginning. The application is filed with the State Engineer. The form for these applications is usually furnished by the State Engineer, and in most of the States must be sworn to. It contains a statement of the plan of the work, the details of description required varying in the different States. Duplicate maps must accompany the application in Colorado,[22] Idaho, and Wyoming, and in most of these States. In four, however, the filing of maps is postponed until after the approval of the application.[23] If applicant is a corporation, the application must contain matters in description of the corporation also. In all, great discretion is allowed the State Engineer in calling for additional information. It is in all the duty of the State Engineer (Board of Irrigation in Nebraska) to examine the application. For the statutory provisions, reference is made to Part VIII of this book.[24]

Special provisions usually appear for large dams and reservoirs, some examples of which are given in the note; and usually the statutes go into considerable detail.[25]

A permit is required of all appropriators (even of riparian owners, in States rejecting riparian rights), and even if a power-house is put in the stream itself and involves no other diversion. In order to apply the water sought to be appropriated to a beneficial use, it was held necessary to change it from the way that it would naturally flow down said stream, and that the act of the legislature was intended to and does cover all such

[21] Vanderwork v. Hewes (N. M.), 110 Pac. 567.

A special statute in Nebraska requires permit of State Engineer in drainage of lakes. Neb. Stats. 1909, p. 525.

[21a] Turley v. Furman (N. M.), 114 Pac. 278. See *supra*, sec. 340 et seq.

[22] The duplicate must be recorded. The same applies to enlargements.

[23] *Infra*, sec. 418.

[24] *Infra*, Part VIII.

[25] *Colorado.*—Special provisions for reservoirs having a capacity of over seventy-five million cubic feet, etc., are contained in 3 M. A. S., 1905 ed., 2270a et seq., 2286d et seq., M. A. S., 2270. Dams over ten feet in height require approval of State Engineer. Rev. Stats. 1908, sec. 3323; Laws 1889, p. 372, sec. 3.

Nebraska.—Dams over ten feet high require approval of State board.

cases.[1] "Whenever its natural condition is changed, and it is taken from its natural flow in the stream and applied to a beneficial use, the law steps in and provides the procedure and the things to be done and the fees to be paid in perfecting its appropriation."[2]

The statutes usually expressly declare that making filings of maps or applications does not alone constitute an appropriation (and beginning work under them is made criminal), if not approved by the proper officials, nor if not followed, when approved, by the succeeding requisites, prosecution of the work, and actual completion as the statutes may require.[3] This is in accord with the rule under the original method of appropriation set forth in the previous chapter.[4]

Forms for applications and filings are given at the end of this book.

Concerning the practical operation of applications and filings, the following is quoted from Bulletin 168 of the Office of Experiment Stations of the United States Department of Agriculture:

Idaho.—"Most of the applications made have to be returned to the applicants for correction, and as a rule they are corrected in accordance with the suggestions of the engineer and returned. Many applicants employ attorneys to make out their papers, but

Comp. Stats. 1903, secs. 6447, 6464; Cobbey's Ann. Stats., sec. 6792.

North Dakota.—Stats. 1905, c. 34, sec. 19, concerning dams over thirty feet in height.

Utah.—Stats. 1905, c. 108. A special provision covers the building of dams (in sections 3 to 10). Duplicate plans, etc., for any dam over five feet in height across the natural channel of a running stream, or any other dam over ten feet, shall be submitted to the State Engineer for his approval; one copy to be returned with his approval or disapproval. Failure of persons to comply with this requirement is a misdemeanor. The work must be done under the supervision of the State Engineer.

Wyoming.—Concerning dams over five feet in height, Rev. Stats., 931, and Stats. 1903, p. 74, c. 69.

[1] Idaho etc. Co. v. Stephenson (1909), 16 Idaho, 418, 101 Pac. 821; Speer v. Stephenson (1909), 16 Idaho, 707, 102 Pac. 365.

[2] Idaho etc. Co. v. Stephenson (1909), 16 Idaho, 418, 101 Pac. 821.

[3] Sowards v. Meagher (Utah, 1910), 108 Pac. 1113. Consult, generally, Jarvis v. State Bank, 22 Colo. 309, 55 Am. St. Rep. 129, 45 Pac. 505; United States v. Rickey, 164 Fed. 496; Rasmussen v. Blust, 83 Neb. 678, 120 N. W. 184; Conley v. Dyer, 43 Colo. 22, 95 Pac. 304; Whalon v. North Platte etc. Co. (Wyo.), 71 Pac. 995; Pool v. Utah etc. Co., 36 Utah, 508, 105 Pac. 289.

[4] "We think the filing of a written application with the State Engineer, as required by the statute, is but declaring, or the giving of a notice of, an intention to appropriate unappropriated public water." Sowards v. Meagher (Utah, 1910), 108 Pac. 1113.

as a rule these do not meet the requirements any better than the others."

Wyoming.—"Although a blank on which to make this application is furnished by the office, nearly one-half of those received have to be returned for correction. . . . . Parties, who have no well-defined idea of constructing ditches file applications for permits simply because it costs nothing. . . . . The tendency of recording speculative filings is only one of the evils. The more aggravating one is the carelessness with which many of the statements are prepared."

(3d ed.)

§ 413. **Fees and Royalties.**—Filing fees must be paid the State Engineer by the applicant according to the schedule contained in the statutes.[5] In an Idaho case the plaintiff constructed a dam across Snake River at a point near where its power-house is situated, placed its power-house on a rock foundation or small island in the channel of the river, and placed its penstock in the river, and conducted the water from the dam to its water-wheels. It was held that plaintiff is required to pay the same fees it would have to pay if it had diverted the water from its dam by a ditch or flume and carried it for a distance on the bank of the river and then turned it into its penstock, and through that on to its water-wheels and back into the river; that the legislature did not intend to exempt from the operations of said act the person or corporation or riparian owner that placed its power-house in the bed of the stream itself.[6] In Utah a statute exempts the United States Reclamation Service from payment of fees.

The Oregon Statute of 1909[7] contains the first State requirement of payment in the nature of a license tax or royalty.[8] It appears that the Oregon State Engineer requires a deposit of these fees in advance, accompanying the application for a permit.[9]

[5] *Infra*, Part VIII, "Statutes."

[6] Idaho etc. Co. v. Stephenson (1909), 16 Idaho, 418, 101 Pac. 821.

[7] Given in the part of this book containing statutes, *infra*, Part VIII. Graduated fees based upon capacity or size of the works now exist in some other States. E. g., Utah Stats. 1911, c. 3, p. 2.

[8] The Oregon schedule enacted in Statutes of 1909, chapter 216, section 17, is, for irrigation:

15¢ for 1–100 acres.
5¢ for 100–1,000 acres.
1¢ for 1,000 acres and over.

For power the schedule is:

25¢ for 1–100 H. P.
15¢ for 100–1,000 H. P.
5¢ for 1,000–2,000 H. P.
2¢ for 2,000 H. P. and over.

The fees are payable in advance, when permit is applied for, the horsepower being figured theoretically.

[9] See Bulletin 209, Office of Experiment Stations, U. S. Dept. Agric.

In his report for 1910, the State Engineer of Oregon recommended that this tax on power development be repealed, as it has been found to cause the abandonment of half the projects that have been undertaken since its passage. No action was taken, however, except to reduce the tax upon projects organized before the original statute went into effect.[9a]

Reference should also be made to the charges of the United States Forest Service, given in the next chapter.

(3d ed.)

§ 414. Examination of Application and Issuance of Permit.— The State Engineer is required to examine the application, comparing it with the information and records of existing appropriations in his office, and may usually call upon the applicant for additional information, or send the application back to the applicant to be corrected. He makes a record in his office of the date of filing the application, and, in general, of all papers filed with him. In most States (but not all), to give others a chance to protest, the State Engineer, after examining the application, publishes a notice of the application in a newspaper for thirty days (or for four weeks), and within thirty days after final publication, protests may be filed with him.[10] In some an application may be contested by one claiming that it is not in the public interest, and alleging that the protestant has a plan for the same project which is more in the public interest.[11] If everything is satisfactory, the State Engineer indorses on the duplicate application, in all the States, his approval, and makes a record thereof, and returns it to the applicant, which constitutes his permit to proceed. If rejected, it is returned so indorsed, with reasons.

Amendments of the application are usually allowed at the discretion of the State Engineer.[12]

9a The Oregon Statute of 1911, chapter 236, page 418, taxes power plants operating before May 22, 1909, as follows:

10¢ for 1-100 H. P.
5¢ for 100–1,000 H. P.
1¢ for 1,000 H. P. and over.

Exempt are works under 25 H. P.; also works of United States, State, or municipalities.

10 See statutes in Part VIII, below.

11 Young v. Hinderlider (N. M.), 110 Pac. 1045; Cookinham v. Lewis (Or.), 114 Pac. 88.

12 In Idaho, in 1911, it was enacted that corrected applications must be returned to the State Engineer within sixty days or they will be treated as new applications. Idaho Rev. Codes, sec. 3254, as amd. in 1911, c. 64 (House Bill 123).

In Utah the State Engineer rules that applications resubmitted after the expiration of sixty days will be

Upon a contest, the statutes usually provide an appeal from the decision of the State Engineer to court.[13] But his decision is open to collateral inquiry in court without such appeal, it has been held, since, as elsewhere considered,[14] the proceeding before the State Engineer to contest a permit is administrative and not judicial in its nature. In one case the proceeding is distinguished from actions brought in the courts because the proceeding before the State Engineer is informal; the rules of evidence do not apply; the State Engineer is authorized to make personal examination, and may be governed thereby; no injury to the petitioner or his property is required to be alleged or proved; the action does not result in the issuance of any writ or process known to the law, and the proceeding is held administrative to aid in carrying out and administering the law regulating and governing the appropriation and application of water to a beneficial use, not judicial in character or effect. Consequently this case held that under the Idaho statute requiring notice to be sent by the State Engineer to interested parties, since the proceeding is not of the binding nature of judicial proceedings, it is sufficient to send notices to the last post-office address which such parties have left with the State Engineer, and is sufficient if sent by registered mail, and need not be sent to assignees or transferees of permits when such transfers do not appear on the State Engineer's records.[15]

(3d ed.)

§ 415. Rejection of Applications.—An example of the provision for refusal of applications is the following: "If, in the opinion of the State Engineer, there is no unappropriated water

treated as new applications in all respects. See Sess. Laws Utah 1907, sec. 36, c. 156. See Poole v. Utah etc. Co., 36 Utah, 508, 105 Pac. 289.

In New Mexico, appropriations initiated under the act of 1907 are granted an extension of time by the Statutes of 1909, page 374.

[13] Whether an appeal from him to court, as allowed by statute, is a judicial suit, *quaere*. So held in Waha Co. v. Lewiston Co. (Idaho), 158 Fed. 137. But in Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210, it was held not a judicial suit, but a continuation of the administrative hearing. A difficulty in the latter holding is whether it would not open the converse of the usual question, and make the statute unconstitutional as placing administrative duties upon *judicial* officers.

[14] *Infra*, secs. 1192, 1194.

[15] Speer v. Stephenson (1909), 16 Idaho, 707, 102 Pac. 365, saying: "To require that notice should be given to all assignees or transferees of the permit when no system is provided for recording the same or method provided by which the assignees or transferees could be ascertained would be demanding of the office an impossible task."

available, he shall reject such application. He shall decline to order the publication of notice of any application which does not comply with the requirements of the law and the rules and regulations thereunder. He may also refuse to consider or approve an application or order the publication of notice thereof, if, in his opinion, the approval thereof would be contrary to the public interest."[16]

Some States, following Colorado, provide that the right to appropriate unappropriated water "shall never be denied."[17] It has been questioned how far the State Engineer's refusal to issue a permit is binding under such a provision.[18] Some States provide that "it shall be the duty of the State Engineer to approve all applications made in proper form which contemplate the application of water to a beneficial use."[18a] The Wyoming declaration modified this by providing that no appropriation shall be denied "except when such denial is demanded by the public interests."[19] And the more recent statutes contain the general power of denial given in the example first quoted, in which "public interest" is merely one of the grounds for denial.[20]

Power of denial on the ground of public interest has recently been extensively used by the Territorial Engineer of New Mexico. In November, 1910, he rejected twelve applications (the total number then pending) to appropriate upon the Pecos River, conflicting with the plans of the United States Reclamation Service. In Young v. Hinderlider[21] an application for an irrigation project financed by outside capital was contested by local capital which subsequently applied for the same project on the ground that it was more in the public interest to have

16 S. D. Stats. 1907, c. 180, sec. 23.

17 Colo. Const., art. 16, sec. 6. See list *supra*, secs. 108, 109. See statutes in Part VIII, below.

18 See Speer v. Stephenson (1909), 16 Idaho, 707, 102 Pac. 365.

18a E. g., Idaho Rev. Codes, sec. 3254, as amd. by Stats. 1911, c. 64 (House Bill 123). A Utah statute of this year provides that the State Engineer must approve all applications except where they will conflict with existing rights, or where, after submission of the question to court, the court decides that the application is not for the most beneficial use of the water. Utah Laws 1911, c. 103, p. 143, amending Comp. Laws of 1907, secs. 1288x5 and 1288x10, and amending Laws of 1909, c. 62. See Or. Stats. 1911, c. 224, p. 404.

19 Wyo. Const., art. 8, sec. 3.

20 See *supra*, sec. 313.

21 N. M., 110 Pac. 1045. A recent Oregon case rules that the State Engineer may reject as against public interest, an irrigation project that could be better handled under the Carey Act. Cookinham v. Lewis (Or.), 114 Pac. 88.

the work owned by local than by outside men and for other reasons. The supreme court of New Mexico held that the public interest referred to in the statute is not confined to cases of menace to health or safety, and that the question of what is the public interest was not one of law, but of fact for the trial court. The case is very interesting. Public interest is much a matter of individual opinion, upon which philosophers and statesmen have disagreed from time immemorial. The State Engineer had rejected the first and approved the second application; the board of water commissioners, to which appeal was taken, reversed him and upheld the original application on the ground that it was first made, and it is to the public interest to uphold the law of prior appropriation and to invite and give security to the investment of outside capital, and that the local applicants were not financially equal to the undertaking; the trial court, to whom appeal was then taken, affirmed the board of water commissioners; the supreme court, upon appeal to it, held that it was a question of fact what constituted public interest, and considered that the trial court had taken a proper view of the public interest upon the facts presented, but remanded the case to give contestants an opportunity to offer further evidence in proof of what the public interest really was in the matter.

A late Oregon statute gives the State Engineer power to reject applications for use outside the State if the outside State refuses diversions for use in Oregon; but otherwise requires him to approve all applications for use outside the State.[21a]

The statutes usually expressly allow appeal to the courts from a State Engineer's rejection of an application.[22] As above noted, this is held not to exclude taking the question to court in the other usual ways of testing the action of administrative officials. The late Utah statute cited above requires rejections on the ground that the use applied for is not the most beneficial one possible, to be submitted to court by the State Engineer in the first instance, before the rejection can take effect, and the conservation commission

[21a] Or. Stats. 1911, c. 224, p. 404.

[22] E. g., Idaho Stats. 1903, p. 223, sec. 12; N. D. Stats. 1905, c. 34, sec. 23; Nev. Stats. 1907, p. 30, sec. 27 (must be commenced within sixty days after notice of rejection); Utah Comp. Laws 1907, sec. 1288x10, amended in Laws 1909, c. 62, p. 84; Utah Comp. Laws 1907, sec. 1288x14.

is to inquire and report upon what uses of streams are most in the public interest.[22a]

(3d ed.)

§ 416. **Same.**—Concerning the rejection of applications in practice it is said in Bulletin 168, United States Department of Agriculture (published in 1906):

Idaho.—"As has been shown in the previous pages, there is no provision for securing a complete list of all rights to water from any stream, and without such a list neither the engineer nor the applicant can tell from the records whether there is unappropriated water in any stream. In many cases it will, of course, be a matter of common knowledge that a stream is or is not fully appropriated, and there may be little danger of injustice so far as the applicant is concerned."[23]

Nebraska.—"The rejection of applications seems to be much more common in Nebraska than in the other States. The report of the secretary for 1899 and 1900 states[24] that in those two years two hundred and ten applications were allowed and one hundred and twenty-six dismissed. In the succeeding two years seventy-four were allowed and seventeen dismissed. The right of the board to reject applications has never been passed upon by the courts. In the one case of appeal from the secretary this question was not passed upon. This right has been denied in Utah and Idaho[25] and in Wyoming is seldom exercised."

Wyoming.—"While the engineer has authority to reject an application when there is no unappropriated water in the source of supply mentioned in the application, and this has sometimes been done, it is not the usual practice. There is usually some flood water, and always the possibility of an increased supply from seepage or more economical use by the holders of prior rights, and consequently permits are frequently granted when the records of the engineer's office show little unappropriated water. . . . . Since the adoption of the present system of acquiring rights a number of canals have been built without complying with the law regarding making application to the State Engineer."[1]

22a Utah Stats. 1911, cc. 103, 137.

23 This is the reason usually given in support of the old rule for appropriation by actual diversion.

24 Page 9.

25 See pages 53, 69.

1 It is, however, the practice in Wyoming to deal with the matter by sending a notification to the applicant, declaring, "The records of the State

General.—"Wyoming, the pioneer State in providing for the public supervision of the acquirement of rights, gives the engineer authority to reject applications which are contrary to public policy. This has been followed by most of the States which have adopted codes in recent years. This provision is so general in its terms that it may be interpreted to mean much or little. In Wyoming the exercise of this authority has given him a great deal of trouble. The engineer of Nevada holds that this provision gives him no authority to reject applications which conform to the general rules of the office. The Utah engineer held that this provision gave him authority to choose between possible uses and refused an application for a use which in his opinion was not for the best possible use of the water. Appeal was taken to the courts, the engineer was overruled in this matter, and at the next session of the legislature the law was repealed. In the other States which have adopted this provision the law is not effective. It appears, therefore, that this law is either ineffective or unpopular with both the engineers and the public. . . . . The flow of a stream is not fixed, but increases and decreases from year to year, the flow in the latter part of the season almost universally increasing as the lands along its banks are irrigated, while the water requirements of land under irrigation have a tendency to decrease. The engineer is not, therefore, in a

Engineer's office show the waters of . . . . to be largely appropriated. The appropriator under this permit is hereby notified of this fact and that the issuance of this permit grants only the right to divert and use the surplus or waste water of the stream, and confers no rights which will interfere with or impair the use of water by prior appropriators." And the State Engineer of Wyoming takes exception to the statements contained in the Department Bulletin. In a communication to the author he says: "Here in Wyoming applications are not rejected unless the plans are faulty or the lands to be irrigated conflict with other permits. On some streams we request parties to provide stored water before permits are issued, but we realize that the flow of streams fluctuates throughout the year, and that the total discharge of streams is different from one year to another. Applications are, therefore, not rejected because of the water supply. The principal reason for this is that the later permits cannot interfere with the earlier rights. I do not know whether other States have encountered the same problems we have here or not. Each month we receive applications which provide for the reclamation of the same tract of land. In cases of this kind it would seem that some public officer should have some discretion in the issuance of the permit. Under the law we can examine the financial standing of the various applicants, scrutinize the plans submitted by each, and issue the permit which seems to provide for the best methods of construction, which we believe is in the interests of the public. This procedure appears to me as being much wiser than to issue conflicting permits, and to allow the construction companies to engage in perpetual warfare, duplicating ditches and reservoirs, and thus increasing the price of water-rights." (From a letter to the author under date of August 31, 1908.)

position to state that there is at any time no unappropriated water in a stream to which rights can be acquired."

Since this was written, some statutory changes have been made, as already noted.

(3d ed.)

§ 417. **Nature of a Permit.**—A permit is the equivalent of the notice posted under the original method. "As a substitute for the notice thus provided for, the legislature in 1903 provided that a person or corporation contemplating the appropriation of water should make application to the State Engineer, and receive a permit from him to construct certain works and appropriate and apply the water to a beneficial use. The permit thus provided for took the place of the posting of notice as required under the act prior to 1903, and merely gave the applicant an inchoate right which could ripen into a legal and complete appropriation only upon the completion of the works and the application of the water to a beneficial use. The right given by the permit is merely a contingent right, which may ripen into a complete appropriation, or may be defeated by the failure of the holder to comply with the requirements of the statute. The permit, therefore, is not an appropriation of the public waters of the State. It is not real property under the statute."[2] The court holds: "A permit, however, is the consent given by the State to construct and acquire real property."[3]

Permits may be sold or assigned, and the purchaser thereof will succeed to the rights under the permit.[4] The assignment is usually required to be recorded in the office of the State Engineer.

Filings under an unconstitutional statute are void.[5] A verified statement filed and introduced in evidence is not evidence

[2] Speer v. Stephenson (1909), 16 Idaho, 707, 102 Pac. 365, citing Rev. Codes, sec. 3056; Ada County Farmers' Irr. Co. v. Farmers' Canal Co., 5 Idaho, 793, 51 Pac. 990, 40 L. R. A. 485. See, also, Sowards v. Meagher (Utah, 1910), 108 Pac. 1113; Pool v. Utah etc. Co., 36 Utah, 508, 105 Pac. 289; Whalon v. North Platte etc. Co., 11 Wyo. 313, 71 Pac. 995.

Compare *supra*, sec. 376, under the original method; and *infra*, sec. 433 et seq., under the Federal Right of Way Acts.

[3] Speer v. Stephenson, *supra*.

[4] Speer v. Stephenson, *supra*; Whalon v. North Platte etc. Co., 11 Wyo. 313, 71 Pac. 995. See, also, Utah Comp. Laws 1907, sec. 1288x17, amended by Laws 1909, c. 62, p. 84.

[5] Great Plains etc. Co. v. Lamar etc. Co., 31 Colo. 96, 71 Pac. 1119; Lamar etc. Co. v. Amity etc. Co., 26 Colo. 370, 77 Am. St. Rep. 261, 58 Pac. 600; Mohl v. Lamar Canal Co., 128 Fed. 776.

of title, and cannot be held to be constructive notice of the existence of such ditch, if the statute under which the same was filed has been declared unconstitutional.[6]

A permit when issued is not conclusive of the holder's right, which is open to contest in court by any injured party as set forth in the preceding sections.[7]

(3d ed.)

§ 418. **Prosecution of the Work.**—In the States which do not require maps upon the filing of the application, duplicate maps must be filed with the State Engineer after its approval. In Colorado maps must be filed within sixty days after beginning work. In Texas, within ninety days. In Nebraska, Nevada and Utah, within six months after approval.

In all the States the work must be prosecuted with diligence; but certain limits are placed in some of them. Work must begin in Nebraska and Utah within six months after approval of application. In Wyoming it must begin within a time fixed by the State Engineer, not exceeding one year. In Idaho if the capacity of the proposed works is less than twenty-five cubic feet per second, work must begin within sixty days; if over that capacity, a bond must be filed within sixty days in an amount fixed by the State Engineer not exceeding $10,000.[8] The

[6] Blake v. Boye, 38 Colo. 55, 88 Pac. 470, 8 L. R. A., N. S., 418.

[7] The former State Engineer of Wyoming, Mr. Clarence T. Johnston, a pioneer in this field, says in a letter to the author: "The permit when issued is simply a privilege given by the public, which owns the water, to someone who proposes to make a beneficial use thereof. A permit protects a party while construction is in progress and while the lands are being reclaimed. If the party holding the permit fails to comply with its provisions, it is canceled. If work is carried on under the provisions of the permit, the division superintendent makes an inspection, takes the testimony of the water-user under the permit and submits the same to the State Board of Control, which issues the final certificate of appropriation." In Wyoming during 1905 and 1906, 346 enlargement permits were issued. These describe 462,206.74 acres of land and provide for 1,496.31 miles of main canal and ditches. The total estimated cost is $5,012,549. During the two years ended September 30, 1906, 1127 permits were issued for new ditches. These permits describe a total of 1,315,011.87 acres of land to be reclaimed and provide for 2,083.16 miles of main canals and ditches. The total estimated cost of construction is $4,427,275.40. "Three hundred and forty-three reservoir permits have been issued during the same period. Only 575 reservoir permits had been issued in the fourteen years preceding during which the law has been in operation."

[8] Stats. 1903, p. 223, secs. 2, 3, as amended 1905, p. 357; Rev. Codes, sec. 3254, as amd. by Stats. 1911, c. 64, (House Bill 123). "The provision for filing bond conditioned on completion of the work was enacted in 1905, and there has been little opportunity to observe its workings. Its natural result will be to prevent

work must be completed, in Idaho, North Dakota, Oklahoma, South Dakota, Utah, and Wyoming within five years, but the State Engineer may name a shorter time, while in Nevada it must be completed in the time requested in the application, though the State Engineer may name a shorter time. In Idaho, North Dakota, Oklahoma, South Dakota and Utah there is a further provision that one-fifth of the work must be done in one-half the time allowed, and the State Engineers of some of the other States[9] specify the same requirement in the absence of statute upon the point. In Nevada an affidavit must be filed with the State Engineer within thirty days after the time required by such permit for the commencement of work thereunder, stating the time when, the place where, and the amount of such work which has been done under said permit.[10]

Proof of completion of the work must be made. In Idaho and Utah, for example, there are special methods for making this proof. In the former it must be filed with the State Engineer on a form provided by him, and, if the works exceed a capacity of fifty cubic feet per second, must be certified to by some competent and well-known irrigation engineer. This is published for four weeks in a newspaper. The State Engineer then makes an examination of the works and files a report. If all is satisfactory he issues a certificate of completion. In Utah, a sworn statement and proof must be filed with the State Engineer on a form provided by him, subscribed by two witnesses, and accompanied by maps also certified. In most of the States the method of making proof of completion is left to the discretion of the State Engineer or Board of Irrigation.

On proof of completion, a certificate is issued which is final, with the exception of four States and Territories,[11] where the final certificate is not issued until actual application of the water to a beneficial use, and Colorado, where the first certificate (issued on original application to appropriate) ends the appropriator's connection with the office of the State Engineer. The appropriator must pay specified fees.

filings for the purpose of blocking some other enterprise or for the purpose of selling worthless 'rights' based only on a permit from the engineer." Bulletin 168, U. S. Dept. Agric.

[9] See statutes and forms in Part IX, below.

[10] Nev. Stats. 1909, p. 31.

[11] Idaho, North Dakota, Oklahoma, and South Dakota.

It is enacted in Idaho that one who fails to be on time with the work, proofs, etc., "shall be deemed to have abandoned all right under his permit." [11a]

The statutes which stop at completion of work regard actual use as not entering into making the appropriation, but as matter subsequent, nonuse operating by way of abandonment or forfeiture, in accordance with the possessory theory of the law of appropriation.[12]

References to the statutes are given in Part VIII of this book.

(3d ed.)

§ 419. Cancellation of Permits for Failure of Work.—The statutes usually give the State Engineer power to cancel permits for failure to comply with the above conditions regarding prosecution of work. Some rulings in that regard have been made by the courts.[13] It has been held that if the State Engineer revokes a permit for failure of one-fifth of work, and an appeal is taken from him to the State court, the case is not really an appeal but becomes a judicial suit, and is removable to the Federal courts.[14] In Idaho it is held that the effect given by the statute to the action of the State Engineer in canceling or refusing to cancel a permit is that such action is thereby fixed as a time from which the statute of limitations begins to run against a suit in the district court, or against an appeal; but that it does not prevent such action entirely, the court saying that: "Hearing the contest and canceling the permit are pure matters of administration. He is in no way authorized to decide or determine what rights, if any, the permit holder has acquired under the permit, or by virtue of any acts taken in connection with the construction of the works authorized by the permit, or the diversion or appropriation of water in connection therewith." [15]

In Utah it is held that the State Engineer may extend the time for completion of work as often as he sees fit, and under such

[11a] Idaho Rev. Codes, sec. 3254, as amd. by Stats. 1911, c. 64 (House Bill 123).

[12] See *supra*, sec. 139.

[13] See, generally, Trade Dollar Co. v. Fraser, 148 Fed. 587, 79 C. C. A. 37; Waha Co. v. Lewiston Co., 158 Fed. 137; Lockwood v. Freeman, 15 Idaho, 395, 98 Pac. 295; City of Pocatello v. Boss, 15 Idaho, 1, 96 Pac. 120; Speer v. Stephenson, 16 Idaho, 707, 102 Pac. 365; Idaho Co. v. Stephenson, 16 Idaho, 418, 101 Pac. 821; Pool v. Utah Co., 36 Utah, 508, 105 Pac. 289; Sowards v. Meagher (Utah), 108 Pac. 1113; Vanderwork v. Hewes (N. M.), 110 Pac. 567.

[14] Waha Co. v. Lewiston Co. (Idaho), 158 Fed. 137.

[15] Speer v. Stephenson, 16 Idaho, 707, 102 Pac. 365.

conditions as he may require, up to the maximum time limit fixed by the statute. Short of such maximum, he may regard any time fixed by him for the work as provisional only.[16] In this case the State Engineer granted a permit to appropriate water for power, and fixed a time for completion, and then, before that time expired, granted a second permit to another for the same purpose and stream. The former, though working diligently, did not finish within the time stated and inadvertently failed, when the time expired, to apply for an extension, but secured one from the State Engineer soon after, and worked thence diligently to actual completion of the work, investing large capital. It was held that the former prevailed; that as the statute did not expressly make time work a forfeiture, the State Engineer had power by extension of time to save the first claimant's rights against the second applicant, though the extension was granted after the original time limit had expired. In effect, this is a holding that the right on completion relates back (as to priority against other claimants) to the date of application, if the work is done diligently, and if the State Engineer, in his discretion, does not declare the contrary; that, in the absence of positive action by the State Engineer to the contrary, the old law as to relating back to commencement of work applies.[17] Since this decision the Utah statutes were amended to provide that cancellation can be made only after an order to show cause and a hearing.[18]

(3d ed.)

§ 420. **Issuance of Certificate of Appropriation.**—The final stage in making the appropriation is the issuance of a certificate of appropriation. These certificates are numbered consecutively according to the date of original application for a permit, thus preserving the doctrine of relation, which was one of the chief

16 Questioning, however, whether, after the cessation of work amounts to an abandonment, the State Engineer could extend the time as against an intervening applicant for the same water.

17 Pool v. Utah etc. Co. (Utah, 1909), 105 Pac. 289. See, also, Sowards v. Meagher (Utah, 1910), 108 Pac. 1113.

18 Sixty days' notice must be given, and the State Engineer must extend the time if delay was caused by operation of law, and has discretion to extend it in other cases also to a total of not exceeding fourteen years from approval of application; or he may declare a forfeiture. Within sixty days after his decision any party may bring suit to have the matter tried in court. Utah Laws 1911, c. 3, p. 2, amending Comp. Laws of 1907, sec. 1288x14. See, also, Stats. 1911, c. 103, p. 143, and Stats. 1909, c. 68, p. 84. See, also, Idaho Stats. 1909, p. 300, sec. 223.

features of the law of appropriation as it originally arose in California.

Upon the proof of completion of work the State Engineer issues a certificate to the appropriator under his seal stating details varying in different States. A record of this is made in his office. The appropriator is required to record this with the recorder or county clerk of the county in which the water is diverted, and, in a few of these States, with the head of the water subdivisions in which the stream lies.

In Colorado, the approval of the original application constitutes the only certificate issued.[19] On the other hand, in Idaho, North Dakota, Oklahoma, and South Dakota, there is one further step that must be gone through before the final certificate is issued. Within a fixed time after the issuance of the certificate of completion of work, there must be filed with the State Engineer a sworn notice of actual application and use of the water. This notice must be subscribed by two witnesses. The State Engineer must then make an examination of the use to which the water is put. Protests may be filed with the State Engineer by other parties. If all is satisfactory, the State Engineer issues a final certificate, or, as it is in these States called, a license, bearing the number and date of the original application for permit, and it is filed and put on record as in the other States.[20]

In Oregon, certificates issued for rights to the use of water for power development acquired under the provisions of this act shall limit the right or franchise to a period of forty years from date of application, subject to a preference right of renewal.[21]

(3d ed.)

§ 421. Date of Right.—The doctrine of "relation," as it arose under the original method of appropriating water, is preserved by making the right date from the filing, with the State Engineer, of the application to appropriate.[22] This is evidenced by num-

[19] 3 M. A. S., 1905 ed., secs. 2265a, 2265h.

[20] See statutes in Part VIII, below.

[21] Or. Stats. 1909, c. 216, sec. 53.

[22] For example (the list is not complete):

Idaho.—Stats. 1903, p. 223, sec. 8; Stats. 1907, p. 314.

Nebraska.—Comp. Stats. 1903, sec. 6439; Cobbey's Ann. Stats., sec. 6785; Laws 1895, c. 69, p. 254, sec. 31.

Nevada.—Stats. 1907, p. 30, sec. 29.

North Dakota.—Stats. 1905, p. 274, secs. 1, 2, 10.

Oregon.—Stats. 1909, c. 216, sec. 54.

South Dakota.—Stats. 1905, p. 201, secs. 2, 20.

Utah.—Stats. 1905, c. 108, sec. 46, and subsequent statutes.

Wyoming.—Rev. Stats., sec. 929.

bering all certificates consecutively. One holding a permit will, by relation back, prevail over another who commenced work earlier without a permit.[23]

In Idaho, on enlargement or on a grant of extra time, priority dates from the application for permission to make such enlargement or to have such extra time.[24]

The formality attending appropriation under these statutes is not unlikely to somewhat hinder any but large enterprises, and tend somewhat to prevent small appropriators from acquiring rights. Evidently it is intended that large companies shall be formed to supply consumers, rather than that consumers should supply themselves directly, as heretofore.[25]

(3d ed.)

§ 422. California Water-power Act of 1911.—In 1911 California adopted a statute applying the Wyoming system to water-power appropriations.[1]

A Board of Control is created of five members (with the governor and the State Engineer as ex-officio members), until a public service commission is created, after which the latter is to act. and the Board of Control shall cease to exist (section 20). Reference should also be made to other 1911 California statutes, creating a department of engineering,[2] a conservation commission,[3] and proposing a constitutional amendment to create a State public service commission.[4]

Before commencing (or enlarging) work to develop power, one must apply to the board for a permit (section 6), stating details prescribed in section 7, with maps and other data prescribed by the board. A copy of the application must, within ten days after filing, be also recorded in the office of the recorder of the county where the proposed works are to be erected (section 7). The board may return the application to be corrected, and priority is retained if the application is returned to the applicant within thirty days. The board may reject the project within six months, if it

23 Whalon v. North Platte etc. Co., 11 Wyo. 313, 71 Pac. 995.

24 Stats. 1903, p. 223, secs. 5, 8; but see Stats. 1907, p. 314, and Rev. Codes, sec. 3254 as amd. by Stats. 1911, c. 64 (House Bill 123).

25 "The present law is destined to be a great aid in the construction of extensive canals." Bulletin 168, U. S. Dept. Agric.

1 Stats. 1911, c. 406. See, also, *Ibid.*, c. 407, amending Civ. Code, sec. 1410; and *Ibid.*, c. 730, amending Civ. Code, sec. 1416.

2 Cal. Stats. 1911, c. 409.

3 Cal. Stats. 1911, c. 408.

4 Cal. Stats. 1911, Senate Amendments, c. 60.

deems that public interest so demands. Approval or rejection is indorsed upon the application and it is returned to the applicant.

If approved, he is to record it in the office of the county recorder where the works lie, and may then proceed (section 9). Work must begin within six (6) months from approval and be prosecuted with diligence, or the board may revoke its approval. The work must be completed in a time fixed in the permit, not exceeding five years, unless, for cause, the board extends the time not over one (1) year more (section 10). Upon completion, if satisfactory to the board, it issues a license for a term not over twenty-five years, the contents of the license being specified in section 13. Renewal may be applied for in the next to last year before expiration, and is to be granted for another term of not over twenty-five years, under such laws as may then be in force.

The amount of water granted is limited by actual use (section 8), and by capacity of works (section 16). The water-right does not vest until final permit (section 9). Licenses are to be numbered consecutively as to each stream or other source, according to date of filing application (section 12).

Licenses are subject to fees and charges, viz., ten ($10) dollars upon filing application, and one hundred ($100) dollars upon receiving a license; and thereafter annually ten (10) cents per theoretical horse-power in excess of one hundred (100) horse-power. These charges can be increased or decreased by the board at any time (section 18). Annual reports must be made to the Board of Control (section 26). Section 28 contains an anti-trust clause similar to that in Federal permits below set forth. Violations of this act, or of the board's orders, is a crime (section 29).

From the operation of the act are excepted municipal corporations, irrigation districts generating electricity for use within the district, and lighting districts (section 30). Nor shall the act impair existing rights (section 14).

Another act of the same year prohibits extraction of minerals from waters without obtaining a State permit, but does not provide any method for obtaining a permit.[5]

These acts are printed in full in the collection of statutes in Part VIII, below. Reference should also be made to the Forest Service requirements in the next chapter.

[5] Cal. Stats. 1911, c. 454. A method for mineral waters on State lands is provided in Stats. 1911, c. 612.

(3d ed.)

§ 423. Federal Requirements.—The preceding rules are complete in themselves, and if on public land, the right thus acquired under local law is secured to the appropriator, so far as Federal legislation is concerned, by the act of 1866, now sections 2339, 2340, Revised Statutes of the United States. But the Federal departments are building a new system based upon rights of way, in numerous matters affecting the foregoing, especially within the forest reserves, as considered in the next chapter.

§§ *424–429. (Blank numbers.)*

CHAPTER 19.

HOW AN APPROPRIATION IS MADE—NEW FEDERAL SYSTEM.

§ 430. Introductory.

A. RULES OF THE FOREST SERVICE FOR RIGHTS OF WAY, ETC.

§ 431. Rules for rights of way, etc.
§ 432. Revocable Forest Service permits.

B. FEDERAL RIGHT OF WAY ACTS.

§ 433. Appropriations under the Federal Right of Way Acts.
§ 434. Nature of rights acquired under the Right of Way Acts.
§ 435. The doctrine of relation.
§ 436. Bonds, stipulations and royalties.
§ 437. Forfeiture.
§ 438. Conflicts with settlers.
§ 438a. Water-power regulations of 1911 of the Forest Service.

C. RELATION OF THE NEW FEDERAL SYSTEM TO THE ACT OF 1866 AND LOCAL LAW.

§ 439. Upon reserved land.
§ 440. Upon unreserved land.
§ 441. Recent tendency away from the act of 1866.
§ 442. Conclusion.
§§ 443–451. (Blank numbers.)

(3d ed.)

§ 430. The foregoing systems of local law are based (at least so far as they involve rights of way) upon the act of Congress of 1866.[1] But the Forest Service considers that the act of 1866 and local law do not govern within the forest reserves, which now cover much of the Western area containing streams. The forest system of control over access to the streams,[2] through rights of way and reservoir sites, is affecting the foregoing local method of acquiring rights upon reserved public land and substituting the following Federal system, which is gradually being extended also to unreserved public land. We here consider the rules now being worked out by the Forest Service and General Land Office.

The departments regard this system as applying to changing old works as well as to building new ones.

[1] U. S. Rev. Stats., secs. 2339, 2340. [2] *Supra*, secs. 54, 225.

government should no longer allow fee simple rights if it can be avoided.[6]

It had been contended that the Forest Service requirements were laws rather than regulations, and exceeded the power conferred by Congress, or that Congress could confer; that if regulations, the Constitution[6a] requires them to be made by Congress itself, and that if laws, Congress cannot delegate its law-making power to executive officers. The rules were held valid for civil purposes in a number of cases,[6b] and also sustained in criminal prosecutions in a number of cases,[6c] while some other cases held them invalid upon the grounds stated.[7] Their validity has now been established by the supreme court of the United States in two rulings just handed down.[8]

B. FEDERAL RIGHT OF WAY ACTS.

(3d ed.)

§ 433. Applications Under the Federal Right of Way Acts.—The foregoing general revocable permit system has been built upon the clause in the act of 1897, above quoted, for making rules and regulations to preserve the reservations. There are also acts of Congress specifically applying to rights of way and reservoir sites within reserved land; chiefly the acts of March 3, 1891, February 15, 1901, and February 1, 1905, and March 4, 1911. These, and others, are quoted below.[9] A considerable body of regulations has been adopted by the departments, and for further details the reader should make application to the Forest Service for the "Use Book" and to the Land Office for "Regulations Concerning Rights of Way." There is little to be found in the statutes or decisions. All that the writer has been able to discover of such nature is collected in the following sections.

6 "I do not believe that a single acre of our public lands should hereafter pass into private ownership except for the single purpose of homestead settlement." Speech of Theodore Roosevelt, at Denver, Colo., Aug. 29, 1910.

6a Article 4, sec. 3.

6b Dastervignes v. United States, 122 Fed. 30, 58 C. C. A. 346; United States v. Dastervignes, 118 Fed. 199; United States v. Shannon, 151 Fed. 863; Same v. Same, 160 Fed. 870. See, also, 38 Land Dec. 67.

6c United States v. Deguirro, 152 Fed. 568; United States v. Domingo, 152 Fed. 566; United States v. Bale, 156 Fed. 687; United States v. Rizzinelli, 182 Fed. 675.

7 United States v. Blasingame, 116 Fed. 654; United States v. Matthews, 146 Fed. 306; Dent v. United States, 8 Ariz. 138, 71 Pac. 920; United States v. Grimaud, 170 Fed. 205.

8 Grimaud v. United States, 31 Sup. Ct. Rep. 480 (May. 1, 1911); Light v. United States, 31 Sup. Ct. Rep. 485 (May 1, 1911). Upon first argument the court had been divided and no decision had been reached. United States v. India, 216 U. S. 614, 30 Sup. Ct. Rep. 576, 54 L. Ed. 639.

9 *Infra*, sec. 1428, Federal statutes.

Under these acts, the appropriator must comply with the State law for acquiring water-rights[10] (how far he must comply with State law regarding rights of way is considered below), and further, must file with the Secretary of Interior a copy of its articles of incorporation (if a corporation), and also maps and statements describing the proposed right of way, and these must be approved by the Secretary of the Interior, who will hear protests from other parties before giving his approval. (Upon reserved land, he must file also with the chief of the reserved department, as hereafter considered.) Maps may be received of canals already constructed at the time of the passage of the act, as well as new canals.[11] If an application is made under the wrong act, it may be considered under such act as it might properly come under.[12] The acts do not apply to Alaska.[13] The Secretary of the Interior has ruled that he may make withdrawals of land from operation of the Right of Way Act of March 3, 1891.[14]

Upon unsurveyed land, the supreme court of New Mexico has held that the act of March 3, 1891, does not require filings, nor approval by officials, and a right vests upon completion of work (as under the act of 1866); filings being sufficiently timely if

[10] "While these acts grant rights of way over the public lands necessary to the maintenance and use of ditches, canals and reservoirs, the control of the flow and use of the water is, so far as this act is concerned, vested in the States or Territories, the jurisdiction of the Department of the Interior being limited to the approval of maps carrying the right of way over the public lands. If the right of way applied for under this act in any wise involves the appropriation of natural sources of water supply, the damming of rivers, or the use of lakes, the maps should be accompanied by proof that the plans and purposes of the projectors have been regularly submitted and approved in accordance with the local laws or customs governing the use of water in the State or Territory in which such right of way is located. No general rule can be adopted in regard to this matter. Each case must rest upon the showing filed." Circular of Land Office Regarding Rights of Way, approved June 6, 1908.

Reg. L. 5 of the new "Forest Service Water Power Use Book" says: "Occupancy and use of national forest lands is the sole privilege granted under a water-power permit. In the issuance of such permits no attempt will be made to adjudicate water-rights since water-rights are acquired under State laws and adjudicated by the courts. Therefore, no protests against the granting of an application, if based upon alleged lack of water-rights, will be considered; nor, in general, will any allegation that the time of beginning or completion of construction has been, or is delayed by litigation over water-rights be accepted as a sufficient reason for granting any extensions of time."

[11] 15 Land Dec. 578.

[12] Northern Cal. Power Co., 37 Land Dec. 80; Inyo Consol. W. Co., 37 Land Dec. 78. Applications cannot be filed until the survey is completed. Anderson v. Spencer, 38 Land Dec. 338.

[13] 26 Land Dec. 305; 35 Land Dec. 297.

[14] 39 Land Dec. 105.

made within twelve months after the government has surveyed the land.[15]

In the year 1909–10, reports on applications for rights of way over public domain for reservoirs, canals, ditches, etc., were rendered on two hundred and twenty-nine applications, forty-one of which were adverse and one hundred and eighty-eight were favorable.[15a]

(3d ed.)

§ 434. **Nature of the Right Acquired Under the Right of Way Acts.**—Under the act of 1891 for irrigation, the estate acquired is a vested easement or base fee during beneficial use.[16] Only irrigation companies were within the terms of the act of 1891,[17] and the Secretary of the Interior refused to approve filings of companies seeking to build canals for electric lighting, water power,[18] or city water supply,[19] or floating lumber,[20] or domestic, manufacturing or hydraulic purposes.[21] By the act of May 11, 1898, irrigation companies are permitted to make filings though they also proposed other subsidiary uses, if the subsidiary uses

15 United States v. Lee (N. M.), 110 Pac. 607.

15a Report of 1910 of Commissioner of the General Land Office, p. 9.

16 38 Land Dec. 211; 38 Land Dec. 493; 37 Land Dec. 6; Whitmore v. Pleasant Valley Co., 27 Utah, 284, 75 Pac. 748; Nippel v. Forker, 9 Colo. App. 106, 47 Pac. 766; Same v. Same, 26 Colo. 74, 56 Pac. 577; United States v. Whitney (Idaho), 176 Fed. 593; Rasmussen v. Blust (1909), 85 Neb. 198, 133 Am. St. Rep. 650, 122 N. W. 862; United States v. Lee (N. M.), 110 Pac. 607.

"The right granted is not in the nature of a grant of lands, but is a base or qualified fee. The possession and right of use of the lands are given for the purposes contemplated by law, but a reversionary interest remains in the United States, to be conveyed by it to the person to whom the land may be patented, whose rights will be subject to those of the grantee of the right of way." Regulations of June 6, 1908, pp. 4, 5.

"The act of March 3, 1891, is general and permanent in its character, and operates continuously to convey the title to public lands to all persons complying with its provisions." United States v. Whitney (Idaho), 176 Fed. 593, saying the act is in this similar to the Railway Right of Way Act of March 3, 1875, and citing cases. A similar comparison to the Railway Act is made in United States v. Lee (N. M.), 110 Pac. 607; De Weese v. Henry Inv. Co., 39 Land Dec. 27. See, as to the Railway Act, Rio Grande etc. Co. v. Stringham (Utah), 110 Pac. 868, holding that on approval by the Secretary of the Interior of the profile of a proposed railroad through public lands in accordance with act of March 3, 1875, the title to the right of way vested in the railroad company, and a subsequent patent of land including the right of way, though not made subject thereto, did not devest the title so acquired. See, also, Minidoka Co. v. Weymouth (Idaho), 113 Pac. 455.

17 32 Land Dec. 452.

18 18 Land Dec. 573.

19 20 Land Dec. 154, 464.

20 21 Land Dec. 63.

21 25 Land Dec. 344.

are of a public nature,[22] but the original application must still be primarily for irrigation.[23]

Under the act of 1905 for municipal or mining purposes the estate acquired is also a vested easement or base fee, like the act of 1891.[24] But it was ruled by the departments that only irrigation, municipal and mining purposes are covered by the foregoing acts, and that vested rights could be acquired for no other purpose. Other purposes (of which "commercial power purposes" is the most important) were considered only under the act of 1901.[25]

Under the act of 1901, the right acquired is considered to give only a permit revocable at will by the forester or other department head,[1] and probably revoked by subsequent homestead, mining or other title to the fee.[2] The revocable character of the estate under the act of 1901 is illustrated by revocations under

[22] 32 Land Dec. 462; 35 Land Dec. 154.

[23] 32 Land Dec. 462.

[24] Circular of Land Office, *infra;* Use Book of Forest Service for 1908, pp. 67, 68; see, also, 37 Land Dec. 80, saying it is unnecessary there to decide.

"The right granted is not in the nature of a grant of lands, but as a base or qualified fee, giving the possession and right of use of the land for the purposes contemplated by the act, during the period of beneficial use. When the use ceases, the right terminates, and thereupon proper steps will be taken to revoke the grant. No right whatever is given to take any material, earth or stone for construction or other purposes, nor is any right given to use any land outside of what is actually necessary for the construction and maintenance of the works." Regulations concerning rights of way; approved June 6, 1908, sec. 48, under A. C. February 1, 1905 (33 Stat. 628).

[25] The act of May 11, 1898, amending the act of 1891, is ambiguous regarding how far irrigation rights may be used for other purposes of a public nature, and the departments rule that commercial power companies come only under the act of February 15, 1901, and not under either 1891 or 1905, even though they propose to furnish power to irrigators who pump water for irrigation (Kern River Co., 38 Land Dec. 302). To come under the act of 1891 or 1905 the power use must be only incidental, and not the main object of the enterprise (Inyo Consolidated Water Co., 37 Land Dec. 78; Northern Cal. Power Co., 37 Land Dec. 80; Kern River Co., 38 Land Dec. 302).

[1] *Ibid.*, and 31 Land Dec. 13; 32 Land Dec. 461.

Before the Senate Committee on Public Lands, February 16, 1910, Mr. Garfield spoke of this act of 1901, and said: "The amendments which we suggest clear away the difficulty that has arisen in administering that act, by authorizing a lease good for fifty years, instead of a revocable permit, which is the only kind of permit that can be issued under the law as it stands to-day."

[2] There is some contention that it is discretionary with the departments to bring all uses under the revocable permit system of 1901 and that the act of 1891 be declared repealed by that of 1901, thereby making irrigation rights of way revocable, and bringing irrigation under Federal instead of State control. The supreme court of New Mexico held that the act of March 3, 1891, is not repealed by the act of 1901. United States v. Lee (N. M.), 110 Pac. 607. See 39 Land Dec. 105.

Secretary Garfield.[3] By an act approved March 4, 1911, the department head is authorized to grant a fifty year *easement* for power development. (This act may be availed of by persons previously holding revocable permits, as well as new projects.)

(3d ed.)

§ 435. **The Doctrine of Relation.**—Under the acts granting easements, it is not yet settled at what point of time vesting of the right occurs.

Against the United States, upon unsurveyed land, it has been held that the right vests upon completion of work, filings being unnecessary until twelve months after government survey is made, whereupon approval of the Secretary is simply confirmation of existing right.[4] But the United States may withdraw the land under withdrawal act of Congress any time before completion; that is, the right does not relate back to beginning of work as against the United States; the doctrine of relation does not apply against the United States so as to prevent withdrawing the land before completion, for the Reclamation Service[5] or for a national park.[6]

Upon surveyed land, or between rival private parties, until approval, the filings give no vested right.[7] But the general view seems to be that the right vests when there is an approval.[8] It has been said to vest upon approval even before beginning work;[9]

[3] The following is the statement appearing in 192 North American Review, 495, in an article criticising the action:

". . . . Two days before Mr. Garfield was to go out of office, there was issued a list of what is called the 'Decisions of March 2, 1909,' by which 'Permits issued by the Secretary of the Interior under act of February 15, 1901,' were revoked. This list covers forty different plants. The names of these plants are withheld, because it would only serve to complicate titles, but it is worth while to know that these revocations were issued without advising with, or granting any hearing whatsoever to, the representatives of any of the water-power companies. Some of the plants had been completed and were in operation, and upon others hundreds of thousands of dollars had been expended."

[4] United States v. Lee (N. M.), 110 Pac. 607.

[5] United States v. Rickey, 164 Fed. 496, permitting such withdrawal before completion of work though after approval of application.

[6] Sierra D. & W. Co., 38 Land Dec. 547, permitting such withdrawal while application was pending but before approval of application.

[7] De Weese v. Henry Inv. Co., 39 Land Dec. 27.

[8] Authorities cited *supra* with regard to the nature of the estate, and *infra* as to the necessity for action to declare a forfeiture. But see 37 Land Dec. 6, to the effect that approval under the act of 1891 gives no right where work was never begun thereunder.

[9] Rasmussen v. Blust (1909), 85 Neb. 198, 133 Am. St. Rep. 650, 122 N. W. 862.

though it has also been held that the right does not vest until work has been actually completed.[10] The last ruling is more in line with the previous local laws, which held the right to vest upon completion of work only, then relating back to posting of notice or filing of application with the State Engineer;[11] but rulings of the land office and the authorities generally are to the effect that the estate vests upon approval of the application, subject only to action in court to declare a forfeiture for failing to complete the work within the time allowed.[12]

Between rival claimants, the first in activity, and not the first in making filings, is first in right to the Secretary of the Interior's approval.[13] When vested, it dates, to determine priority between rival claimants, from the beginning of the survey, and not from filing application in the land office.[14]

The grant under the act of 1891 includes a width up to fifty feet (only so much as is necessary) on each side of the center line of the canal. It also includes the right to use adjacent materials (timber, stone, etc.) in constructing the canal, but this applies only to the original construction, and not to additions or repairs.[15] What is "adjacent" depends upon the facts of each case.[16] The approval of filings under the act of 1891 gives no exclusive right to a canyon or defile, and a right of way may also be granted, if practicable, to other parties.[17]

(3d ed.)

§ 436. **Bonds, Stipulations and Royalties.**—The Forest Service at present does not charge for "special use permits" for irrigation, mining, municipal or sawmill uses, but this does not necessarily indicate no charge hereafter. In any event, it charges all persons for wood cut in clearing, etc.

In case of large enterprises for any purpose, bonds and stipulations are required, a copy thereof being printed below in the

[10] United States v. Rickey, 164 Fed. 496, and see 37 Land Dec. 6.

[11] *Supra*, secs. 393 et seq., 421.

[12] *Infra*, sec. 437.

[13] De Weese v. Henry Inv. Co., 39 Land Dec. 27.

[14] It was ruled that, under the acts of 1891 and 1901, priority for the right of way relates back to the beginning of the survey, if work was diligently done and application in the land office diligently made, and will prevail over a rival applicant beginning a survey three days later but getting his application first on file in the land office. Anderson v. Spencer, 38 Land Dec. 338. See, also, United States v. Lee (N. M.), 110 Pac. 607.

[15] 34 Land Dec. 213; 14 Land Dec. 566.

[16] 28 Land Dec. 439.

[17] 35 Land Dec. 637.

part of this book relating to forms. The power to do this is deduced from the discretion to refuse entirely. If the permit or easement may be entirely refused, it is ruled that it may be granted upon any condition.[18] The bonds cover payment for timber cut or injured;[19] and, in the case of power companies, royalties to the United States and (it was proposed) stipulations as to rates to be charged, and for control of the power plant by the forest officer.[20] An elaborate set of stipulations was made in the revocable permit to San Francisco for a municipal water plant.[21] In the case of railways over power sites, a ruling formerly required a stipulation to move the tracks when required to do so by the Federal department; but the present ruling is that either the railway permit will be granted absolutely, or the land will be withdrawn absolutely for conservation.[22]

These requirements are, as yet, based upon the general statutes giving the officials discretion to make rules and regulations or to refuse permits. They are not, as yet, contained in more specific statutory form. It is contended, on the authority of United States v. Gratiot,[23] that Congress may enact them specifically, and further may provide a general leasing system for disposal of the public lands. These requirements are as yet further confined mostly to the forest domain. In national parks one Secretary of Interior ruled that no rights of any kind would be granted to private enterprises.[24] The previous secretary had granted a permit through Yosemite Park to a city for water supply,[1] but its revocation remains under consideration. In a previous case, however, rights had been granted in the Sequoia National Park, and a charge by way of royalty was imposed of two and one-half per cent of the gross receipts; and in the Coeur D'Alene Indian Reservation the Interior Department imposed a royalty charge.[2]

Further consideration is given in a following section.[3]

18 United States v. Bailey (S. D.), 178 Fed. 302.

19 *Ibid.*

20 See 26 Op. Atty. Gen. 421, where Attorney General Bonaparte advised in favor of the power to make these stipulations. Stipulations as to rates to be charged seem to be omitted in the new form below considered.

21 City of San Francisco, 36 Land Dec. 409.

22 39 Land Dec. 86, 89, 209. See, also, 36 Land Dec. 482, as to United States Reclamation Service ditch over railway located since 1890, which department ruling is disapproved in Minidoka Co. v. Weymouth (Idaho), 113 Pac. 455.

23 14 Pet. 526, 10 L. Ed. 573.

24 Secretary Ballinger in Sierra D. & W. Co., 38 Land Dec. 547.

1 Mr. Garfield in City of San Francisco, 36 Land Dec. 409.

2 Mr. Garfield before the Senate Committee on Public Lands, February 16, 1910.

3 *Infra*, sec. 438a.

So far as these Federal contracts control service to the public of a State, reference is made to a later chapter.[4]

(3d ed.)

§ 437. **Forfeiture.**—Under the act of 1891, applying to irrigation, the work must be completed within five years;[5] under the act of 1897, applying to livestock reservoirs, the work must be completed within two years.[6] Under the act of March 4, 1911, for power, the period is two years. If not completed on time, the Interior Department cannot extend the time to the disadvantage of an intervening adverse claim;[7] nor, on the other hand, can the Interior Department itself declare a forfeiture, since it is ruled that, by approval by application, a vested right has passed, and the Interior Department loses jurisdiction, nor can the Interior Department treat it as null and approve another person's application for the same reservoir site; but the Interior Department will have suit brought in court to declare the forfeiture.[8] The same is ruled where application has been approved by mistake.[9] The suit may be brought by the attorney general of the United States[10] without special act of Congress so instructing, and without the necessity for an act expressly declaring the forfeiture by congressional action.[11] Between private parties, perhaps, the privileges will be held forfeited in a State court in a suit between

[4] *Infra*, secs. 1260 et seq., 1323.

[5] A. C. March 3, 1891, sec. 20.

[6] A. C. February 13, 1897, 29 Stat. 484; 38 Land Dec. 175.

[7] 38 Land Dec. 175, under the livestock act. See, also, Anderson v. Spencer, 38 Land Dec. 338, under the acts of 1891 and 1905.

[8] 38 Land Dec. 211; 38 Land Dec. 493. "Twenty-seven civil suits were recommended for the setting aside of grants of rights of way over the public domain for reservoirs, canals, ditches, etc. Investigations are now in progress, involving all such grants heretofore approved for such purposes, with a view of bringing civil action against all grantees where the evidence shows misuse, nonconstruction, or abandonment of such privileges." Page 9 of Report for 1910 of Commissioner of General Land Office.

[9] Kern River Co., 38 Land Dec. 302.

[10] 33 Land Dec. 469; Rio Grande etc. Co. v. United States, 215 U. S. 266, 30 Sup. Ct. Rep. 97, 54 L. Ed. 190.

[11] United States v. Whitney (Idaho), 176 Fed. 593, saying: "This requirement being in the nature of a condition subsequent, the rule undoubtedly is that failure to comply therewith does not operate *ipso facto* to devest the grantee of the title and reinvest the grantor therewith, but that to be effectual, the default must be followed with a declaration of forfeiture by some competent authority, and, the grant here being of a public nature, such declaration can be made only by an act of Congress, or in an appropriate judicial proceeding," and holding congressional action not necessary.

There seems some inconsistency between the above authorities and the ruling in United States v. Rickey, 164 Fed. 496, holding that until the work is completed the right falls *ipso facto* if the land is withdrawn for the Reclamation Service.

private parties without any special action to declare the forfeiture where the claimant has also lost his water appropriation according to State law;[12] that is, these special privileges probably fall with the ordinary rights when the latter fall under local law. But it is recently held that a private party cannot raise the question.[13]

(3d ed.)

§ 438. Conflicts With Settlers.—Questions arising out of conflicts with settlers have been already considered.[14]

(3d ed.)

§ 438a. Water-power Regulations of 1911 of the Forest Service.—Since the foregoing was written the Forest Service has issued a Water Power Use Book for 1911.[15] As copies may be obtained upon application to the Forest Service, and as the forms prescribed therein are printed hereafter,[16] the present section endeavors to state the substance of the new requirements as briefly as possible.

Permits must be obtained. No application will be received for land within an existing project.[17]

"*Noncommercial*" works (operating one's own mines, one's own mills, one's own irrigation requiring power, temporary power in constructing permitted works, municipal plants, and other uses hereafter to be named as such by the Secretary of Agriculture)[18] will be granted permits on application to the district forester, and will not be charged for.[19] If under one thousand horse-power they must be accompanied by triplicate maps, field-notes, evidence of water-right, statements of amount of water available, of available power, etc.; but no contract stipulations are required.[20] If over one thousand horse-power, they must execute stipulations to pay for timber, protect the forests, etc.[21] "Water-power works of a semi-commercial nature will be regarded as commercial ex-

12 Baldridge etc. Co. v. Leon etc. Co., 20 Colo. App. 518, 80 Pac. 477.

13 "If the rights acquired by the Tarryall Company under the approval of its reservoir site were subject to forfeiture by its failure to construct the reservoir within the period of five years fixed by law, it, or its transferee, nevertheless, had the right of possession thereunder until such forfeiture is declared in a proper proceeding." O'Riley v. Noxon (Colo.), 113 Pac. 486.

14 *Supra*, secs. 258, 263.

15 Issued December 28, 1910.

16 *Infra*, sec. 1459.

17 Reg. L. 4.

18 Reg. L. 2.

19 Reg. L. 2.

20 Reg. L. 11 and L. 12.

21 Reg. L. 12.

cept in so far as a satisfactory showing of partial noncommercial use may be made to the district forester by the permittee." *Commercial* uses are defined as all other than above specified.[22]

Permits are to be issued as preliminary and final. The preliminary application and permit are covered by Reg. L. 9. The preliminary application must be filed with the district forester, consisting of an application in triplicate on Form 58;[23] a map (with negative or blue-prints) showing the entire project in detail, etc., with statements of available water, head, amount of power, and "*prima facie* evidence in triplicate, certified by the proper public officer, of the appropriation by the applicant or its predecessors of all the water which it is proposed to use in the operation of the works applied for." Statement is recommended to be obtained from the Reclamation Service that its projects will not be impaired.[24] "An application for a preliminary water-power permit filed with the district forester shall not be complete until the last map or paper required by this regulation shall have been filed in the form prescribed."[25] The preliminary application and permit are to cover the time while maps, plans and other data are being prepared for a final application, but give no right to begin actual construction work except in exceptional cases.[1]

[22] Reg. L. 2.

[23] *Infra*, sec. 1459.

[24] See, also, W. P. Use Bk., p. 69.

[25] In regard to issuing the preliminary permit: "Upon receiving the district engineer's report, the district forester will prepare five copies of permit on form 59. If the application is approved by the district forester and the district engineer they will initial the permit. The district forester will send the chief engineer a copy of the complete application, except the certificate of water appropriation, the original map on tracing linen, one copy of the district engineer's report, the original, and one copy of the permit, and the correspondence file.

"The chief engineer will examine all the papers received from the district forester, and if he approves the application, he will initial the original permit and return it with the original map on tracing linen and the correspondence file to the district forester. If he does not approve the application, he will return the original permit without initial and with a letter to the district forester explaining in detail his reasons for not approving.

"Upon the return of the permit from the chief engineer, if approved, the district forester will prepare a letter of transmittal (Form 861) in triplicate, stating the amount of the charge. The original will be sent to the applicant, and upon receipt of notice from the district fiscal agent that deposit has been made the district forester will forward to the forester one copy of the complete application, one copy of the report of the district engineer, the original, and one copy of the permit, and the correspondence file.

"When the original permit has been signed by the secretary, the forester will retain one copy of the permit and one print map of location and return all the other papers in the case to the district forester." W. P. Use Book (1911), pp. 65, 66.

[1] Reg. L. 1 and W. P. Use Bk. (1911), p. 62.

The final application and permit are covered by Reg. L. 10. Application must be filed with the district forester, consisting of an application in triplicate on a prescribed form; maps (with negative or two-print copies) with affidavits attached; maps for each project showing complete details (specified at length); separate maps for each reservoir; separate maps for each conduit with drawings of types used; separate maps for each power-house with types of generators; maps of transmission lines; field-notes in triplicate, verified; detailed estimates in triplicate of power output; of water appropriated, natural flow, storage, heads, etc.; evidence from public officer of water-right, with any transfers, etc.; articles of incorporation, etc.; and various other matters. "An application for final permit filed with the district forester shall not be complete until the last map or paper required by this regulation shall have been filed in the form prescribed."[2] A final application relates back to date of preliminary application.[3] Changes during construction require amended filings.[4] Extensions of time for beginning and completing construction require written approval of the Secretary of Agriculture, granted only for special and peculiar cause.[5] False certificates are visited with the penalty that the officials may refuse thereafter to receive papers executed by such person.[6] The officials shall watch the progress of the work.[7] If all require-

2 Reg. L. 10.

3 W. P. Use Bk. (1911), p. 67.

Upon final application it is directed, *inter alia:* "After the completion of the examination and the collection of the data, the district engineer will submit a report in triplicate to the district forester. The report will describe the project in detail, with its relation to other projects of the same or allied or competing companies; state whether the project comprehends a full development of the available power; describe the market for the power and the general market conditions in the district so far as such information is available, and the relation of the power development to other interests, particularly agricultural. The report should present detailed estimates of the amount of power that will probably be developed and the complete data upon which such estimates are based. The report should designate the several items necessary for filling the blanks of the stipulation and permit, a recommendation of the gross power capacity to be inserted in the stipulation, and such other recommendations as may seem desirable." W. P. Use Book (1911), p. 70.

4 Reg. L. 14. See, also, W. P. Use Bk. (1911), pp. 62–64, 68.

5 Reg. L. 15.

6 Reg. L. 17.

7 "In order that the district forester may know whether the terms of the stipulation and permit are being complied with, the supervisor should keep himself fully informed of the progress of the work. He shall immediately upon the date specified in the stipulation upon which construction should begin make an examination and report to the district forester whether the construction has begun. The supervisor should ascer-

ments are complied with, priority dates from filing the last paper going to make up the preliminary application.[8] Water-right questions are declared outside the forestry jurisdiction, and will not be considered in issuing permits.[9]

Upon issuance of final permit a stipulation must be executed within ninety days.[10] Its provisions are covered in Reg. L. 13, viz., to pay for timber cut, injured or destroyed;[11] to pay for damage from flood, seepage, breaks, or other damage to forests; to dispose of brush or refuse; to keep land along transmission line cleared; protect telephone crossings; to prevent injury to grazing stock; to prevent and stop forest fires near the lands; to rebuild roads destroyed or injured by the works; to maintain crossings over conduits; to sell power to the United States when required (under certain conditions); to begin and diligently complete the work proposed, within a period fixed in permit; to pay the charges or royalty; to operate continuously unless shut-down is sanctioned by the Secretary of Agriculture; not to sell out to a monopoly;[12] to maintain measuring weirs, etc., and keep water records; to keep the books and records of the permittee open at all times to inspection of the officials; to make annual return to the Secretary of Agriculture of matters required by him.

The term of permit will usually not exceed two years for preliminary permits.[13] Final permits will cover fifty years unless sooner revoked, etc.[14] Revocation is to be made by a letter prepared by the district forester and signed by the Secretary of Agriculture and sent to the permittee.[15] If a permit is revoked, no application for a like use will be received within one year from the same party.[16] Upon a sale or transfer of the plant, the Secretary of Agriculture has discretion to issue a permit to the transferee.[17]

tain from time to time thereafter whether the works are being constructed with due diligence and in substantial agreement with the maps and plans, and in case of doubt should call for an examination by the district engineer. He shall also immediately on the date specified in the stipulation upon which operation should begin make an examination and report to the district forester whether such operation has begun." W. P. Use Book (1911), pp. 76, 77.

8 Reg. L. 3. See, also, p. 64.
9 Reg. L. 5.
10 W. P. Use Book (1911), p. 73.
11 Amount to be estimated by the ranger. Page 69.
12 Stipulation 20. See *infra*, sec. 1459.
13 Page 61.
14 Reg. L. 6.
15 Page 63.
16 Reg. L. 3.
17 Reg. L. 16.

Royalty charges are covered by Reg. L. 7 and L. 8. They are to be ten cents per horse-power the first year (beginning, it appears, from the granting of preliminary permit and not from date of operating the plant);[18] increasing ten cents per year until one dollar is reached the tenth year, and remaining one dollar per horse-power thereafter. Being in arrears sixty days voids a preliminary permit, and arrears for six months voids a final permit.[19] These charges are to be figured upon the "net power capacity"; and Reg. L. 8 prescribes how this is to be calculated. The average annual station-output of horse-power is to be estimated from all water available, etc.; and deductions therefrom are to be made for unreserved or patented lands involved; also a deduction (not exceeding twenty-five per cent) calculated by multiplying the square of the miles of primary transmission by the constant factor .001;[20] and a deduction for such part of the power as the permittee uses for "noncommercial uses."[21] A redetermination of the gross capacity may be ordered any time after ten years, and "The decision of the Secretary of Agriculture shall be final as to all matters of fact upon which the determination of the gross power capacity of the works and the storage power of the reservoir or reservoirs depend."[22]

C. RELATION OF THE NEW FEDERAL SYSTEM TO THE ACT OF 1866 AND LOCAL LAW.

(3d ed.)

§ 439. Upon Reserved Land.—The act of 1866, sections 2339 and 2340, United States Revised Statutes, is a right of way act. Its construction was early settled as a grant of reservoir sites

18 Page 62.

19 Reg. L. 7.

20 Probably referring to loss in transmission.

21 "The gross power capacity as finally determined should represent that extent of development which good business judgment would warrant, if a ready market were available for all the power. Full consideration of the fact that such market may not be available at the outset is taken by the provision of very low rates in the earlier years, gradually increasing with the probable increase of market until the tenth year after the beginning of operation, when the full rate is charged." Pages 71, 72.

22 Reg. L. 8.

"Permits for transmission lines which are not a part of a general power project covered by a power permit will be issued by the district forester. A fee will be charged of five dollars per annum for each mile of national forest land crossed by such lines, and the minimum fee for any one permit will be five dollars per annum. Applications for such transmission line permits will be filed in the office of the supervisor, and will consist of tracings and field-notes of survey, both in the form and with the

and rights of way upon public land subject to local law alone.[23] It has never been expressly repealed.

Upon reserved or withdrawn public land, the Land Office and the Forest Service consider it repealed by implication; and the Federal requirements above considered have, it is evident, completely taken the matter in hand and displaced local law so far as concerns rights of way and reservoir sites. No distinction is made between reservations created for exclusive occupancy such as military and Indian reservations, and reservations not in exclusive occupancy; the acts authorizing reservation or withdrawal of land are considered to impliedly repeal the act of 1866 and local law for that land henceforth. The Land Office has ruled, in a case arising in California, that the act of 1866 "does not authorize the construction of a right of way across reservations of the United States, but seems to be limited to the public land," and held that the act of 1866 is not in force within forest reserves.[24] In a recent case in the United States district court in California, on a preliminary hearing before the commissioner, he ruled that the act of 1866 is no longer in force for either the reserved or unreserved land; but there has been no decision yet by the court.[25] The Forest Service takes the same position regarding its lands.[26]

affidavits and certificates required for such lines when part of a water-power application. (Reg. L. 10.)" W. P. Use Bk. (1911), p. 80.

[23] *Supra*, secs. 92 et seq., 151 et seq., 197 et seq.

[24] Kern River Co., 38 Land Dec. 302. It has also ruled, however, that a foreign corporation cannot get a Federal right of way without complying with the State corporation laws. 38 Land Dec. 74.

See United States v. Conrad Inv. Co., 156 Fed. 123, seeming to regard the act of 1866 as still in force on reserved land, so far as the dam is not so placed as to interfere with government occupancy (p. 128; but see p. 131). See, also, Denver Co. v. Ry. Co., 30 Colo. 204, 69 Pac. 568, 60 L. R. A. 383.

[25] United States v. Hydro-Electric Co. (report of Master in Chancery H. M. Wright, Oct. 17, 1910), ruling that a power right of way, though crossing only a small corner of a forest reserve, cannot be acquired except by permit, and that confining the pole-line to a State highway makes no difference. This case has been the subject of charges back and forth between the projectors and the forestry, and the House of Representatives in 1911 passed, at the request of the claimants, a resolution to investigate. See H. Doc. No. 1424, 61st. Cong., 2d Session.

[26] The following letter to the author is printed here with permission:

"Office of the Forester.

"Washington, February 11, 1910.

"Your letter of January 4th is received. The questions you propound concerning the effect of the act of 1866 (U. S. Rev. Stats., secs. 2339, 2340) are recognized here as peculiarly difficult ones. . . . .

"The act of 1866 does not in terms apply to reserves of any kind. The free and uncontrolled location of rights of way for ditches, etc., is inconsistent with the proper control and regulation of national forests by

In California, concerning appropriation in national reserves, it is provided [1] that the notice of appropriation shall state that the appropriation is within such reserve, and the claimant shall then make and diligently prosecute an application to the Federal authorities for a permit, and shall commence work within sixty days after obtaining it, and prosecute the work thence diligently to completion under the Federal regulations. In other words, California has left the entire matter of acquisition of rights of way within forest reserves (whether the act of 1866 were there in force or not) with the Forest Service.[2] Hence cases arising in California do not actually involve the question how far the act of 1866 is in force within reserves.

(3d ed.)

§ 440. Upon Unreserved Land.—Acts creating reservations or authorizing withdrawals of course would not be an implied repeal of the act of 1866 for unreserved or unwithdrawn land. As to such land there is nevertheless some contention, under stress of the recent change of Federal policy from "development" to "conservation," that an implied repeal exists there also, owing to the right of way acts passed since 1866. At present, however, the weight of authority is against the contention.

the department. The act of 1891, which does apply to reserves, provides, with reference to irrigation rights of way, that they shall not 'be so located as to interfere with the proper occupation by the government of any such reservation.' The act of June 4, 1897 (30 Stat. 11), which we call the Forest Administrative Act, authorizes the Secretary of the Interior (now Agriculture) to 'make such rules and regulations and establish such service as will insure the objects of such reservation, namely, *to regulate their occupancy and use* and to preserve the forest thereon from destruction.' These and other statutory provisions, especially as construed by Attorneys General Moody and Bonaparte (22 Op. 13, 26 Op. 421), show a legislative intent that the creation of a national forest shall remove the lands embraced therein from the operation of the right of way provisions of the act of 1866.

"The Forest Service has no jurisdiction over unreserved lands, and, of course, has had no occasion to form an opinion as to whether the act of 1866 remains in force thereon.

"I may say further that this department some time ago, in determining questions coming before it, reached the conclusion that the act of 1866 does not authorize the use of the lands of the United States for the conveyance of water for the generation of electricity for commercial power purposes. We hold that such a purpose was not then contemplated by Congress and, besides, under established rules of construction, is not within the terms of the grant. More recently the Department of the Interior in two cases reached the same conclusion. [Citing rulings below quoted.]

"Very truly yours,

"HENRY S. GRAVES, Forester."

1 Civ. Code, sec. 1422.

2 See Wishon v. Globe etc. Co., 158 Cal. 137, 110 Pac. 290.

The later Right of Way Act of 1891 was, at the time of its passage, intended to *aid* large enterprises by providing an alternative and securer method than the act of 1866 afforded. The act of 1866 made the grant upon simply taking possession under local law. The later act gave capital the additional security of a Federal record and documentary title, without making this obligatory upon appropriators; for ordinary purposes the act of 1866 was generally accepted at the time, and for large installations additional security was to be accorded. While Congress has never attempted to grant patents to water-rights, there is, in the later Right of Way Acts, some approach to carrying to patent, as concerns right of way, the grant contained in the act of 1866, but not displacing that act as a grant in cases of small enterprises, nor, in fact, any enterprises which were satisfied to rest under the confirmation contained in the act of 1866, without going to patent. This history is traced fully in the historical chapters. The supreme court of New Mexico recently said:[3] "It has long been the policy of the government to encourage irrigation in the arid and semi-arid West. Congress in its wisdom has enacted such laws as will enable rights of way to be acquired for such irrigation works over the public lands, and thus encourage the development of the country. The tendency has been toward more liberal laws in that regard, and it is a matter of common knowledge that in this territory it has been the custom for years to enter on the unsurveyed public lands of the United States and construct such ditches, canals, pipelines, and reservoirs as were necessary to put the waters of the streams to a beneficial use for agricultural and kindred purposes. . . . . It would appear as a serious step backward to now hold that such irrigation systems could not be constructed and rights of way acquired upon unsurveyed land without first seeking the consent of the Secretary of the Interior, thus involving long and tedious delays, which in such cases would be absolutely unavoidable under the law."

Consequently for unreserved land it is ruled that failure to comply with the later Right of Way Acts merely results in a loss of the additional privileges; the right of way or reservoir site nevertheless vests (subject to local law) under the act of 1866,

[3] United States v. Lee (N. M.), 110 Pac. 607, a case arising under the Right of Way Act of March 3, 1891. See, also, *supra*, cc. 5, 6; especially sec. 92 et seq.

whether the ditch was built before the passage of the later act,[4] or after,[5] or even if filings were attempted under a later act but rejected by the Land Office.[6] For unreserved land the history and the present state of the authorities is that the later Right of Way Acts are only cumulative to the act of 1866 without displacing it; that the right of way still vests (when the local law has been complied with) under the grant contained in the act of 1866, if the appropriator does not insist upon the added privileges of the later acts.

In a ruling of the Interior Department rendered some years ago it is held that the rights of claimants under section 2339 of the Revised Statutes are not dependent upon the later Right of Way Acts, nor upon an approval of such maps or filings as are required by the act of March 3, 1891. "The act of March 3, 1891, in respect to this, was primarily to extend to such claimants the right to place their claims of record with the Land Department

[4] Lincoln etc. Co. v. Big Sandy Co., 32 Land Dec. 463. The claim under Revised Statutes, 2339, was for a ditch built prior to the act of 1891.

[5] In Cottonwood etc. Co. v. Thom (1909), 39 Mont. 115, 104 Pac. 281 (S. C., 101 Pac. 825, indicates that the ditch was built after 1891), the Montana court said, per Mr. Justice Smith, that the act of 1866, "granted a right of way for the construction of ditches across the public domain, and that the respondent's rights, acquired by virtue thereof, were not forfeited by a failure to comply with the provisions of the act of 1891."

[6] Rasmussen v. Blust (1909), 85 Neb. 198, 133 Am. St. Rep. 650, 122 N. W. 862.

The point was left open in United States v. Rickey, 164 Fed. 496, where it was held that a reservoir site could not be acquired under the act of 1866 after the site is expressly reserved by the United States from entry.

Among other rulings of the Department of Interior it has been laid down that the act of 1866 was not repealed by the later right of way acts (specifically, the act of 1891), Re Cache Valley Co., 16 Land Dec. 192, 196; and that filings under the later acts (specifically the act of 1891) add nothing to a right of way confirmed under the act of 1866 (Silver Lake etc. Co. v. City of Los Angeles, 37 Land Dec. 152); and that the difference between the act of 1866 and the act of 1891 is that the latter requires approval by an official before beginning work, while the former requires no official's approval, but merely "acknowledges and confirms" after the work is actually completed. Re McMillan Reservoir Site, 37 Land Dec. 6.

See generally, Silver Lake etc. Co. v. City of Los Angeles, 37 Land Dec. 152; Re McMillan Reservoir Site, 37 Land Dec. 6; Lincoln etc. Co. v. Sandy etc. Co., 32 Land Dec. 463; Re Santa Fe etc. R. R. Co., 29 Land Dec. 213; Re South Platte etc. Co., 20 Land Dec. 155; Re Cache Valley Co., 16 Land Dec. 192; Re Pecos Irr. etc. Co., 15 Land Dec. 470, 578; Baldridge etc. Co. v. Leon etc. Co., 20 Colo. App. 518, 80 Pac. 477; Whitmore v. Pleasant Valley Co., 27 Utah, 284, 75 Pac. 748; Nippel v. Forker, 9 Colo. App. 106, 47 Pac. 766; S. C., 26 Colo. 74, 56 Pac. 577; United States v. Conrad Inv. Co., 156 Fed. 123; United States v. Rickey, 164 Fed. 496; Cottonwood D. Co. v. Thorn, 39 Mont. 115, 101 Pac. 825; Same v. Same, 104 Pac. 281; Rasmussen v. Blust, 85 Neb. 198, 133 Am. St. Rep. 650, 122 N. W. 862; United States v. Lee (N. M.), 110 Pac. 607.

for their better protection. It may be, too, that it enlarged the privileges conferred by section 2339 of the Revised Statutes, in that it gave the right to the use of fifty feet of land on each side of the marginal limits of canals, ditches and reservoirs—a privilege not carried by said section—but however this may be, it surely did not operate to make the continued enjoyment of rights conferred by said section dependent upon the filing of the maps provided for in the act." [6a]

(3d ed.)

§ 441. Recent Tendency Away from the Act of 1866.—But the policy of development under local law enacted by the act of 1866 is inconsistent with the policy of Federal conservation as instituted by Mr. Pinchot and the Forest Service. Consequently the contention first mentioned (that the act of 1866 is not in force for unreserved land any more than for reserved land) is gathering force in the Land Office.[7] Recently the Interior Department has ruled that the act of 1866 never applied initially (neither upon reserved nor unreserved land) to rights of way for power purposes.[8] Heretofore the rulings of half a century under the act

[6a] Lincoln Co. v. Big Sandy Co., *supra*.

[7] The writer received the following letter from the General Land Office a few years ago:

"General Land Office,

"Washington, D. C., March 26, 1908.

"In reply to your letter of March 12, 1908, you are advised that the question as to whether rights of way may be obtained under Sections 2339 and 2340 of the Revised Statutes since the passage of the act of March 3, 1891 (26 Stat. 1095), apparently has not been decided specifically by the Department, but it may be in a short time.

"It is better for the applicant in every case who contemplates constructing works for irrigation, etc., involving a large expenditure of money to have some record evidence of his right of way, such as is the case when applications are filed under the provisions of the right of way acts. No more definite information as to whether parties must file under the act of 1891 or whether they may construct and obtain rights under said sections can be given at this time. For regulations under the act of March 3, 1891, see Vol. 34 of the Land Decisions, page 212.

"Very respectfully,

"S. V. PROUDFIT,
"Assistant Commissioner."

[8] In Kern River Co., 38 Land Dec. 302, the Land Office ruled: "It is too obvious for argument that in 1866, the date of the original act constituting this law, Congress did not contemplate power companies because they were not in existence at that time." In Sierra Buttes Co., Nov. 19, 1909 (not officially reported), the act of 1866 is said to be restricted mainly to mining uses, relying upon a passage in Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240, 4 Morr. Min. Rep. 504, where the court had merely held that the act of 1866 conferred no rights to enter private or occupied land. See, also, Montana Water Electric Power & Mining Co., decided by the Interior Department November 12, 1909 (not reported).

of 1866 have been that it applied to *any* beneficial purpose,[9] for the sake of developing the resources of the country.

(3d ed.)

§ 442. **Conclusion.**—The Federal system here considered is just developing. Though nominally based only upon reservoir sites and rights of way, yet as waters can seldom be used without ditches or other conduits (that is, a right of access [10]), it has many features of a body of water law also. In any event, it leaves room for much conflict between the Forest Service and the State Engineer and the general State water administrations, upon matters so intimately connected as rights of way and water-rights. In this matter, as throughout the policy of conservation, the conflict between State and Federal jurisdiction, elsewhere considered,[11] is becoming marked; and the law is in an uncertain and formative stage.

The foregoing, regarding acquisition of rights, is a different question from the regulation of service rendered to the public.[12]

9 *Supra*, sec. 378, beneficial purpose.
10 *Supra*, sec. 54.
11 *Supra*, c. 8.
12 *Infra*, sec. 1260 et seq.

§§ *443–451. (Blank numbers.)*

CHAPTER 20.

MEANS OF USE—RESERVOIRS, DITCHES, FLUMES, PIPES AND OTHER STRUCTURES.

A. ARTIFICIAL WATER CONDUITS, ETC.

§ 452. General.
§ 453. Use without diversion.
§ 454. Use in artificial water structures—Ditches, flumes, pipes in general.
§ 455. The ditch, etc., is an easement.
§ 456. Ditch and water-right distinguished.
§ 457. Water in artificial waterworks or structures.

B. USE OF ARTIFICIAL CONDUITS, ETC.

§ 458. Contracts concerning ditches.
§ 459. Joint use of ditch.
§ 460. Repair of ditches.
§ 461. Damage from breaking ditches, etc.
§ 462. Same—Floods.
§ 463. Same.
§§ 464–472. (Blank numbers.)

A. ARTIFICIAL WATER CONDUITS, ETC.

(3d ed.)

§ 452. **General.**—We now leave the questions arising out of the obtaining of water-rights, and take it as granted that a valid water-right has been obtained by appropriation, as previously set forth. The inquiry now is as to the limits within which the water can be then used. The limitations to be considered are (1) those concerning the means of enjoyment; (2) concerning the amount of water; (3) concerning changes in the mode of enjoyment. These are considered in successive chapters.

(3d ed.)

§ 453. **Use Without Diversion.**—Where use is by water-wheels, if the power-house is in the stream-bed it was held to be an appropriation in one case;[1] while in another,[2] putting current-wheels in a stream was in effect held not to be a proper method

[1] Idaho etc. Co. v. Stephenson, 16 Idaho, 418, 101 Pac. 821.

[2] Schodde v. Twin Falls etc. Co. (Idaho), 161 Fed. 43, 88 C. C. A. 207. See Colo. Rev. Stats. 1908, sec. 3180; Gen. Stats., sec. 1727; Gen. Laws, sec. 1377.

of appropriation. The real meaning of this latter decision, however, we have already considered.[3] A few other cases have held use without diversion to constitute appropriation.[4]

A dam is not improper *per se*, but becomes such when it is the means of taking an excess of water over the quantity to which the dam owner is entitled.[5]

(3d ed.)

§ 454. Use in Artificial Water Structures—Ditches, Flumes, Pipes, in General.—Conveyance in ditches, flumes, pipes, etc., is the means usually adopted in putting the water to use. In mining, where the doctrine of appropriation arose, and also in irrigation, the water is ditched, flumed, or piped long distances, sometimes fifty or more miles. A ditch is an artificial watercourse.[6] It is real estate.[7]

(3d ed.)

§ 455. The Ditch, etc., is an Easement.—That a ditch is an easement has been frequently declared.[8] The essence of the right to a ditch is the right of way to conduct water over another's land, and confers no ownership of the land itself, and the ditch

3 *Supra*, sec. 313.

4 *Supra*, sec. 366, settling on banks of stream.

5 Arroyo D. etc. Co. v. Baldwin (1909), 155 Cal. 280, 100 Pac. 874. Regarding use in storage reservoirs, see Index.

6 Lower Kings River etc. Ditch Co. v. Kings etc. Co., 60 Cal. 408. So is a pipe. Standart v. Round Valley W. Co., 77 Cal. 399, 19 Pac. 689.

7 Clark v. Willett, 35 Cal. 534, at 549, 4 Morr. Min. Rep. 628; Bashore v. Mooney, 4 Cal. App. 276, 87 Pac. 556. Water conduits are real estate. Cal. etc. Co. v. County of Los Angeles (1909), 10 Cal. App. 185, 101 Pac. 547. An easement is real estate. Corea v. Higuera, 153 Cal. 451, 95 Pac. 884, 17 L. R. A., N. S., 1018. A ditch, by means of which the waters of a natural stream are diverted, is not itself governed by the law of natural watercourses. Simmons v. Winters, 21 Or. 35, 28 Am. St. Rep. 727, 27 Pac. 7. See definitions of a "ditch" in Nev. Stats. 1909, pp. 91, 247.

8 Among other cases: Gregory v. Nelson, 41 Cal. 278, 12 Morr. Min. Rep. 124; Campbell v. West, 44 Cal. 646, 1 Morr. Min. Rep. 218; Quinlan v. Noble, 75 Cal. 250, 17 Pac. 69; Allen v. San Jose etc. Co., 92 Cal. 138, 28 Pac. 215, 15 L. R. A. 93; Bean v. Stoneman, 104 Cal. 49, 37 Pac. 777, 38 Pac. 39; Burris v. People's Ditch Co., 104 Cal. 248, 37 Pac. 922; Mesnager v. Englehardt, 108 Cal. 68, 41 Pac. 20; Joseph v. Ager, 109 Cal. 517, 41 Pac. 422; Dixon v. Schermeier, 110 Cal. 583, 42 Pac. 1091; Jacob v. Day, 111 Cal. 571, 44 Pac. 243; North Fork etc. Co. v. Edwards, 121 Cal. 662, 54 Pac. 69; Los Angeles v. Pomeroy, 125 Cal. 420, 58 Pac. 69; Mayberry v. Alhambra etc. Co., 125 Cal. 444, 54 Pac. 530, 58 Pac. 68; Oliver v. Agasse, 132 Cal. 297, 64 Pac. 401; Anaheim W. Co. v. Ashcroft (1908), 153 Cal. 152, 94 Pac. 613; Blake v. Boye, 38 Colo. 55, 88 Pac. 470, 8 L. R. A., N. S., 418; Smith v. Colorado etc. Co., 34 Colo. 494, 82 Pac. 940, 3 L. R. A., N. S., 1148.

is not land.[9] In view of this case holding that a ditch is not land, it would seem that ejectment would not lie for a ditch. There is, however, an early case holding that ejectment would lie for a ditch, and it has been frequently cited and relied on.[10]

The ownership of a ditch includes no ownership of the soil,[11] nor any fee in the land.[12] Nor, consequently, does it include the right to build a house alongside the ditch;[13] but ownership of a ditch merely consists in right of way.[14] "In plaintiff's plea of former judgment the allegation is that it had been adjudicated that she was the owner of a 'ditch and waterway' across the lands of defendant for the purpose of conveying waters. In the foregoing discussion we have treated this allegation as meaning no more than that she owned an easement or right to carry waters over his lands through a ditch or waterway, and such, we think, is the proper construction of the language quoted."[15]

Changes that are burdensome to the servient tenement cannot be made, following the usual law of easements.[16] The rights and duties of repair follow the law of easements.[17] The right to maintain a ditch arises like any easement, and if on public land, it arises by government grant under the act of 1866, on the same principle that the water-right itself is a grant; and the

[9] Mt. Carmel Fruit Co. v. Webster, 140 Cal. 183, 73 Pac. 826; the facts of this case are stated *infra*, sec. 537.

[10] Reed v. Spicer, 27 Cal. 57, 4 Morr. Min. Rep. 330. Relied on in Integral Co. v. Altoona Co., 75 Fed. 383, 21 C. C. A. 409; Ada Co. v. Farmers' Co., 5 Idaho, 799, 51 Pac. 990, 40 L. R. A. 485; Pomeroy on Riparian Rights, sec. 57; Kinney on Irrigation, sec. 224. In Dondero v. O'Hara, 3 Cal. App. 633, 86 Pac. 985, ejectment for a ditch was allowed. The point was not raised. But compare Swift v. Goodrich, 70 Cal. 103, 11 Pac. 561.

[11] Lyman v. Arnold, 5 Mason, 195, Fed. Cas. No. 8626.

[12] Whitmore v. Pleasant Valley Co., 27 Utah, 284, 75 Pac. 748; Nichols v. New England etc. Co., 100 Mich. 230, 59 N. W. 155; Hayward v. Mason (1909), 54 Wash. 649, 104 Pac. 139; Hayward v. Mason (Wash. 1909), 104 Pac. 141.

[13] Whitmore v. Pleasant Valley Co., 27 Utah, 284, 75 Pac. 748.

[14] *Ibid.*, and Bashore v. Mooney, 4 Cal. App. 276, 87 Pac. 556.

[15] Sloss, J., in Hoyt v. Hart, 149 Cal. 722, 87 Pac. 569. The civil law classed the right to conduct water over another's land as the same as a right of way. Institutes of Justinian, lib. III. "Rusticorum praediorum iura sunt haec; iter, actus via, aquae ductus. . . . . Aquae ductus est ius aquae decendae per fundum alienum. . . . . Item praediorum urbanorum servitutes sunt hae: . . . . ut stillicidium vel flumen recipiat quis in aedes suos, vel in aream, vel non recipiat."

[16] *Infra*, sec. 501 et seq.

So long as a tract remains in one ownership, there can be no dominant and servient tenements as between different portions of the tract, and the owner may rearrange the quality of any possible servitude. Oliver v. Burnett, 10 Cal. App. 403, 102 Pac. 223.

[17] *Infra*, sec. 460 et seq.

burden of the ditch attaches to the land if the land later passes into private title.[18] But a new ditch cannot be built over private land, nor an old one changed, without the consent of the land owner, unless by prescription or condemnation under the power of eminent domain.[19] Excepting government ditches, a right of way for which has been reserved from all patents granted since 1890.[20]

Formerly Colorado decisions allowed the building of private irrigation ditches over another's land without his consent; but now in Colorado as elsewhere this is not permitted. After title to land has passed from the government, the land can be burdened with a right of way for water only by consent of the owner, or by condemnation proceedings. The Colorado rule in this respect has already been discussed at length.[21] The early Colorado partiality to irrigation ditches is similar to that urged in California in the early days for mining ditches, which finally the court rejected in California also.[22]

The building of a ditch over private land by condemning an easement of right of way is discussed under the topic of eminent domain.[23] It has been held that a water-right must be obtained before a right of way for a ditch can be obtained.[24]

Some cases speak of "servitude upon a ditch" or "easement in a ditch" to express the right of consumers from irrigation companies, though a servitude upon a servitude or an easement in an easement seems an anomalous form of expression.[25]

(3d ed.)

§ 456. Ditch and Water-right Distinguished.—The water-right itself, as a flow and use, is not an easement. It is a thing in itself, not a servitude upon some other thing; whereas the right

18 U. S. Rev. Stats., secs. 2339, 2340; Gregory v. Nelson, 41 Cal. 278, 12 Morr. Min. Rep. 124; Smith v. Hawkins, 110 Cal. 122, 42 Pac. 453; Jacob v. Day, 111 Cal. 571, 44 Pac. 243; Le Quim v. Chambers (1908), 15 Idaho, 405, 21 L. R. A., N. S., 76, 98 Pac. 415 (a pipe-line). *Supra*, sec. 257.

19 *Supra*, sec. 221 et seq.

20 Green v. Wilhite, 14 Idaho, 238, 93 Pac. 971; Same v. Same, 156 Fed. 755.

21 *Supra*, sec. 223 et seq.

22 *Supra*, sec. 85.

23 *Infra*, sec. 604.

24 Nippel v. Forker, 26 Colo. 74, 56 Pac. 577; Castle Rock Co. v. Jurisch, 67 Neb. 377, 93 N. W. 690. *Contra*, however, State ex rel. Kettle Falls etc. Co. v. Superior Court, 46 Wash. 500, 90 Pac. 653. See *infra*, sec. 615. See O'Reilley v. Noxon (Colo.), 113 Pac. 486.

25 See *infra*, secs. 1324, 1338.

to a ditch or other artificial watercourse is an easement.[1] "The right to the use of water in a natural stream is in no sense an easement, but its use by diversion, in an artificial watercourse, is strictly an easement."[2] Consequently, a grant of a right of way for a ditch does not necessarily include a conveyance of a right to take water from the stream from which the ditch is built.[3] An injury to a water-right cannot be proved under a count for an injury to a ditch, or *vice versa*.[4] A canal may well be granted, reserving the water-right.[5] They may be condemned separately on eminent domain proceedings.[6] An abandonment of a ditch does not necessarily include an abandonment of the owner's water-right.[7] A decree as to the one does not necessarily govern as to the other.[8] Revocation of a license to build a ditch does not necessarily affect the right to the water carried by the ditch.[9]

"Ownership of a ditch and the water-right for waters to flow through the ditch may, and often do, exist in different parties. The existence of the one right does not necessarily imply the existence of the other right in the same party."[10] It is said in another case: "But the water-right, when acquired, although intimately related to and connected with the site for a dam and canal, and dam and canal commenced, etc., is a different thing, even though each may be necessary to make the other available or useful. They are capable of several and distinct injuries, giving rise to separate and distinct causes of action, for which there are separate and distinct remedies. The dam and canal may be trespassed upon, broken down, destroyed or

[1] See Zimmler v. San Luis Co., 57 Cal. 221; McLear v. Hapgood, 85 Cal. 555, 24 Pac. 788; Natoma etc. Co. v. Hancock, 101 Cal. 42, 31 Pac. 112, 35 Pac. 334 *(semble contra)*; Dixon v. Schermeier, 110 Cal. 582, 42 Pac. 1091; Jacob v. Day, 111 Cal. 571, 44 Pac. 243; Mayberry v. Alhambra etc. Co., 125 Cal. 444, 54 Pac. 530, 58 Pac. 68.

[2] Yale on Mining Claims and Water Rights, p. 204.

[3] Zimmler v. San Luis Co., 57 Cal. 221.

[4] Nevada etc. Co. v. Kidd, 37 Cal. 282.

[5] Rogers v. Riverside etc. Co., 132 Cal. 9, 64 Pac. 95; Wold v. May, 10 Wash. 157, 38 Pac. 875; Ada etc. Co. v. Farmers' etc. Co., 5 Idaho, 793, 51 Pac. 990, 40 L. R. A. 485.

[6] Schneider v. Schneider, 36 Colo. 518, 86 Pac. 348.

[7] Nichols v. McIntosh, 19 Colo. 22, 34 Pac. 278.

[8] Parke v. Boulware, 7 Idaho, 490, 63 Pac. 1045.

[9] Ison v. Sturgill (Or. 1909), 109 Pac. 579.

[10] Swank v. Sweetwater etc. Co., 15 Idaho, 353, 98 Pac. 297, citing Ada County Farmers' Irr. Co. v. Farmers' Canal Co., 5 Idaho, 793, 51 Pac. 990, 40 L. R. A. 485; Stocker v. Kirtley, 6 Idaho, 795, 59 Pac. 891; Parke v. Boulware, 7 Idaho, 490, 63 Pac. 1045.

taken into possession under a claim of right, without taking away the water, or preventing its use in any other mode or place, or without questioning plaintiff's right to it, and plaintiff may have its action for the trespass, or to recover the possession of the land constituting the dam and canal, or their site; and the water may also be diverted and taken away without in any way disturbing or interfering with the dam and canal."[11]

The water-right, however, though entirely a distinct thing from the ditch, may be an appurtenance to a given ditch or the ditch to the water-right, if used specifically in connection therewith. In such a case, the water-right may pass as an appurtenance in the conveyance of the ditch.[12] In one case[13] the ditch was built in two parts, which were separately sold on foreclosure of a mechanic's lien. It was held that the water-right passed as an appurtenance to the upper part, and the owner of the lower part has no water-right.[14] Where, however, the ditch is not made up of distinct parts the water-right is appurtenant to every part of the ditch, however long.[15] In this case the rule is applied to allow suit in one county or State through which the ditch runs, for diversion of the water in another county or State, in which the water entered the ditch. There would seem to be a conflict between this rule that a water-right is appurtenant to the ditch, and the rule[16] that an injury to the water-right (diversion) cannot be proved under a count for injury to the ditch.

In one case[17] the court says the water-right is the principal, and if either is appurtenant to the other, the ditch is appurtenant to the water-right.

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§ 457. **Water in Artificial Waterworks or Structures.**—This is a matter fully considered elsewhere.[18]

11 Nevada C. & S. C. Co. v. Kidd, 37 Cal. 282, 309.

12 Lower etc. Co. v. Kings etc. Co., 60 Cal. 408; Williams v. Harter, 121 Cal. 47, 53 Pac. 405. See *infra*, sec. 550 et seq.

13 Reynolds v. Hosmer, 51 Cal. 205, 5 Morr. Min. Rep. 6.

14 Accord, 6 Wall. 561. Also Jarvis v. State Bank, 22 Colo. 309, 55 Am. St. Rep. 129, 45 Pac. 505, of a ditch made up of distinct parts.

15 Lower Kings River etc. Co. v. Kings etc. Co., 60 Cal. 408; Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210.

16 Nevada etc. Co. v. Kidd, *supra*.

17 Jacobs v. Lorenz, 98 Cal. 332, 33 Pac. 119. See, also, Cascade etc. Co. v. Railsback (Wash.), 109 Pac. 1062. See, also, Nippel v. Forker, 26 Colo. 74, 56 Pac. 577.

18 *Supra*, sec. 30 et seq.

B. USE OF ARTIFICIAL WATER CONDUITS, ETC.

(3d ed.)

§ 458. Contracts Concerning Ditches.—There is no limitation upon the right to deal with or dispose of this kind of property, and the usual law of contracts applies.[18a] A covenant to allow a neighbor to take the water from a stream and build two ditches across one's land runs with the land.[19] A license for a pipe-line does not cover a defective pipe-line.[20] A sale of a ditch may carry with it a water-right as an appurtenance;[21] but a grant may be made of a canal reserving the water-right;[22] and a water-right will not always pass as an appurtenance with the grant of a ditch-right if such was not the intent.[23] They may be sold separately.[24] Ditches and water-rights are subject to mechanics' liens,[25] or execution,[1] or mortgage.[2] In equity, parol licenses and contracts are sometimes given an effect which they would not have at law, as to which more hereafter; but in general, conveyances of ditches or agreements regarding them are within the statute of frauds.[3] Recording of a grant to build a ditch is not necessary *inter partes* or purchasers with notice.[4]

A grant of right of way for a pipe-line without specifying dimensions means a reasonable width,[5] and becomes fixed when a definite one is thereunder located and used.[6] An express grant of a right of way to lay pipes without specifying number and size becomes fixed by laying a ten-inch pipe with the acquiescence of both parties, and more or larger pipes cannot be laid thereafter in the absence of special matter in the instru-

[18a] *Infra*, sec. 536 et seq.

[19] Weill v. Baldwin, 64 Cal. 476, 2 Pac. 249.

[20] Graham v. Redlands etc. Co., 3 Cal. App. 732, 86 Pac. 989.

[21] *Infra*, secs. 508, 550.

[22] Rogers v. Riverside etc. Co., 132 Cal. 9, 64 Pac. 95.

[23] Zimmler v. San Luis etc. Co., 57 Cal. 221. See *infra*, sec. 550 et seq.

[24] Miller v. Vaughan, 8 Or. 333, and *supra*, sec. 456.

[25] Reynolds v. Hosmer, 51 Cal. 205, 5 Morr. Min. Rep. 6; Bear Lake etc. Co. v. Garland, 164 U. S. 1, 17 Sup. Ct. Rep. 7, 41 L. Ed. 327; Creer v. Cache Valley Co., 4 Idaho, 280, 95 Am. St. Rep. 63, 38 Pac. 653; Jarvis v. State Bank, 22 Colo. 309, 55 Am. St. Rep. 129, 45 Pac. 505.

[1] Gleason v. Hill, 65 Cal. 17, 2 Pac. 413.

[2] Mitchell v. Canal Co., 75 Cal. 464, 17 Pac. 246.

[3] Prentice v. McKay, 38 Mont. 114, 98 Pac. 1081; Oliver v. Burnett, 10 Cal. App. 403, 102 Pac. 223. See *infra*, sec. 555 et seq.

[4] Little v. Gibb, 57 Wash. 92, 106 Pac. 491. See *infra*, sec. 542.

[5] Everett etc. Co. v. Powers, 37 Wash. 143, 79 Pac. 617; Ballard v. Titus (1910), 157 Cal. 673, 110 Pac. 118.

[6] Winslow v. Vallejo, 148 Cal. 725, 113 Am. St. Rep. 349, 84 Pac. 191, 5 L. R. A., N. S., 851, 7 Ann. Cas. 851; Kern etc. Co. v. Bakersfield, 151 Cal. 403, 90 Pac. 1052.

ment of grant providing for such change.[7] Under a license to enter on plaintiff's land to construct a pipe-line of a specified capacity of good substantial material and workmanship for the conveyance of water to the licensees' premises, the latter were not entitled to enter on the land to construct a pipe-line which was substantially defective in character and likely to be productive of unnecessary damage to plaintiff.[8] Where one has a grant of right in general terms to build a ditch over another's land, he must build it subject to the restriction to create the least practical interference with the servient freehold.[9] It has been held that a grant of a right of way for a pipe-line includes by implication a right to build a telephone line along it to be used in maintaining the canal.[9a]

A reservation of a "right of way" does not include the right to dig trenches and lay trenches for the conduct of water.[10] In one case an association reserved to itself, its members and alienees "a reasonable right of way in and across" the lands which it granted. It was held that "the phrase 'right of way' as thus used has a well-defined meaning. It contemplates a right of ingress and egress to and from the grantee's lands. It does not contemplate the right to dig trenches and lay pipe-lines for the conduct of water."[11]

The right to erect a dam and lay a four and one-half inch pipe therefrom does not convey a right to change such dam, at will, nor to lay an eight-inch pipe across any portion of the land which might be desired. Having made its first location under its grant, a water company was bound thereby, and had no right to go where it would, and lay any pipe it saw fit across any desired part of the land.[12]

Water in a pipe is a commodity, and if conveyed in a pipe, the pipe may belong to one person and the water to another.[13]

7 Winslow v. City of Vallejo, 148 Cal. 723, 113 Am. St. Rep. 349, 84 Pac. 191, 5 L. R. A., N. S., 851, 7 Ann. Cas. 851 (Sloss, J.).

8 Graham v. Redlands Heights Water Co. et al., 3 Cal. App. 732, 86 Pac. 989.

9 Tarpey v. Lynch (1909), 155 Cal. 407, 101 Pac. 10.

9a City of Portland v. Metzger (Or.), 114 Pac. 106.

10 San Rafael Co. v. Ralph Rogers Co., 154 Cal. 76, 96 Pac. 1092.

11 San Rafael R. Co. v. Ralph Rogers Co. (1908), 154 Cal. 76, 96 Pac. 1092.

12 Rhoades v. Barnes (1909), 54 Wash. 145, 102 Pac. 884.

13 New Jersey Co. v. Town of Harrison, 72 N. J. L. 194, 62 Atl. 767.

Further reference is made to the general chapter hereafter devoted to contracts, conveyances and appurtenances.

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§ 459. **Joint Use of Ditch.**—Ownership of an easement over another's land is not necessarily inconsistent with a like use by the landowner, of the servient tenement, so long as such use is subordinate to the easement, and does not restrict or limit its exercise.[14] In the case just cited Mr. Justice Sloss said: "There is no inconsistency between the portion of the decree declaring that plaintiff has an easement in these ditches, and that portion which grants to defendant the right to use the ditches jointly with plaintiff for the purpose of carrying his waters. The easement is a right to use the lands of the defendant for conducting her waters to her lands. It can coexist with a right in the defendant or anyone else to use the same waterways, so long as such use does not restrict or interfere with the right owned by the plaintiff. It would not be claimed that merely because A has a right of way over B's land, B cannot, under any circumstances, use the portion of his land affected by the easement in a manner which does not infringe upon the exercise of such easement. It is well settled, as a general proposition, that the owner of the servient estate may use his property in any manner and for any purpose consistent with the enjoyment of the easement."[15] The same is true when the right to the ditch has been obtained by prescription.[16] One might acquire a prescriptive right to use an irrigation ditch to convey a limited quantity of water to his land, while another retained the right also to use the ditch for his own purposes to the extent of its remaining capacity.[17]

Regarding joint ownership of ditches see, further, a previous chapter.[18]

[14] Hoyt v. Hart, 149 Cal. 722, 87 Pac. 569.

[15] Accord, Colegrove Water Co. v. City of Hollywood, 151 Cal. 425, 90 Pac. 1053, 13 L. R. A., N. S., 904; Hayward v. Mason (1909), 5 Wash. 649, 104 Pac. 139.

[16] Smith v. Hampshire, 4 Cal. App. 8, 87 Pac. 224 (citing Abbott v. Pond, 142 Cal. 396, 76 Pac. 60, 61); Bashore v. Mooney, 4 Cal. App. 276, 87 Pac. 553.

[17] Bashore v. Mooney, 4 Cal. App. 276, 87 Pac. 553.

[18] *Supra*, sec. 320, tenants in common.

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§ 460. Repair of Ditches.—As in the case of any easement, the ditch-owner, as the dominant, has the duty of keeping the ditch in repair, and not the landowner.[19] Correspondingly he has a right of entry upon the servient estate to make the repairs[20] and to clean out the ditch, and if the landowner interferes, injunction lies.[21] The landowner, on his part, cannot remove the lateral or subjacent support to which the ditch is entitled.[22] Otherwise he is free to use his land in the ordinary way, such as for pasturing sheep, though they trample the ditch. It is the ditch-owner's duty to fence or otherwise keep the ditch in repair against damage from the ordinary use of the land by the landowner.[23] And *per contra* if the cattle drown in the ditch, the ditch-owner is not liable to the landowner.[24] The owner of the servient estate may erect fences along the sides of a ditch or artificial watercourse. Unless it is expressly stipulated that the way shall be an open one, or it appears from the terms of the grant or the circumstances of the case that such was the intention of the parties, the owner of the servient estate may also erect gates across the way, provided they are so located and constructed as not unreasonably to interfere with the use of the ditch.[25] Where ditch crosses ditch, the later claimant must adjust the crossings so as not to interfere with the prior

19 Fraler v. Sears etc. Co., 12 Cal. 556, 73 Am. Dec. 562, 12 Morr. Min. Rep. 98; Richardson v. Kier, 34 Cal. 63, 91 Am. Dec. 681, 4 Morr. Min. Rep. 612; Richardson v. Kier, 37 Cal. 263; Durfee v. Garvey, 78 Cal. 546, 21 Pac. 302; Bean v. Stoneman, 104 Cal. 49, 37 Pac. 777, 38 Pac. 39; Niday v. Barker (1909), 16 Idaho, 73, 101 Pac. 254. See 15 L. R. A., N. S., 992, note.

20 Pico v. Colimas, 32 Cal. 578; Ware v. Walker, 70 Cal. 591, 12 Pac. 475; City of Bellevue v. Daly, 14 Idaho, 545, 125 Am. St. Rep. 179, 94 Pac. 1037 *(dictum)*. See 15 L. R. A., N. S., 992, note, 14 Ann. Cas. 1136. This right, however, must be exercised with due care and diligence and not arbitrarily. Hutchinson v. Watson D. Co. (1909), 16 Idaho, 484, 133 Am. St. Rep. 125, 101 Pac. 1059.

21 Stufflebeem v. Adelsbach, 135 Cal. 221, 67 Pac. 140.

22 Gregory v. Nelson, 41 Cal. 278, 12 Morr. Min. Rep. 124; Lorenz v. Waldron, 96 Cal. 243, 31 Pac. 54.

23 Cattle trampling ditch. Durfee v. Garvey, 78 Cal. 546, 21 Pac. 302; Keller v. Fink (Cal.), 37 Pac. 411. Cattle polluting ditch. City of Bellevue v. Daly, 14 Idaho, 545, 125 Am. St. Rep. 179, 94 Pac. 1037, 15 L. R. A., N. S., 992, 14 Ann. Cas. 1136. *Contra*, however, Bileu v. Paisley, 18 Or. 47, 21 Pac. 934, 4 L. R. A. 840.

24 Messinger v. Gordon, 15 Colo. App. 429, 62 Pac. 959.

25 Utah etc. Co. v. Stevenson, 34 Utah, 184, 97 Pac. 27.

ditch.[1] Repairs may be made on a ditch slightly changing its grade.[2]

Regarding maintenance and repair of distributing systems as between company and consumers, reference is made to a later chapter.[3]

(3d ed.)

§ 461. **Damage from Breaking Ditches, etc.**—The use by means of ditches, flumes and similar apparatus is, of course, the most usual, and using the water in this way does not, by any means, make the appropriator an insurer of others against damage from breaking, overflow, seepage, or other escape of the water. The famous English case of Rylands v. Fletcher[4] declared that a man builds a reservoir, or other works to hold water, at his peril.[5] But such is not the law in the West. The ditch-owner is not liable merely because the break or escape occurred, but only if it occurred through his negligence. Negligence must be shown.[6]

1 Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240, 4 Morr. Min. Rep. 504.

2 Burris v. People's Ditch Co., 104 Cal. 248, 37 Pac. 922.

Regarding contribution between tenants in common for repair of ditches, see *supra*, sec. 320.

Regarding duty to bridge, see MacCammelly v. Pioneer Irr. Dist., 17 Idaho, 415, 105 Pac. 1076; Hague v. Juab etc. Co. (Utah, 1910), 107 Pac. 249; Farmers' Highline Canal Co. v. Westlake, 23 Colo. 29, 46 Pac. 134; Nebraska Stats. 1895, p. 23, sec. 52; Stats. 1903, c. 120, p. 613; Cobbey's Ann. Stats., sec. 6806.

3 *Infra*, sec. 1284.

4 L. R. 1 Ex. 265, L. R. 3 H. L. 330.

5 "In Rylands v. Fletcher, L. R. 1 Ex. 267, L. R. 3 H. L. 330, it was declared that no amount of diligence is a legal excuse, if such water escapes and damages another. The correctness of this doctrine has been much discussed by law-writers and courts. It has been approved in Massachusetts (see Gorham v. Gross, 125 Mass. 232, 28 Am. Rep. 234); in Minnesota (see Cahill v. Eastman, 18 Minn. 324 (Gil. 292), 10 Am. Rep. 184). It has been disapproved in other States. See Losee v. Buchanan, 51 N. Y. 476, 10 Am. Rep. 623; Pa. Coal Co. v. Sanderson, 113 Pa. 126, 57 Am. Rep. 445, 6 Atl. 453; Marshall v. Welwood, 38 N. J. L. 339, 20 Am. Dec. 394." Scott v. Longwell, 139 Mich. 12, 102 N. W. 230, 5 Ann. Cas. 679. See, also, Moore v. Berlin Co., 74 N. H. 305, 124 Am. St. Rep. 968, 67 Atl. 578, 11 L. R. A., N. S., 284, 13 Ann. Cas. 217. See, also, 15 L. R. A., N. S., 541, note.

6 *California.*—Tenney v. Miners' Ditch Co., 7 Cal. 335, 11 Morr. Min. Rep. 31; Wolf v. St. Louis Co., 10 Cal. 541, 10 Morr. Min. Rep. 636; Todd v. Cochell, 17 Cal. 98, 10 Morr. Min. Rep. 655; Richardson v. Kier, 34 Cal. 63, 91 Am. Dec. 681; 4 Morr. Min. Rep. 612; Hoffman v. Tuolumne etc. Co., 10 Cal. 413; Everett v. Hydraulic Co., 23 Cal. 225, 4 Morr. Min. Rep. 589; Campbell v. Bear River Co., 35 Cal. 679, 10 Morr. Min. Rep. 656; Weidekind v. Tuolumne etc. Co. (Cal.), 12 Pac. 387; Bacon v. Kearney etc. Syndicate, 1 Cal. App. 275, 82 Pac. 82 (overflow of ditch); Gibson v. Puchta, 33 Cal. 310, 12 Morr. Min. Rep. 227; Paolini v. Fresno Co.,

It is not even a case of *res ipsa loquitur* and negligence is not presumed from the mere fact that a break or escape occurred,[7] unless such presumption is specially enacted by statute.[8] The ordinary rule of negligence, that there must be a failure to use the care which an ordinary prudent man would have taken under

9 Cal. App. 1, 97 Pac. 1130. But see Parker v. Larsen, 86 Cal. 236, 21 Am. St. Rep. 30, 24 Pac. 989 (leakage).

Colorado.—City of Denver v. Mullen, 7 Colo. 345, 3 Pac. 693; Platte Co. v. Anderson, 8 Colo. 131, 6 Pac. 515; Walley v. Platte Co., 15 Colo. 579, 26 Pac. 129; Catlin etc. Co. v. Best, 2 Colo. App. 481, 31 Pac. 391 (holding negligence shown). But see the statutory presumption, *infra*.

Idaho.—Arave v. Idaho etc. Co., 5 Idaho, 68, 46 Pac. 1024.

Montana.—King v. Miles, 16 Mont. 463, 50 Am. St. Rep. 506, 41 Pac. 431; Fleming v. Lockwood, 36 Mont. 384, 92 Pac. 962, 14 L. R. A., N. S., 628, 13 Ann. Cas. 263; Mulrone v. Marshall, 35 Mont. 238, 88 Pac. 797, citing Montana cases.

Nebraska.—Kearney etc. Co. v. Akeyson, 45 Neb. 635, 63 N. W. 921; Suitor v. Chicago etc. Ry. (1909), 84 Neb. 256, 120 N. W. 113.

Nevada.—Shields v. Orr etc. Co., 23 Nev. 349, 47 Pac. 194.

Texas.—City of Paris v. Tucker (Tex. Civ. App.), 93 S. W. 233 (a pipe-line).

Wyoming.—Howell v. Big Horn Basin etc. Co., 14 Wyo. 14, 1 L. R. A., N. S., 596, 81 Pac. 785, citing cases.

[7] Tenney v. Miners' etc. Co., 7 Cal. 335, 11 Morr. Min. Rep. 31.

[8] *California.*—The great weight of authority in California is against any such presumption, as above cited. At the same time it should be noted that the case of Parker v. Larsen, 86 Cal. 236, 21 Am. St. Rep. 30, 24 Pac. 989, holds the ditch-owner to the same liability as in Fletcher v. Rylands (not citing it); and there is a statutory enactment approaching the insurer rule in some cases. Political Code, section 3486, and section 3487.

Colorado.—A statutory liability is enacted in M. A. S. 2272; Rev. Stats. 1908, secs. 3204, 3213, 3233, 3238; Gen. Stats., sec. 1726 et seq.; Laws 1872, p. 144, sec. 1; Laws 1876, p. 78, sec. 2; Laws 1879, p. 107, sec. 40; Laws 1899, p. 316, sec. 9. It seems to approach close to the rule of Rylands v. Fletcher as concerns reservoirs, for the court holds the reservoir owner to a strong liability under it, on the ground that the water is *likely to escape* and to do damage if it escapes (Canon City v. Oxtoby (1909), 45 Colo. 214, 100 Pac. 1127); and liable absolutely, irrespective of negligence (with a query as to "act of God." Garnet etc. Co. v. Sampson (Colo.), 110 Pac. 79, affirming Larimer Ditch Co. v. Zimmerman, 4 Colo. App. 78, 34 Pac. 1111); Sylvester v. Jerome, 19 Colo. 128, 34 Pac. 760; and this is not changed by the statutes requiring supervision by State Engineer (Garnet Co. v. Sampson, *supra*). But there is some question how far this applies only to reservoirs or also to ditches, *Ibid.*, and Middlekamp v. Bessemer etc. Co., 46 Colo. 102, 103 Pac. 280, 23 L. R. A., N. S., 795.

Idaho.—Ditch-owner liable to landowner for damages from breakage, whether neglect or accident (unless unavoidable). McLean's Rev. Codes Idaho, sec. 3300; Rev. Stats. 1887, sec. 3181, 11th Ter. Sess. (1881), 269.

Washington.—In a Washington case it is held that one who places obstructions in a *navigable* stream does so at his peril as to any damage to landowners, and negligence need not be shown. Gilson v. Cascade etc. Co. (1909), 54 Wash. 289, 103 Pac. 11.

Wyoming.—Rev. Stats. 1899, secs. 901, 974, 3069.

Statutory liabilities sometimes appear in the water codes making it a misdemeanor to use works without the permission of the State Engineer as to their safety; e. g., N. M. Stats. 1907, p. 71, sec. 33; S. D. Stats. 1907, c. 180, sec. 28.

the circumstances, applies.[9] The owner of a millrace must use care "proportionate to the danger" to prevent the water from escaping and percolating through the banks to the injury of the adjacent property owners,[10] and if a dam breaks without his fault, he must repair it as soon as practicable.[11]

In one case the test is said to be: "The true test, considering all the circumstances, is, ought a competent and skillful engineer reasonably to have anticipated such a flood as caused the damage to the plaintiff and to have made provision therefor?" [12] though that seems to put too strong an interpretation on due care when separated from the facts of that case; for it is a simple question of fact as to what is due care in each case, on the part of an ordinary prudent man, and not necessarily a skillful engineer. The failure to employ a skillful engineer, or to act as such a person would, may be evidence of negligence, but it is simply a fact for the jury to consider in deciding whether such care was used as an ordinary prudent man would have used under the circumstances. The law seeks only to preserve the ordinary course of things; and if damage then occurs, it must lie where it falls. An instruction that defendant must use the care of "a *very* prudent man" is held erroneous.[13]

Where all the land in controversy was mineral land, one party cleared off a portion of his claim and planted it to potatoes. In the irrigation of his crop the water percolated through and into the mining tunnel of plaintiffs, and they sought to restrain him from such use of his land. The court says: "The defendant had the undoubted right to cultivate and plant this tract of land, and, having planted it, there can be as little question that he had the same right to irrigate it for the purpose of maturing his crop. In irrigating his land the defendant is subject to the maxim, '*Sic utere tuo ut alienum non laedas.*' An action cannot be main-

[9] Wolf v. St. Louis etc. Co., 10 Cal. 541, 10 Morr. Min. Rep. 636, and cases just cited. Cf., also, Parker v. Gregg, 136 Cal. 413, 69 Pac. 22.

[10] Scott v. Longwell, 139 Mich. 12, 102 N. W. 230, 5 Ann. Cas. 679.

[11] Hoffman v. Tuolumne Co., 10 Cal. 418.

[12] Price v. Oregon etc. Co., 47 Or. 350, 83 Pac. 843.

[13] Wolf v. St. Louis Co., 10 Cal. 544, 10 Morr. Min. Rep. 636. In Weidekind v. Tuolumne Water Co., 65 Cal. 431, 4 Pac. 415, it was held erroneous to charge that there was negligence unless the dam had certain kind of gates, or was built of certain dimensions or of certain material. "And we think the court erred in charging that 'it was the duty of the defendant to *constantly* examine said dam during the season of freshets.' That might depend on circumstances, and should have been left to the jury."

tained against him for the reasonable exercise of his right, although an annoyance or injury may thereby be occasioned to the plaintiffs. He is responsible to the plaintiffs only for the injuries caused by his negligence or unskillfulness, or those willfully inflicted in the exercise of his right of irrigating his land."[14]

The ditch-owner is not *per se* liable for damages from leakage caused without negligence by the activity of some burrowing animal,[15] but it is otherwise where the ditch-owner was also negligent.[16]

It has been held that notice or warning to the ditch-owner is sufficient to fix him with negligence if he remains inactive and the damage occurs thereafter.[17]

Concerning contributory negligence, some references are given in the note.[18]

(3d ed.)

§ 462. **Same—Floods.**—Where the overflow results from a flood, it is still a question of use of due care; there being no liability for such extraordinary floods as would surprise caution, but being liable where the floods were periodical or might have been anticipated. There is no liability for damage from floods

[14] Gibson v. Puchta, 33 Cal. 310, 12 Morr. Min. Rep. 227.

Damage from seepage from irrigation and from ditches used in irrigation is held not actionable in the absence of negligence, but actionable when negligent. Paolini v. Fresno etc. Co. (1908), 9 Cal. App. 1, 97 Pac. 1130. Citing Shields v. Orr etc. Co., 23 Nev. 349, 47 Pac. 194, and Parker v. Larsen, 86 Cal. 236, 21 Am. St. Rep. 30, 24 Pac. 989, but not citing Gibson v. Puchta. (The case of Parker v. Larsen, *supra*, seems to hold that negligence need not be shown.)

As to water doing damage from diffused percolation, see, also, Moore v. Berlin Co., 74 N. H. 305, 124 Am. St. Rep. 968, 67 Atl. 578, 11 L. R. A., N. S., 284, 13 Ann. Cas. 217, repudiating the rule of Fletcher v. Rylands, and holding that negligence must be shown.

[15] Tenney v. Miners' etc. Co., 7 Cal. 335, 11 Morr. Min. Rep. 31.

[16] Greeley etc. Co. v. House, 14 Colo. 549, 24 Pac. 329.

[17] Greeley etc. Co. v. House, 14 Colo. 549, 24 Pac. 329; McCarty v. Boise etc. Co., 2 Idaho (225), 245, 10 Pac. 623.

[18] As to the effect of contributory negligence, see Shields v. Orr etc. Co., 23 Nev. 349, 47 Pac. 194; McLeod v. Lee, 17 Nev. 103, 28 Pac. 124; Fraler v. Sears etc. Co., 12 Cal. 555, 73 Am. Dec. 562, 12 Morr. Min. Rep. 98; Consolidated etc. Co. v. Hamlin, 6 Colo. App. 341, 40 Pac. 582; Arave v. Idaho C. Co., 5 Idaho, 68, 46 Pac. 1024; Stuart v. Noble D. Co., 9 Idaho, 765, 76 Pac. 255; Jenkins v. Hooper Irr. Co., 13 Utah, 100, 44 Pac. 829; Lisonbee v. Monroe Irr. Co., 18 Utah, 343, 72 Am. St. Rep. 784, 54 Pac. 1009; North Point Co. v. Utah Co., 16 Utah, 246, 67 Am. St. Rep. 607, 52 Pac. 168, 40 L. R. A. 851; Bacon v. Kearney, 1 Cal. App. 275, 82 Pac. 84; McLellan v. Brownsville etc. Co., 46 Tex. Civ. App. 249, 103 S. W. 207; Malmstrom v. People's D. Co. (Nev.), 107 Pac. 98.

that could not be anticipated,[19] or from rainstorms of such unusual severity as to surprise caution.[20] A flood resulting from an unprecedented rainstorm causes no liability,[21] but floods that are of periodical occurrence must be guarded against by the ditch-owner, as it is possible to take precautions against floods of that kind.[22] In the last case cited in the foregoing note the court says: "The injury complained of occurred in a season of high water caused by the melting of the snow on the mountains above. The overflow so caused is periodical, and may be, and is, anticipated by all persons inhabiting the regions where the alleged damage occurred. The obligation rested on defendant to keep the banks of its canal in repair. It was bound to use ordinary diligence for this purpose. The diligence required, however, must be commensurate with the duty, and the duty is that ordinarily employed by a prudent business man when dealing with his own affairs under the circumstances which surround him and call his mind and energy into action."[23] In another case it is said: "If the defendant was not bound to provide against unheard-of floods, he was at least bound to provide against such as had occurred not more than three years prior to the construction of the ditch."[24] Extraordinary rainfalls must be guarded against if experience shows them to be recurrent even though at irregular intervals.[25]

It is thus not true to say that only "acts of God" absolve from liability for flood, since reasonable care cannot guard against some floods which still fall short of technical "*vis major.*" Only *vis major* will absolve from breach of contract, however, as distinguished from tort, and dealing with a contract in this connection, it has been said that floods or extraordinary freshets, in order to come within "act of God" must be more than such rises or high

[19] Proctor v. Jennings, 6 Nev. 83, 3 Am. Rep. 240, 4 Morr. Min. Rep. 265.

[20] Lisonbee v. Monroe etc. Co., 18 Utah, 343, 72 Am. St. Rep. 784, 54 Pac. 1009.

[21] Mathews v. Kinsell, 41 Cal. 512; Chidester v. Consolidated Ditch Co., 59 Cal. 197; Town of Jefferson v. Hicks, 23 Okl. 684, 102 Pac. 79 *(dictum)*; Bridgeport v. Bridgeport etc. Co., 81 Conn. 84, 70 Atl. 650; Bluick v. Chicago etc. Co. (Iowa), 115 N. W. 1013.

[22] The Salton Sea Cases, 172 Fed. 820; Turner v. Tuolumne etc. Co., 25 Cal. 397, 1 Morr. Min. Rep. 107; Chidester v. Consolidated Ditch Co., 59 Cal. 197.

[23] Chidester v. D. Co., *supra.*

[24] Burbank v. West Walker River Ditch Co., 13 Nev. 431.

[25] Fairbury etc. Co. v. Chicago etc. Co., 79 Neb. 854, 113 N. W. 535, 13 L. R. A., N. S., 542.

water in a stream as are usual and ordinary and reasonably anticipated at particular periods of the year.[1]

Floods recurrent, though at irregular intervals, are not within "act of God," so as to protect a gold-dredging company from damage to a populous community by overflow of dam.[2]

(3d ed.)

§ 463. **Same.**—The statute of limitation on an action for damage from seepage begins to run, not from construction of the canal, but from the first visible damage, if of a permanent kind; and successive actions will not lie. The statutory limitation is complete within the period after the first visible damage.[3]

The owner of land upon a watercourse may construct an embankment thereon to protect his land from the superabundant water in times of flood, but, in doing so, he must so erect it that the natural and probable consequences of the embankment in times of ordinary floods will not be to cause the overflow water to erode or destroy the lands of other proprietors on the stream.[4] A railway must provide culverts over a ravine, even though not a watercourse.[5]

[1] Ryan v. Rogers, 96 Cal. 349, 31 Pac. 244. See Mulrone v. Marshall, 35 Mont. 238, 88 Pac. 797.

Concerning damages from flood in general, see 57 Cent. L. J. 268.

[2] City of Oroville v. Indiana Gold Dredging Co. (Cal. 1908), 165 Fed. 550. See "Storm Waters," *supra*, sec. 347. Act of God defined (floods). Gibson v. Cascade etc. Co. (1909), 54 Wash. 289, 103 Pac. 11; Salton Sea Cases, 172 Fed. 792; City of Oroville v. Indiana etc. Co., 165 Fed. 550; Chidester v. D. Co., 59 Cal. 203; Greeley Irr. Co. v. Von Trotha (Colo.), 108 Pac. 985. Extraordinary flood held act of God. Eagan v. Central Vermont Ry., 81 Vt. 141, 130 Am. St. Rep. 1031, 69 Atl. 732, 16 L. R. A., N. S., 928. Defendant has burden of proving act of God. Buel v. Chicago etc. Co., 81 Neb. 130, 116 N. W. 299. An "extraordinary flood" is one of those visitations whose coming is not foreseen by the usual course of nature, and whose magnitude and destructiveness could not have been anticipated and prevented by the exercise of ordinary foresight. (Quoting 13 Ency. of Law, 2d ed., p. 686.) Town of Jefferson v. Hicks (1909), 23 Okl. 684, 102 Pac. 79. See Broadway Mfg. Co. v. Leavenworth Co., 81 Kan. 616, 106 Pac. 1034.

[3] Middlekamp v. Bessemer etc. Co. (1909), 46 Colo. 102, 103 Pac. 280, 23 L. R. A., N. S., 795.

[4] Town of Jefferson v. Hicks (1909), 23 Okl. 684, 102 Pac. 79.

[5] Quinn v. Chicago Ry. etc. Co. (1909), 23 S. D. 126, 120 N. W. 884. See Missouri etc. Co. v. Cannon (Tex. Civ. App.), 111 S. W. 661.

Concerning injunction against structures which cause flooding of land by obstructing the flow of water, see Pealer v. Gray's etc. Co. (1909), 54 Wash. 415, 103 Pac. 451; Hastie v. Jenkins (1909), 53 Wash. 21, 101 Pac. 495; Gibson v. Cascade etc. Co. (1909), 54 Wash. 289, 103 Pac. 11.

Measure of damages for flooding. See Tosini v. Cascade etc. Co. (S. D. 1908), 117 N. W. 1037.

Regarding floods, see, also, *supra*, sec. 348, and *infra*, sec. 828.

§§ *464–472. (Blank numbers.)*

CHAPTER 21.

LIMITATIONS ON QUANTITY OF WATER.

A. CAPACITY OF STRUCTURES.

§ 473. Introductory.
§ 474. The original claim.
§ 475. Capacity of ditch—The possessory test.
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B. BENEFICIAL USE.

§ 478. Beneficial use—The final test.
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C. ANNUAL INCREASE OF USE.

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D. DUTY AND MEASUREMENT OF WATER.

§ 486. Measurement of water.
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§ 488. Duty of water as affected by loss in transmission.
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§§ 490–495. (Blank numbers.)

A. CAPACITY OF STRUCTURES.

(3d ed.)

§ 473. Introductory.—Three tests of quantity are found in the decisions. First, the original claim, which must obviously be so because of the rule permitting successive appropriations. Second, the capacity of the ditch, because an appropriation, being created by taking possession of the stream, could not exceed the amount diverted and taken into possession. In the early cases, when the right was unquestionably accepted as a possessory right on the public domain, the capacity of the ditch was frequently taken as the *chief* test, because it fixed the amount in possession. Third, the amount beneficially used, because all that is not used within a reasonable time is regarded as aban-

doned. To-day, however, the third has overshadowed all the others, being narrower than the others, and now most strongly insisted upon; being the strongest instance of the change now going on in the law from a possessory system to a specific use system.[1]

(3d ed.)

§ 474. **The Original Claim.**—The appropriator is limited to the quantity first appropriated, and he cannot divert more than that as against subsequent appropriators.[2] By the early law before the code in California the appropriator was limited to the amount originally claimed, and the amount claimed was determined largely from the means used, and the purpose intended,[3] and such would still be the rule in California for an appropriator by actual diversion, the code formalities not being followed. An appropriation made under the present statutes of all States, however, requires the amount claimed to be specially stated in the notice or in the application for permit, and the appropriation is limited to that as the maximum.[4]

The amount claimed in the notice is the first limit.[5] This is quite obvious, being necessary for the protection of subsequent appropriators. As against subsequent appropriators not existing at the time of the enlargement of one's claim, however, the enlargement may, of course, be made, just as a new appropriation could be made, being in accord with the established doctrine of priority.[6]

(3d ed.)

§ 475. **Capacity of Ditch—The Possessory Test.**—The appropriator, by claiming more than he actually diverts, gets no right to divert the surplus later as against intervening claimants; and hence, the capacity of his ditch, if less than the amount

1 See cross-references, *supra*, sec. 139.

2 Senior v. Anderson, 115 Cal. 496, 47 Pac. 454; Union etc. Co. v. Dangberg, 81 Fed. 73; Becker v. Marble Creek etc. Co., 15 Utah, 225, 49 Pac. 892, 1119.

3 White v. Todd's Valley etc. Co., 8 Cal. 443, 68 Am. Dec. 338, 4 Morr. Min. Rep. 536; Ortman v. Dixon, 13 Cal. 33; McDonald v. Bear River etc. Co., 13 Cal. 220, 1 Morr. Min. Rep. 626; McKinney v. Smith, 21 Cal. 374, 1 Morr. Min. Rep. 650; Toohey v. Campbell, 24 Mont. 13, 60 Pac. 396.

4 *Supra*, sec. 371 et seq., 408 et seq.

5 Last Chance etc. Co. v. Heilbron, 86 Cal. 1, 26 Pac. 523.

6 Beaver etc. Co. v. St. Vrain etc. Co., 6 Colo. App. 130, 40 Pac. 1066; Hector etc. Co. v. Valley etc. Co., 28 Colo. 315, 64 Pac. 205.

claimed, is the second test of the amount to which he is entitled, allowing a reasonable time after completion of the ditch to remove boulders or other obstructions.[7] The quantity of water appropriated is measured by the capacity of the ditch at the smallest point, as determined by evidence of size and grade.[8] An appropriation is limited to capacity of ditch, and surplus thereover belongs to later appropriators.[9] The rule under these circumstances was thus stated by the early supreme court of California:[10] "He is entitled to have the water [of the stream flowing down to his ditch] undiminished in quantity, so as to leave sufficient *to fill his ditch* as it existed at the time the subsequent appropriations above him were made." The early supreme court of Nevada formulated the rule in somewhat more precise terms. "It seems that the quantity of water appropriated is to be measured by the capacity of the ditch or flume at its smallest point, that is, at the point where the least water can be carried through it."[11] Rights of tenants in common, claiming a water-right through the construction of a canal, are determined by the capacity of the canal, and not by the subsequent diversion.[12]

In determining what the capacity of a given ditch is, in a case where testimony respecting the carrying capacity of a ditch varied from two hundred and twenty-nine to six hundred inches, the court, after examining the evidence, found the true capacity to be only three hundred inches, and held that a ditch of capacity of three hundred inches at the intake should deliver to the place of use four miles away, two hundred and seventy to two hundred and eighty inches, the difference being the allowance for seepage

[7] White v. Todd's etc. Co., 8 Cal. 443, 68 Am. Dec. 338, 4 Morr. Min. Rep. 536; Ortman v. Dixon, 13 Cal. 33; McKinney v. Smith, 21 Cal. 374, 1 Morr. Min. Rep. 650; Posachane etc. Co. v. Standart, 97 Cal. 476, 32 Pac. 532; Bean v. Stoneman, 104 Cal. 49, 37 Pac. 777, 38 Pac. 39; Senior v. Anderson, 115 Cal. 496, 47 Pac. 454; San Luis etc. Co. v. Estrada, 117 Cal. 168, 48 Pac. 1075; McDonald v. Lannen, 19 Mont. 78, 47 Pac. 648; Whited v. Cavin (Or.), 105 Pac. 396; Pomeroy on Riparian Rights, secs. 80, 81; Kinney on Irrigation, secs. 162, 166. See 60 Am. St. Rep. 808, 814, note.

[8] Ophir S. M. Co. v. Carpenter, 6 Nev. 393, 4 Morr. Min. Rep. 653; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; Caruthers v. Pemberton, 1 Mont. 111, 4 Morr. Min. Rep. 622; Browning v. Lewis, 39 Or. 11, 64 Pac. 304.

[9] Driskill v. Rebbe, 22 S. D. 242, 117 N. W. 135.

[10] Bear R. Co. v. New York Co., 8 Cal. 327, 4 Morr. Min. Rep. 526.

[11] Ophir S. M. Co. v. Carpenter, 4 Nev. 534, 4 Morr. Min. Rep. 640, 6 Nev. 393, 4 Morr. Min. Rep. 653.

[12] Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

and evaporation in transit.[13] Carrying capacity of ditch can be determined from width, depth and grade.[14]

Under a statute in Colorado,[15] appropriations may be made for filling a reservoir, measured by the capacity of the reservoir on a single filling. In Windsor Co. v. Lake Supply Co.[16] it was held that the Colorado statute providing for reservoir appropriations forbids more than one filling on one priority in any one year, as against other reservoirs not yet filled.[17] As to a ditch, "capacity" means continuing carrying capacity, in consideration with beneficial use, but as to a reservoir, it means capacity in one complete filling only.[18]

The investigations of the United States Department of Agriculture of the capacity of various types of conduits[19] show that there is a wide variation of loss. (Even in the same canal ten times as much water will be lost at one time than at another). Large canals lose less than small ones. The loss for all canals taken by straight average is probably about five and seventy-seven one-hundredths per cent per mile. Between stream and land a total of fifty per cent is lost in old canals and sixty per cent in new ones. Cement-lined canals lose little in transportation. For example, the Gage canal in Southern California is cement lined and the water is distributed through underground pipes and ninety-two per cent of the water reaches the land.[20] Canals without lining at all require about three and five-tenths to four acre-feet per year at the head, after conditions have become settled.

[13] Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, at 1105, 102 Pac. 728.

[14] Bates v. Hall, 44 Colo. 360, 98 Pac. 3. And as to measurement of capacity of ditch, see Water Supply Co. v. Larimer etc. Co., 24 Colo. 322, 51 Pac. 496, 46 L. R. A. 322; Broadmoor etc. Co. v. Brookside etc. Co., 24 Colo. 541, 52 Pac. 792.

[15] M. A. S., secs. 2403, 2408.

[16] 44 Colo. 214, 98 Pac. 729.

[17] *Quaere*, whether, *after all reservoirs* in a water district have, in any one season or year, been once filled to their decreed capacity, a second filling may be had, and, if so, in what order they shall be filled. Left open in same case.

[18] "A reservoir appropriation, like that for a canal, cannot be made to do double duty. To permit a double filling of a reservoir in any one year on one appropriation, as against junior rights, is just as obnoxious to the principle mentioned as if the appropriation for immediate irrigation, through a canal, after it had been applied to the particular land for which it was diverted, was then made to serve other lands." Windsor Co. v. Lake Supply Co., 44 Colo. 214, 98 Pac. 729.

[19] Report of Office of Experiment Stations for year ending June, 1908, page 370 et seq.

[20] "While there is no doubt that cement concrete is the most effective

(3d ed.)

§ 476. Capacity of Ditch Ceasing to be a Measure.—Measurement of right by capacity of ditch is an instance of the possessory origin of the law, and its displacement as a measure by beneficial use is an instance of how the possessory origin of the law is disappearing.

The right arose as a possessory one on the public domain (though turned into a freehold by the act of 1866), and as such took on the characteristics based upon the idea of possession of the stream or of a portion of its flow. Actual diversion (the taking of possession) created the right; capacity of ditch (the amount in possession) measured the right; the right to possession was independent of mode or place of use, which could be changed at will; the right to the flow remained until actual abandonment (voluntary relinquishment of possession). Hence the above rulings making capacity of works the test, supported by cases of which Moore v. Clear Lake W. W.[21] is a leader, applying the doctrine of *injuria sine damno* to protect the flow to ditch capacity, even though plaintiff were not then using the water and suffered no present damage (so long as he did not intend an abandonment).[22] Thus, in the case just cited, frequently since approved, it was laid down (as the headnote correctly reports): "In an action to restrain the diversion of water from a stream, the complaint alleged that the plaintiff was the owner and in possession of a certain ditch connected with the stream, and that he had a right to appropriate for use and distribution so much of the water of the stream *as the ditch had capacity to carry*. Held, that an allegation to the effect that the plaintiff was in a position to use or distribute the water was unnecessary."[1]

as regards seepage, it is also the most expensive, the cost being more than six times that of the heavy oil lining (three and two-thirds gallons per square yard), which saved fifty and four-tenths per cent of the water which would have been lost were the ditch not lined, while the saving with the concrete ditch is eighty-six and six-tenths per cent, or only one and three-fourths times as large. Where water is very valuable there is no doubt that the concrete ditch is more permanent and economical. But where the water is not so scarce, and a little waste will do no damage, the expense of lining the ditch with oil may be justified, while a more expensive lining would be impracticable. The durability of the oil lining has not been thoroughly tested, and it may be that more extended experience will show them to be less valuable than these experiments would indicate."

[21] 68 Cal. 147, 8 Pac. 816. See *infra*, sec. 642.

[22] See cross-references *supra*, sec. 139.

[1] In the opinion it is said, among other things: "Here the point is made that the court fails to show that the plaintiff is in a position to use the

A change, however, is rapidly going on in the law from a possessory to a specific use system, and capacity of ditch has been almost wholly displaced by beneficial use as a measure of right. The first step in this regard was to allow ditch capacity to govern only for a certain number of years, making beneficial use the sole test where nonuse exceeded the time limit. Of this restrictive stage Smith v. Hawkins[2] is the leading case, allowing ditch capacity to govern for five years, but not if nonuse in whole or part exceeds that period; and following this stage, most States by statute fixed a similar time limit of from two to five years.[3] But the change did not stop with this stage. Now, the great weight of authority disregards capacity of ditch entirely, without regard to any length of time in which it remained out of use and without regard to any intention not to abandon it. Actual use within a reasonable time prior to the time a controversy arises is alone the test stated to-day in the decisions generally.

The reader should note well, however, that this is an instance of a wide-bearing *change* in the law, leaving conflicting lines of authorities in this and other connections. Thus, the California law holds the law to the public domain where it had its *possessory* origin, Colorado does not; the California code holds to actual diversion as completing the right, Colorado holds to actual application to use; the right is generally held independent of mode or place of use, and yet there is a strong tendency to make it inhere inseparably in the specific initial use made of it; some authorities hold a distributing company which makes the diversion to be the appropriator, others the consumer who actually makes the use; some authorities hold the right to remain indefinitely, though in nonuse, until voluntary intentional abandonment of possession, and grant injunctions against interference, though without damage, until such abandonment; others so hold for a definite period of years though not indefinitely, and still others hold solely to actual use within a reasonable time before the time of controversy, and refuse injunctions absolutely in the absence of actual damage to present use; most of these conflicting rulings being not confined to different jurisdictions, but occurring in different cases within the

water himself, or that he is in any position which gives him a right to furnish the water to others. The allegation of these matters is not essential to plaintiff's cause of action," etc. Moore v. Clear Lake Co., 68 Cal. 146, at 150, 8 Pac. 816.

[2] 110 Cal. 122, 42 Pac. 453. Affirmed in 120 Cal. 86.

[3] *Infra*, sec. 576.

same jurisdiction.[4] In other words, the law is in a state of evolution, with the end of making the requirements of some specific initial use its sole "basis, measure, and limit."[5]

(3d ed.)

§ 477. **Same.**—Whether a complete change from a possessory to a specific purpose system is desirable is a difficult question in the policy of the law. Under the possessory system, any use which is not waste is a beneficial use. It admits of emphatic expression.[6] On the other hand, under the specific use system, it is sometimes stated as one enforcing economical use; nor are these two forms of expression synonymous.[7] While waste will not necessarily exist because you *might* get along with less, the most economical use would require the lesser use and make irrigation perilous. It is frequently said[8] that the appropriators and users of the waters will be required and commanded to so divert, use and apply the waters as to secure the largest duty and greatest service therefrom.[9] Yet, a lesser duty and service than the largest might still fall short of waste. The difference in the mode of expression is that the prohibition of waste allows what engineers call a "factor of safety"; while the requirement of most economical use is like keeping a bridge continually loaded to its theoretical capacity.

Some other considerations are noted in a recent report of the United States Department of Agriculture, saying: "The water

[4] See cross-references *supra*, sec. 139.

[5] See Drach v. Isola (Colo.), 109 Pac. 748, as an instance in Colorado of how the courts are revising the old decrees based upon capacity of ditch, and now holding them open to re-examination based upon beneficial use.

[6] Such emphatic expressions thereunder are possible as, for example, "Perhaps the appellant's counsel is of the belief that the plaintiff, having made the first appropriation, is entitled to have the water come down to him to the extent of his appropriation, whether he has use for it or not. If so, he is mistaken. Water is too precious in this arid climate to permit its being unnecessarily wasted." Roeder v. Stein, 23 Nev. 92, 42 Pac. 867. In another case: "If the defendants have no present or immediate need of the full quantity of water which they may divert and use, they cannot waste it, but it is their duty to allow such portion as they have no immediate need for to remain in the natural stream, or, if diverted, to return such surplus again into the same stream, where, unless they then intend to recapture it, it becomes subject to diversion by the various ditches in accordance with their numerical priorities." Burkart v. Meiberg, 37 Colo. 187, 86 Pac. 98, 6 L. R. A., N. S., 1104, citing La Jara Co. v. Hansen, 35 Colo. 105, 83 Pac. 644.

[7] Judge J. M. Seawell in California Past. Co. v. Madera etc. Co. (Superior Court of Madera County, California, Nov. 13, 1906).

[8] For example, in Van Camp v. Emery, 13 Idaho, 202, 89 Pac. 752.

[9] "The highest and greatest possible duty." Farmers' etc. Co. v. Riverside Irr. Dist. (1909), 16 Idaho, 52, 102 Pac. 481; Niday v. Barker, 16 Idaho, 73, 101 Pac. 254.

laws of the arid States are of two general classes, considered from this point of view: those which allow of the acquirement of rights to definite quantities of water and those which limit rights to the necessities of a definite tract of land. Under laws of the former class canal owners are free to use their water supply on as large or as small an area as seems to them best, and since the more economically the water is used the larger area it will serve and the larger returns it will bring, every consideration leads to an economical use of water. Canal owners receive the direct benefit of their economy. Under laws of the latter class, limiting rights to the needs of a particular tract of land, with a maximum limit fixed, as in Wyoming and Nebraska, there can be no incentive to economy, since any water made available by economical use goes to others than the one making the saving. The inevitable tendency is for farmers to use as much as possible within the maximum fixed, in order that they may not by present economy decrease their supply for future needs. The laws of all the arid States prohibit waste and authorize the water officials to stop waste, but between positive waste and the most economical use there is a wide margin. This system has the added disadvantage of making rights indefinite. When prior rights are fixed at a definite quantity of water, subsequent appropriators know what may be taken by the prior appropriators and can estimate fairly well their own chances for water, but under the other system a change in the type of agriculture by prior appropriators may so enlarge their use as to destroy entirely the value of later rights."[10]

B. BENEFICIAL USE.

(3d ed.)

§ 478. Beneficial Use—The Final Test.—The appropriator is not to-day entitled to the quantity actually diverted and taken into possession if he uses only a portion of it; his right is limited to the amount so actually used. This is now strenuously enforced.[11] Actual use within a reasonable time (not exceeding the statutory

[10] Report of the Office of Experiment Stations of the U. S. Department of Agriculture for 1908.

[11] *Alaska.*—Ketchikan Co. v. Citizens' Co., 2 Alaska, 120.

Arizona.—Sullivan v. Jones (Ariz.), 108 Pac. 476.

California.—White v. Todd's etc. Co., 8 Cal. 443, 68 Am. Dec. 338, 4 Morr. Min. Rep. 536; Dougherty v. Haggin, 61 Cal. 305; Barrows v. Fox, 98 Cal. 63, 32 Pac. 811; Riverside etc. Co. v. Sargent, 112 Cal. 230, 44 Pac. 560; Santa Paula etc. Works v. Peralta, 113 Cal. 38, 45 Pac. 168; Senior v. Anderson, 115 Cal. 496, 47 Pac. 454; Smith v. Hawkins, 120 Cal. 86, 52 Pac. 139, 19 Morr. Min. Rep. 243; Senior v. Anderson, 130 Cal. 290, at 297, 62 Pac. 563; Bledsoe v.

period, if any, for forfeiture of right by nonuse),[12] prior to the time a controversy arises, has become the sole measure of right.[13]

Decrow, 132 Cal. 312, 64 Pac. 397; Barneich v. Mercy, 136 Cal. 205, 68 Pac. 589; Strong v. Baldwin, 137 Cal. 432, 70 Pac. 288; Hewitt v. Story, 64 Fed. 510, 12 C. C. A. 250, 30 L. R. A. 265. The rule is enacted in section 1411 of the Civil Code.

Colorado.—Yunker v. Nichols, 1 Colo. 551, 8 Morr. Min. Rep. 64; Combs v. Agric. D. Co., 17 Colo. 146, 31 Am. St. Rep. 275, 28 Pac. 966; X. Y. etc. Co. v. Buffalo etc. Co., 25 Colo. 529, 55 Pac. 720; Platte Valley Co. v. Central Trust Co., 32 Colo. 102, 75 Pac. 391; Nichols v. McIntosh, 19 Colo. 22, 34 Pac. 278; Church v. Stillwell, 12 Colo. App. 43, 54 Pac. 395; United States etc. Co. v. Gallegos, 89 Fed. 772, 32 C. C. A. 470; Burkart v. Meiberg, 37 Colo. 187, 86 Pac. 98, 6 L. R. A., N. S., 1104; Cooper v. Shannon, 36 Colo. 98, 118 Am. St. Rep. 95, 85 Pac. 175; Town of Sterling v. Pawnee Co., 42 Colo. 421, 94 Pac. 341, 15 L. R. A., N. S., 238; Tubbs v. Roberts, 40 Colo. 498, 92 Pac. 220; Windsor Co. v. Hoffman Co. (Colo. 1910), 109 Pac. 423; Same v. Same (Colo. 1910), 109 Pac. 425.

Idaho.—Van Camp v. Emery, 13 Idaho, 202, 89 Pac. 752; Drake v. Earhart, 2 Idaho, 750, 23 Pac. 541; Stickney v. Hanrahan, 7 Idaho, 424, 63 Pac. 189; Kirk v. Bartholomew, 2 Idaho, 1087, 29 Pac. 40.

Montana.—Toohey v. Campbell, 24 Mont. 13, 60 Pac. 396; Quigley v. Birdseye, 11 Mont. 439, 28 Pac. 741; Kleinschmidt v. Greiser, 14 Mont. 484, 43 Am. St. Rep. 652, 37 Pac. 5 (gradual increase allowed); Creek v. Bozeman W. Co., 15 Mont. 121, 38 Pac. 459; Anderson v. Cook, 25 Mont. 330, 64 Pac. 873, 65 Pac. 113; Hilger v. Sieben (1909), 38 Mont. 93, 98 Pac. 881; Stats. 1907, c. 185, pp. 109, 489. See, also, Civ. Code, secs. 1881, 1884.

Nebraska.—Courthouse etc. Co. v. Willard, 75 Neb. 408, 106 N. W. 463; Farmers' Irr. Dist. v. Frank, 72 Neb. 136, 100 N. W. 286; Cobbey's Ann. Stats., secs. 6772, 6774.

Nevada.—Twaddle v. Winters, 29 Nev. 88, 85 Pac. 280, 89 Pac. 289; Simpson v. Williams, 18 Nev. 432, 4 Pac. 1213; Roeder v. Stein, 23 Nev. 92, 42 Pac. 867; Union Mill Co. v. Dangberg (Nev.), 81 Fed. 73; Rodgers v. Pitt (Nev.), 89 Fed. 420, 129 Fed. 932; Gotelli v. Cardelli, 26 Nev. 382, 69 Pac. 8; Berry v. Equitable etc. Co., 29 Nev. 451, 91 Pac. 537; Stats. 1907, p. 30, sec. 4.

New Mexico.—Millheiser v. Long, 10 N. M. 99, 61 Pac. 111; Hagerman Co. v. McMurray (N. M.), 113 Pac. 823, citing this book; Stats. 1907, p. 71, secs. 2, 39.

North Dakota.—Stats. 1905, c. 34, sec. 2; Rev. Codes (1905), sec. 7604 et seq.

Oregon.—Williams v. Altnow, 51 Or. 275, 95 Pac. 200, 97 Pac. 539; Simmons v. Winters, 21 Or. 35, 28 Am. St. Rep. 727, 27 Pac. 7; Hindman v. Rizor, 21 Or. 112, 27 Pac. 13; Cole v. Logan, 24 Or. 304, 33 Pac. 568; Bowman v. Bowman, 35 Or. 279, 57 Pac. 546; Cole v. Logan, 24 Or. 304, 33 Pac. 568; Glaze v. Frost, 44 Or. 29, 74 Pac. 336; Bolter v. Garrett, 44 Or. 304, 75 Pac. 142; Gardner v. Wright, 49 Or. 609, 91 Pac. 286; Mann v. Parker, 48 Or. 321, 86 Pac. 598; Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728; Porter v. Pettengill (Or. 1910), 110 Pac. 393; Whited v. Cavin (Or. 1909), 105 Pac. 396.

South Dakota.—Stenger v. Tharp, 17 S. D. 13, 94 N. W. 402; Stats. 1907, c. 180, sec. 2.

Utah.—Manning v. Fife, 17 Utah, 232, 54 Pac. 111; Becker v. Marble etc. Co., 15 Utah, 225, 49 Pac. 892, 1119; Hague v. Nephi Irr. Co., 16 Utah, 421, 67 Am. St. Rep. 634, 52 Pac. 765, 41 L. R. A. 311; Nephi Irr. Co. v. Vickers, 29 Utah, 315, 81 Pac. 144; Sowards v. Meagher (Utah, 1910), 108 Pac. 1113; Stats. 1911, c. 104, p. 145, sec. 13, saying "irrespective of carrying capacity of ditch."

Washington.—Pierce's Code 1905, sec. 5836; Miller v. Wheeler (Wash. 1909), 54 Wash. 429, 103 Pac. 641, 23 L. R. A., N. S., 1065.

Wyoming.—Johnston v. Little Horse etc. Co., 13 Wyo. 208, 110 Am. St. Rep. 986, 79 Pac. 22, 70 L. R. A. 341. Stats. 1907, p. 138, sec. 12, saying "irrespective of carrying capacity of ditch."

[12] *Infra*, sec. 576.

[13] As to what is a reasonable time, see secs. 383, 484, 485, 567 et seq.

"When the appropriator is no longer using the water either for the season or any specific time, his right to cut off or interfere with the flow of the stream for the time being lapses."[14] In one case[15] it is held that the appropriation "must also be limited in its application to the acreage of land upon which previously applied, except at such times as the water or some part thereof may not be needed by others; and the owner not requiring its use should not be permitted to complain of its application to a beneficial use by others interested. In other words, at all times that the water is not required by one or more, it must be at the disposal of others in the order of their relative rights thereto."[16] In an oft-cited opinion by Judge Hawley it is said: "In the appropriation of water, there cannot be any 'dog in the manger' business by either party, to interfere with the rights of others, when no beneficial use of the water is or can be made by the party causing such interference."[17] The same case holds that waste in the use of water is not permissible. To secure protection in the diversion and use of the waters of a stream for irrigation, or any other purpose, there must be an economic, beneficial and reasonable use thereof, so as to prevent waste. An excessive diversion of water for any purpose cannot be regarded as a diversion for a beneficial use.

Water codes usually contain the provision "beneficial use shall be the basis, the measure and the limit of the right."[18] And statutes generally enact the same rule in other forms.[19]

Beneficial use is coming to be called "conservation" of the water.[20]

[14] Hutchinson v. Watson D. Co., 16 Idaho, 484, 133 Am. St. Rep. 125, 101 Pac. 1059, holding that an appropriator must leave the water in its natural channel except at such times as he is actually using it. See, also, Williams v. Altnow, 51 Or. 275, 95 Pac. 200, 97 Pac. 539; Whited v. Cavin (Or. 1909), 105 Pac. 396.

[15] Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

[16] Citing Mann v. Parker, 48 Or. 321, 86 Pac. 598; Gardner v. Wright, 49 Or. 609, 637, 91 Pac. 286; Williams v. Altnow, 51 Or. 275, 95 Pac. 200, 97 Pac. 539.

[17] Union Mining Co. v. Dangberg, 81 Fed. 73.

[18] For example, Nev. Stats. 1903, p. 24, sec. 1, 1907, p. 30; N. M. Stats. 1907, c. 49, p. 71, sec. 2; N. D. Stats. 1905, c. 34, sec. 2; Rev. Codes (1905), sec. 7604 et seq.; S. D. Stats. 1905, p. 201, sec. 2; Utah Comp. Laws, 1907, sec. 1288x20. In the National Irrigation Act, the law of appropriation is recognized, "Provided that the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure and the limit of the right."

[19] See note 11, *supra*.

[20] Cases cited *supra*, sec. 137.

(3d ed.)

§ 479. Same—Even if Less Than Capacity of Ditch.—Beneficial use controls to-day, even if less than capacity of ditch.[21] "The right of a party in appropriating water is limited to the amount he actually uses for a beneficial purpose, not exceeding the carrying capacity of his ditch or canal."[22]

In a California case[23] the court said, per Mr. Justice Van Fleet (now justice of the United States district court): "An appropriation of water by the owner of lands by means of a ditch is not measured by the capacity of the ditch through which the appropriation is made, but is limited to such quantity, not exceeding the capacity of the ditch, as the appropriator may put to a useful purpose."[24] In a Colorado case[25] it is said: "In order to constitute an appropriation of water there must not only be a diversion of the water from the stream and a carrying of it to the place of use, but it must be beneficially applied, and the measure of the appropriation does not depend alone upon the amount diverted and carried, but the amount which is applied to a beneficial use must also be considered. For instance, in the case of New Mercer Ditch Co. v. Armstrong,[1] it was determined by the decree that the ditch had a carrying capacity of about thirty-three cubic feet of water per second of time. It was constructed to irrigate one hundred and twenty acres of land, and it was determined that the appropriator was entitled to only so much water as he could beneficially apply upon that land."[2]

21 Riverside etc. v. Sargent, 112 Cal. 230, 44 Pac. 560; Smith v. Hawkins, 120 Cal. 86, 52 Pac. 139, 19 Morr. Min. Rep. 243; Bledsoe v. Decrow, 132 Cal. 312, 64 Pac. 397; Walker v. Lillingston, 137 Cal. 401, 70 Pac. 282; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; Bowman v. Bowman, 35 Or. 279, 57 Pac. 546; Millheiser v. Long, 10 N. M. 99, 61 Pac. 111; Stenger v. Tharp, 17 S. D. 13, 94 N. W. 402; Smith v. Duff (1909), 39 Mont. 382, 133 Am. St. Rep. 587, 102 Pac. 984; Leavitt v. Lassen Irr. Co. (1909), 157 Cal. 82, 106 Pac. 404; Whited v. Cavin (Or. 1909), 105 Pac. 396; Ison v. Sturgill (Or. 1910), 109 Pac. 579.

22 Stenger v. Tharp, 17 S. D. 13, 94 N. W. 402.

23 Smith v. Hawkins, 120 Cal. 86, at 88, 52 Pac. 139, 19 Morr. Min. Rep. 243.

24 "Not by the amount which he took, not by the amount which he claimed, not, as the court decrees, by an amount sufficient thoroughly and properly to irrigate a thousand acres of land." Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. 404 (citing Senior v. Anderson, 115 Cal. 496, 47 Pac. 454; Smith v. Hawkins, 120 Cal. 86, 52 Pac. 139, 19 Morr. Min. Rep. 243; Strong v. Baldwin, 137 Cal. 440, 70 Pac. 288). In Whited v. Cavin (Or.), 105 Pac. 396, this is said to be "almost axiomatic." In Salt Lake City v. Gardner (Utah), 114 Pac. 147, "elementary and no longer questioned by anybody."

25 Woods v. Sargent, 43 Colo. 268, 95 Pac. 932.

1 21 Colo. 357, 40 Pac. 989.

2 See Union Mining Co. v. Dangberg, 81 Fed. 73.

Beneficial use by and needs of the appropriator, and not the quantity originally diverted or the capacity of the ditches constructed, determines the limit of the appropriator's rights. Even where a large ditch capacity was originally actually needed and used, lands after years of irrigation do not require the amount first essential, because the law of nature, added to improved methods, greatly reduces, in the course of time, the quantity required.[3]

It is sometimes so provided by statute.[4]

(3d ed.)

§ 480. **Time at Which Beneficial Use is to be Figured.**—The tendency of decisions to-day is to figure beneficial use solely at the very time when any controversy arises. But, as elsewhere considered, the spirit of the law has always been to allow a reasonable time;[5] and moreover the statutes specifying a definite number of years for forfeiture of right for nonuse[6] must be given some force. Taking the law as a whole, it is a fair deduction that beneficial use is to be measured a *reasonable time* (not exceeding the statutory period, if any, for forfeiture by nonuse) *prior to* the time the controversy arises; the question what is a reasonable time being one of fact in each case.

(3d ed.)

§ 481. **What Constitutes Waste.**—The following is a collection of various more or less specific, although disconnected, examples of rulings upon what does and does not constitute beneficial use. No further attempt is made to classify them, partly because no fixed classification exists,[7] the point being one now in the course of rapid development, but chiefly because the question is one of fact, a very general one, to be left broadly to the jury (or to the court, if sitting without one), and the result in any particular case will depend upon the attitude which the jury (or judge), as reasonable

[3] Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, at 1101, 1102, 102 Pac. 728, citing United States v. Conrad Inv. Co. (C. C. Or.), 156 Fed. 123, 130.

[4] *In Wyoming:* "Rights to the use of water shall be limited and restricted to so much thereof as may be necessarily used for irrigation or other beneficial purposes as aforesaid, irrespective of the carrying capacity of the ditch," etc. (Stats. 1907, p. 138, sec. 12; Rev. Stats. 895.) Copied in *Utah* Stats. 1911, c. 104, p. 145, sec. 13. See Montana Stats. 1907, p. 484.

[5] *Supra*, sec. 378, diligence; *infra*, sec. 483, future needs; *infra*, sec. 567 et seq., abandonment.

[6] *Infra*, sec. 576.

[7] See Cascade Co. v. Empire etc. Co. (Colo.), 181 Fed. 1011.

men, will take toward the evidence as a whole, when presented to them at the trial.

Reference should also be made to preceding sections in another chapter considering what constitutes a beneficial purpose.[8]

The amount necessary for beneficial use is a question of fact in each case.[9] It is not to be determined by rule or presumption, but by the evidence each case presents to the court or jury.[10] Evidence will be received of the number of acres irrigated and the needs per acre,[11] and of the custom of the locality.[12] The testimony of farmers living in the vicinity regarding the quantity of water required for the irrigation of crops and regarding the capacity of a flume may outweigh the testimony of professional engineers.[13] In Oregon it has been recently held [14] that where one is entitled to the use of water from a stream, and has between sixty and seventy acres of land in cultivation, including an orchard, it will be assumed that a flow of sixty inches of water is ample for his irrigation and domestic requirements; thereby, without statute, reaching by presumption substantially the same rule as the maximum limit fixed by the water codes.[15]

Beneficial use necessarily varies with the humidity of seasons.[16]

An appropriator of water from a stream for irrigating purposes is not confined to the amount of water he used, or to the amount of land he irrigated during certain dry seasons when there was not sufficient water to irrigate all his land or as much as he had previously irrigated.[17] "Dry season" is that season, regardless of the time of the year, when irrigation is necessary for preservation of crops.[18] This season when irrigation can be beneficially applied is also called the "irrigating season." [19] There is but one "irrigating

[8] *Supra*, sec. 378 et seq.

[9] X. Y. etc. Co. v. Buffalo etc. Co., 25 Colo. 529, 55 Pac. 720.

[10] In Schodde v. Twin Falls Co. (Idaho), 161 Fed. 43, 88 C. C. A. 207, a current-wheel is held *per se* a wasteful method of use. But as to this case, see *supra*, sec. 310.

[11] Kirk v. Bartholomew, 2 Idaho, 1087, 29 Pac. 40, 3 Idaho, 367, 29 Pac. 46.

[12] Rodgers v. Pitt, 89 Fed. 420.

[13] Twaddle v. Winters, 29 Nev. 88, 85 Pac. 280, 89 Pac. 289.

[14] Gardner v. Wright, 49 Or. 609, 91 Pac. 286.

[15] *Infra*, sec. 487.

[16] Gotelli v. Cardelli, 26 Nev. 382, 69 Pac. 8.

[17] Rodgers v. Pitt, 129 Fed. 932, saying: "During the dry years there was not sufficient water to furnish the necessary supply. Complainant could not obtain sufficient water to irrigate the land. The complainant certainly ought not to be confined to the amount of water he used, and to the number of acres irrigated during the dry seasons."

[18] Daly v. Ruddell, 137 Cal. 671, 676, 70 Pac. 784.

[19] See Twaddle v. Winters, 29 Nev. 88, 85 Pac. 280, 89 Pac. 289; Anderson v. Bassman, 140 Fed. 14.

adopted.[14] Advance in methods of irrigation, and increase in number of users, must be considered in deciding the requirement for beneficial use, and thereby the extent of the appropriation.[15]

Recent statutes frequently make waste criminal.

(3d ed.)

§ 482. **Same.**—Merely that in the earlier history of the vicinity large quantities were diverted and actually applied notwithstanding the ditches first constructed had sufficient capacity to carry such supply, does not necessarily show that such amount was really needed. Beneficial use is measured by conditions at time of suit. Improved methods may limit the amount below that originally used. In Hough v. Porter[16] Mr. Justice King says: "Owing to the little demand and large proportionate supply in use by those along Silver creek and its branches in the early eighties, together with the lack of general knowledge and experience on the subject throughout the state, wasteful methods at that time were, no doubt, common; but of recent years improved means throughout the West have come into use, and a scarcity of the supply has made a more economic use necessary. The result is that the law has become well settled that beneficial use and needs of the appropriator, and not the capacity of the ditches or quantity first applied, is the measure and limit of the right of such appropriators.[17] . . . . The farmer at first may have needed but one hundred inches of water and yet constructed ditches carrying three times that quantity, using it in a wasteful manner, which right he still insists upon by reason of the ditch, when first constructed, being of sufficient capacity to carry the excessive supply. It is well settled that such a claim cannot be successfully maintained."[18] In another Oregon case[19] it is said: "He also says that during the time he owned the

[14] Rodgers v. Pitt, 129 Fed. 932, saying: "The court cannot, in the absence of any law upon the subject, compel the farmers to use any particular system, but it might, in a case where an extravagant and wasteful system is used, which demands more water than they are entitled to by virtue of their appropriations, declare that under such circumstances they were not entitled to the quantity of water they were using, and give the excess to subsequent appropriators."

[15] Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

[16] 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

[17] Citing this book, 2d ed., p. 263; Seaweard v. Pacific L. Co., 49 Or. 157, 88 Pac. 963; Gardner v. Wright, 49 Or. 609, 91 Pac. 286; Union Mill. M. Co. v. Dangberg (C. C.), 81 Fed. 73, 119; Anderson v. Bassman (C. C.), 140 Fed. 26.

[18] Citing Seaweard v. Pacific L. Co., 49 Or. 157, 161, 88 Pac. 963.

[19] Davis v. Chamberlain, 51 Or. 304, 98 Pac. 154.

Davenport ditch he used it in mining during the winter months and up to the 1st of June—up to the irrigating season. 'That is the way we used it.' Hence there does not exist in the owners of either the Farmers' ditch or the Davenport ditch any right to divert water thereby after the 1st of June. An appropriation of water is limited in every case in quantity as well as for the period of time for which the appropriation is made." [20]

The Land Office has ruled that the final and only conclusive proof of reclamation under the Reclamation Act is production.[21]

In an Idaho case the facts were held to show beneficial use by a party for irrigation at some times and for mining at the remaining times.[22] In another Idaho case [23] defendants had, during the irrigation season, diverted and used the waters of Snake River since the year 1885. After the irrigation season, and about the 15th of October, 1907, the defendants, having no use for the water until the next season, nevertheless shut down their headgate at the head of the slough, and also placed therein a dam of earth and rock so as to prevent the water from flowing down the channel through Watson slough, and diverted and deflected the whole body of the stream into the main channel of Snake River, and thereby cut off from plaintiff the flow of water in Watson slough. This time when the water is not in use by the defendant was held not covered by its appropriation, and during such times it is as though there were no appropriation at all, and the waters are the same as if unappropriated, and the diverter is a stranger, intermeddler or interloper with respect to the watercourse. As to plaintiff, he, subsequent to defendant's appropriation, took up, about 1891, riparian land through which the slough runs and he has for more than seventeen years last past been using the waters naturally flowing in the stream and watercourse for domestic purposes and for watering his livestock, and claims that as a riparian owner he is entitled to the continued use thereof and to have the water flow through his lands in its natural course when not used for irrigation or other purposes by prior appropriators in conformity with law. He was upheld in this claim.

[20] Citing Simmons v. Winters, 21 Or. 35, 28 Am. St. Rep. 727, 27 Pac. 7; McPhee v. Kelsey, 44 Or. 193, 74 Pac. 401, 75 Pac. 713; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; Atchison v. Peterson, 20 Wall. 507, 514, 22 L. Ed. 414, 1 Morr. Min. Rep. 583.

[21] 37 Land Dec. 468.

[22] Lockwood v. Freeman, 15 Idaho, 395, 98 Pac. 295.

[23] Hutchinson v. Watson D. Co. (1909), 16 Idaho, 484, 133 Am. St. Rep. 125, 101 Pac. 1059.

C. ANNUAL INCREASE OF USE.

(3d ed.)

§ 483. **Future Needs.**—In considering the amount of water to which an appropriator is entitled, there is introduced a new feature to meet the requirements of irrigation. The history and principles so far stated show that the system of appropriation aims fundamentally at definiteness and certainty. It allowed the prior appropriator to take what he wanted and do with it what he wanted, if he let the world know, so that later comers would have to take things as they found them, and would know what they could take. Consequently, as regards the limitation to beneficial use, later appropriators had to look solely at the amount the prior appropriator was actually applying to a beneficial purpose at the time the subsequent claimant arrived. For any enlargement of amount used thereafter the prior claimant had to take his chances with others at the time he sought to increase the amount.[24]

But while in mining a fixed amount may usually be sufficient from the start for all purposes, in irrigation of newly settled land it will not. The need for water grows as the area cultivated grows. The settler can cultivate, perhaps, only a few acres the first year; but he does everything with a view to later expansion. As is said in one case, it is reasonable to suppose that reclamation of the entire area owned at the time of diversion is contemplated.[25] Before his larger acreage is cleared and planted, however (which may take several years), other claimants to the use of the water have arrived. Does the law allow the former to continue increasing his use in the face of these later claimants?

It seems well settled that such is the rule. The amount used need not be a fixed, constant quantity. The amount used is still a limit, as previously set forth. But it is a movable limit, which may gradually increase as the irrigator's needs increase. The principle has been repeatedly affirmed.[1] In California this principle was

[24] Compare Windsor Res. Co. v. Lake Supply Co., 44 Colo. 214, 98 Pac. 729.

[25] Seaweard v. Pacific etc. Co., 49 Or. 157, 88 Pac. 963.

[1] *Colorado:* See New Mercer etc. Co. v. Armstrong, 21 Colo. 357, 40 Pac. 989. (*Dictum*, but enlargement not upheld on facts.) Just as in California, there seems to be no actual decision in Colorado to this effect.

Idaho: Hall v. Blackman, 8 Idaho, 272, 68 Pac. 19; Conant v. Jones, 3 Idaho, 606, 32 Pac. 250; Brown v. Newell, 12 Idaho, 166, 85 Pac. 385.

Montana: Kleinschmidt v. Greiser, 14 Mont. 484, 43 Am. St. Rep. 652, 37 Pac. 5; Arnold v. Passavant, 19 Mont. 575, 49 Pac. 400.

Nevada: Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; Rodgers

affirmed in Senior v. Anderson;[2] though the enlargement was not upheld on the facts of the case. There seems no other California decision on the point, the court relying on Oregon cases.[3] In a later case the California court said: "There are cases which hold that the diversion of a large quantity of water is a good appropriation of the whole *ab initio*, although it is not all used at first, if the design is gradually to extend the use, and that design is carried out before an adverse appropriation of the surplus below the point where it is returned to the stream. But this is a point which has not been argued, and we merely allude to it in passing."[4] The essential point of the rule is not correctly stated in this passage, since the essence of the rule is that the design may be carried out in spite of an intervening appropriation elsewhere on the stream, as the quotations below show.

The same doctrine has been applied to future enlargement of use for power purposes as well as irrigation.[5]

(3d ed.)

§ 484. **Same.**—There are limitations upon this principle of figuring future needs in the amount appropriated though not at present used. These limitations are but applications of the rules heretofore stated for determination of the amount to which an appropriator is entitled, which apply to future use as much as to present use.

First, the future needed amount must be originally claimed at the time of initiating the appropriation; being the limitation

v. Pitt, 129 Fed. 932; Union Mining Co. v. Dangberg, 81 Fed. 73.

Oregon: Nevada D. Co. v. Bennett, 30 Or. 59, 60 Am. St. Rep. 777, 45 Pac. 472; Glaze v. Frost, 44 Or. 29, 74 Pac. 336; Seaweard v. Pacific etc. Co., 49 Or. 157, 88 Pac. 963; Ison v. Sturgill (Or.), 109 Pac. 579 (*dictum*).

Utah: Elliot v. Whitmore, 23 Utah, 342, 90 Am. St. Rep. 700, 65 Pac. 70; Sowards v. Meagher (Utah), 108 Pac. 1113.

Washington: Longmire v. Smith, 26 Wash. 439, 67 Pac. 246, 58 L. R. A. 308. See, also, Avery v. Johnson (Wash.), 109 Pac. 1028.

[2] 115 Cal. 496, 47 Pac. 454.

[3] Compare the following: An appropriator using twenty-five inches entered into a contract reserving his "present right." It was held that water for future needs was not reserved under "present right." Southside etc. Co. v. Burson, 147 Cal. 401, 81 Pac. 1107. Compare Duckworth v. Watsonville Co., 158 Cal. 206, 110 Pac. 927, holding an appropriation for town supply cannot be increased with growth of the town, or for emergency use, against other appropriators. See, also, Cox v. Clough, 70 Cal. 349, 11 Pac. 732.

[4] Hubbs and Miners' Ditch Co. v. Pioneer Water Co., 148 Cal. 407, 83 Pac. 253.

[5] Trade Dollar etc. Co. v. Fraser (Idaho), 148 Fed. 587, 79 C. C. A. 37; Union Min. Co. v. Dangberg, 81 Fed. 73; McFarland v. Alaska etc. Co., 3 Alaska, 308.

already stated, to the original claim. The future needs must have been in mind and claimed at the time the appropriation was originally made, and not a mere afterthought.[6] That is, the enlarged use must be part of an original policy of expansion. Otherwise, it cannot prevail over interveners.[7] Water for future needs must have been part of the original appropriation, and if a decree settling rights is made, such right, if not included therein, cannot be claimed thereafter.[8] Use on after-acquired land must have been contemplated at the time of the original appropriation.[9]

Second, the future enlargement cannot exceed the original capacity of the ditch.[10] Among the settled propositions of the law of appropriation, Judge Hawley[11] includes the following: "That if the water is used for the purpose of irrigating lands owned by the appropriator, the right is not confined to the amount of water used at the time the appropriation is made; that the appropriator is entitled not only to his needs and necessities at that time, but to such other and further amount of water, *within the capacity of his ditch*, as would be required for the future improvement and extended cultivation of his land, if the right is otherwise kept up."[12]

Third, he can hold this future needed amount only for a reasonable time; if he holds it, without using it, longer than is reasonable under the circumstances of each case, the right to it is lost by abandonment, and he will be limited to the amount in use at the time of an intervening appropriation by another. Four years were held to be an unreasonable time in Senior v. Anderson,[13] on the facts of that case, saying: "We do not hold that the Hines appropriation is limited by the quantity of water he could put to a useful purpose upon his land the first or second year, but to such quantity as he could put to a useful purpose upon his land, within a reasonable time by the use of reasonable diligence. . . . . We think that

[6] Becker v. Marble Creek etc. Co., 15 Utah, 225, 49 Pac. 892, 1119; Brown v. Baker, 39 Or. 66, 65 Pac. 799, 66 Pac. 193; Toohey v. Campbell, 24 Mont. 13, 60 Pac. 396; Tanghenbaugh v. Clark, 6 Colo. App. 235, 40 Pac. 153; Ison v. Sturgill (Or. 1910), 109 Pac. 379; Porter v. Pettengill (Or.), 110 Pac. 393; Long on Irrigation, sec. 59.

[7] *Ibid.*; Sieber v. Frink, 7 Colo. 148, 2 Pac. 901.

[8] Farmers' Union etc. Co. v. Rio Grande etc. Co., 37 Colo. 512, 86 Pac. 1042.

[9] Rutherford v. Lucerne etc. Co., 12 Wyo. 299, 75 Pac. 445.

[10] McDonald v. Lannen, 19 Mont. 78, 47 Pac. 648.

[11] Union etc. Co. v. Dangberg, 81 Fed. 73. The italics are ours.

[12] See cases cited *supra*, sec. 475, capacity of ditch. See, also, Smith v. Duff (1909), 39 Mont. 182, 133 Am. St. Rep. 507, 102 Pac. 984.

[13] *Supra*.

the time elapsing after 1883 [14] was ample to bring under cultivation all the land upon the Hines place intended for cultivation by the use of water." This is the requirement of beneficial use adapted to a situation demanding delay.[15] What is a reasonable time is a question of fact in each case. "What is a reasonable time in which to apply water originally intended to be used for some beneficial purpose depends upon the magnitude of the undertaking and the natural obstacles to be encountered in executing the design." [16] It has been held that the time during which a colonization company was seeking to induce immigration is a reasonable time.[17] Five years have been held too long; [18] ten years; [19] thirteen years; [20] eighteen years.[21] On the other hand, seven years have been held a reasonable time; [22] thirteen years; [23] fourteen years.[1] In California there is ground for saying that five years will be a limit. In Smith v. Hawkins,[2] it was laid down as a general proposition in California that in all cases the right is lost by forfeiture if there is a failure for five years to apply the water to a beneficial use. The principle of forfeiture after a definite period of nonuse appears also in the recent water codes.[3] For example, in the Idaho statute it is provided that actual application and use of the waters must be made within a time fixed by the State Engineer when he issues the permit of appropriation, and shall not exceed four years.[4] In adjudication of existing priorities by the courts, the time, not exceeding four years, and the amount, for future needs, must be fixed by the decree.[5] Similar provisions fixing the time for future

[14] To 1887.

[15] Cf. *ante*, sec. 383, diligence.

[16] Seaweard v. Pacific etc. Co., 49 Or. 157, 88 Pac. 693.

[17] Nevada Ditch Co. v. Bennett, 30 Or. 59, 60 Am. St. Rep. 777, 45 Pac. 472.

[18] Seaweard v. Pacific etc. Co., 49 Or. 157, 88 Pac. 963.

[19] Hindman v. Rizor, 21 Or. 112, 27 Pac. 13; Cole v. Logan, 24 Or. 304, 33 Pac. 568; Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

[20] Low v. Rizor, 25 Or. 551, 37 Pac. 82.

[21] New Mercer etc. Co. v. Armstrong, 21 Colo. 357, 40 Pac. 989.

[22] Moss v. Rose, 27 Or. 595, 50 Am. St. Rep. 743, 41 Pac. 666.

[23] *Semble*, Rodgers v. Pitt, 129 Fed. 932.

[1] *Semble*, Hall v. Blackman, 8 Idaho, 272, 68 Pac. 19.

On what is a reasonable time see, also, Gates v. Settlers' Co., 19 Okl. 83, 91 Pac. 856; Brown v. Newell, 12 Idaho, 166, 85 Pac. 385, citing Idaho cases; Beers v. Sharpe, 44 Or. 386, 75 Pac. 719; Nevada etc. Co. v. Bennett, 30 Or. 59, 60 Am. St. Rep. 777, 45 Pac. 472; Conant v. Jones, 3 Idaho, 606, 32 Pac. 250. See *supra*, sec. 383, diligence.

[2] 110 Cal. 122, 42 Pac. 453, affirmed in 120 Cal. 86, 52 Pac. 139, 19 Morr. Min. Rep. 243. The case of Smith v. Hawkins is quoted and considered again later, *infra*, sec. 575.

[3] *Infra*, sec. 576.

[4] Stats. 1903, p. 223, secs. 1, 2, 6; sec. 1, as amended 1905, p. 357.

[5] *Ibid.*, sec. 38.

application of the water exist in the statutes passed since 1903, by some of the other States. The Idaho statute in 1907 [6] provides that the forfeiture for the statutory period of nonuse (five years) shall not apply to the matter now under consideration.

Fourth, probably, until the appropriator's future needs have become present needs, and the extra amount is actually used, others may use the water temporarily.[7]

(3d ed.)

§ 485. **Same.**—Some general quotations may be added. In Arnold v. Passavant,[8] the appropriation was made for one hundred and eighty acres, but only forty-five were cultivated at the time a later claim was initiated. The prior claim for enough to irrigate one hundred and eighty acres was upheld, the evidence being "that he cultivated his land and used water to irrigate it, as he and his partner got money in their pockets." In Hall v. Blackman [9] the court says: "The history of irrigation in this State shows that the public lands have generally been taken by poor men, and that they have not in twenty years brought into cultivation one-half the land taken by them, and if our irrigation laws required them to cultivate all of their land in a very short time or lose the right to water that they had diverted and taken to the place of intended use, it would result in defeating the very purpose of the public land laws of Congress and defeat most settlers in acquiring the right to the use of sufficient water to irrigate their lands." In Rodgers v. Pitt,[10] Judge Hawley says: "The conditions [draining sloughs and plowing sagebrush] on the land had to be changed in order to apply the water claimed and appropriated to a useful and beneficial purpose. It was part of the enterprise which Marker had in view in making his appropriation. There is no principle of law that required him under such circumstances to delay making his appropriation until after he succeeded in draining the land and putting it in a condition where it could be cultivated." Kinney on Irrigation [11] says: "We find that the rule is that he may make an appropriation of all the water that he will need upon his land, and that the fact that he does not make immediate use of the whole land will not destroy his priority of

6 Stats. 1907, p. 507.

7 See Seaweard v. Pacific etc. Co., 49 Or. 157, 88 Pac. 963.

8 19 Mont. 275, 41 Pac. 400.

9 8 Idaho, 272, 68 Pac. 19.

10 129 Fed. 932.

11 Sec. 668a. And see Long on Irrigation, sec. 48.

right if he continues the development of his land and makes a full use of his water-right within a reasonable time."

A recent Oregon case[12] says: "When an ordinarily prudent person makes a prior appropriation to irrigate arid land of which he is the owner, or in the lawful possession expecting to acquire title thereto, if such land will be benefited by irrigation, and the volume of the stream is sufficient therefor, it is reasonable to suppose that he has in mind both the extent of his land and the amount of the water at the time of his appropriation, and that he intends to reclaim the entire area thereof, either by the ditches constructed at the time or by a canal system then in contemplation. But pioneers on the public domain do not ordinarily possess great wealth, and hence cannot rapidly convert arid land into farms; and, such being the case, the law allows a reasonable time in which to complete the appropriation. If the increase in the area of arable land for the irrigation of which water has been diverted varies with and is measured by the lapse of time, the additional application of water annually to meet the augmented demand causes the appropriation to relate back to its inception, thereby cutting off all intervening rights of adverse claimants to the use of such water.[13] What is a reasonable time in which to apply water originally intended to be used for some beneficial purpose depends upon the magnitude of the undertaking and the natural obstacles to be encountered in executing the design."[14]

The supreme court of Utah has recently held that, where done in good faith, an appropriation may be made wholly for future use.[15]

[12] Seaweard v. Pacific etc. Co., 49 Or. 157, 88 Pac. 963.

[13] Citing Simmons v. Winters, 21 Or. 35, 28 Am. St. Rep. 727, 27 Pac. 7; Hindman v. Rizor, 21 Or. 112, 27 Pac. 13; Cole v. Logan, 24 Or. 304, 33 Pac. 568; Smyth v. Neal, 31 Or. 105, 49 Pac. 850.

[14] Citing Hindman v. Rizor, 21 Or. 112, 27 Pac. 13; Nevada Ditch Co. v. Bennett, 30 Or. 59, 85, 60 Am. St. Rep. 777, 45 Pac. 472.

"In the meantime, however, he is only entitled to such water from year to year as he puts to a beneficial use. A person may add his application of water thereto for irrigation as his necessities may demand, as his abilities may permit, until he has put to a beneficial use the entire amount of water at first diverted by him and conducted to the point of intended use." Conant v. Jones, 3 Idaho, 606, 32 Pac. 250.

"Respondent has increased the area of his irrigated lands in the last few years, which we think he had a perfect right to do." Lockwood v. Freeman, 15 Idaho, 395, 98 Pac. 295.

[15] "May an application be made to appropriate water for a beneficial purpose so contemplated in the future? We confess that the question is open to debate, and is not free of doubt. We have, however, with some hesitancy, reached the conclusion that such

Rights pending completion at the time a decree is rendered settling rights must be left open by the decree.[16]

(3d ed.)

§ 485a. **Same.**—Upon the proper classification of this principle which, adapting an expression of Judge Hawley's, we have called "appropriation for future needs," the cases are not always agreed. We have considered it as a question of the amount of water which an appropriator may hold against others. This follows the original theory of appropriation as being complete on diversion and *prima facie* to the amount of the capacity of the ditch, the question of when actual use is or is not made being a question of waste and abandonment. In the foregoing quotations this point of view appears in such expressions as holding "the water they had diverted and taken to the place of intended use." On the other hand, it is often considered as a question in the making of an appropriation, on the theory that the appropriation is not complete until actual use is made. According to this view, the principles we have given are to be classified as follows: The contemplation of the enlargement is equivalent to the *bona fide* intention required in making an appropriation; as to reasonable time, that is the element of diligence; as to temporary use of interveners, that is the principle of relating back delayed to actual application instead of taking place on diversion. This latter view of the proper place of the principle appears above in an Oregon case which says: "The additional application of water annually to meet the augmented demand causes the appropriation to relate back to its inception, thereby cutting off all intervening rights of adverse claimants to the use of the water." To the writer it seems an illustration of the theory that the diversion completes the appropriation and the capacity of the ditch is *prima facie* the amount thereof, but that waste or failure of beneficial use rebuts the *prima facie* case on the principles of abandonment or forfeiture.

It is a rule of holding the capacity of the ditch for future use. *Prima facie,* the capacity of the ditch, being the amount in actual possession, is, as already discussed, the amount appropriated; but

an application may properly be made when it is made in good faith and with an actual *bona fide* intention and a present design to appropriate the water for a beneficial use, though contemplated in the future, and when it is not made for the purpose of mere speculation or monopoly." Sowards v. Meagher (Utah), 108 Pac. 1113.

[16] Conley v. Dyer, 43 Colo. 22, 95 Pac. 304.

all not used within a reasonable time is abandoned. Where due diligence is used to put the full capacity to use within a reasonable time, abandonment is negatived. The principle is sometimes called that of annual increase of irrigation; but the designation of "appropriation for future needs" which is suggested by an expression in an opinion above quoted from Judge Hawley, is more expressive of the situation, since the rule is one of holding the capacity of the ditch for the future enlarged cultivation. It is an example of the possessory side of the law.[16a]

We have discussed this point at some length because it is one of unusual importance, and because it indicates a "possessory" survival in fitting the law of appropriation to irrigation. It seems to the writer one of the unconscious instances in which irrigation has induced in the law of appropriation a tendency to adopt some of the principles of the common law of riparian rights. It undoubtedly lessens the insistence upon actual use, when the right may thus lie in abeyance for years without use, not unlike the way it does at common law.

The present policy is to favor those who actually undertake to settle in the hitherto unsettled regions and, toward them, to be liberal in enforcing the rule of beneficial use. Correspondingly, this liberality to the first settlers somewhat discourages later arrivals; but irrigation actually undertaken is considered worth more than later possibilities.

D. DUTY AND MEASUREMENT OF WATER.

(3d ed.)

§ 486. **Measurement of Water.**—The original standard of measurement was the miner's inch. The courts, however, do not insist, aside from statute, upon any special mode of designation. "That is certain which can be made certain; and if any particular kind of water measurement has been in use in that locality, such customary measurement would apply in a determination of the extent of plaintiff's ownership in the carrying capacity of the pipe-line." [17]

[16a] See particularly sec. 139, *supra*.

[17] Collins v. Gray, 3 Cal. App. 723, 86 Pac. 893. "Inch" means any measurement shown by evidence, but is meaningless where the evidence shows no method of measurement, and, it is held, also shows that it could not have been according to the statutory definition. Logan v. Guichard (Cal. 1911), 114 Pac. 989. See, also, Crane v. McMurtrie (N. J. 1911), 78 Atl. 170.

What constitutes a miner's inch varies in different localities.[18] It is said of the California inch: "The term 'miner's inch' is more or less indefinite, for the reason that California water companies do not all use the same head above the center of the aperture, and the inch varies from one and thirty-six hundredths to one and seventy-three hundredths cubic feet per minute each; but the most common measurement is through an aperture two inches high and whatever length is required, and through a plank one and one-half inches thick. The lower edge of the aperture should be two inches above the bottom of the measuring-box and the plank five inches high above the aperture, thus making a six-inch head above the center of the stream. Each square inch of this opening represents a miner's inch, which is equal to a flow of one and one-half cubic feet per minute."[19] Of the Colorado inch it is said: "In Colorado an 'inch' is the volume which will pass through an orifice one inch square under a pressure of five inches, measured from the top of an orifice, and varies somewhat with the number of inches sought to be measured; thirty-eight and four-tenths inches is the accepted equivalent of a cubic foot per second, however."[20]

It has been held that the word "inch" means such customary inch as prevails in a given locality.[21] Statutory definitions of "miner's inch" sometimes appear.[22] In Oregon it has been held that when the record is silent as to the quantity of water intended by the word "inch," it will be presumed to be measured under a six-inch pressure.[23] In Idaho the statute provides for a four-inch pressure.[24]

[18] Dougherty v. Haggin, 56 Cal. 522, 15 Morr. Min. Rep. 211.

[19] Kent's Mechanical Engineer's Pocketbook, p. 18.

[20] Bulletin 118, U. S. Dept. Agric. Exper. Sta., p. 73. See 2 M. A. S., sec. 4643.

[21] Collins v. Gray, 3 Cal. App. 723, 86 Pac. 983. See Carron v. Wood, 10 Mont. 500, 26 Pac. 388; Logan v. Guichard (Cal. 1911), 114 Pac. 989.

[22] Cal. Stats. 1901, p. 660: "Section 1. The standard miner's inch of water shall be equivalent or equal to one and one-half cubic feet of water per minute measured through any aperture or orifice. Section 2. All acts or parts of acts inconsistent with the provisions of this act are hereby repealed." A similar act exists in Montana. Stats. 1899, p. 117. Note, however, that the California Civil Code, section 1415, requires the measurement to be under a four-inch pressure, while the above statutory measurement required is under a six-inch pressure. It has been held in California that the statutory definition will not be applied where the evidence shows that the parties did not intend to be governed by it. Logan v. Guichard (Cal. 1911), 114 Pac. 989.

[23] Gardner v. Wright, 49 Or. 609, 91 Pac. 286; Morgan v. Shaw, 47 Or. 333, 83 Pac. 534; Bowman v. Bowman, 35 Or. 279, 57 Pac. 546.

[24] Laws 1889, p. 380, sec. 1.

The designation by "miner's inches" is falling into disuse, and, instead, the "second-foot" is taking its place; being a flow of one cubic foot per second of time. This is now the statutory standard generally.[25] The second-foot being the unit of flow, the unit of volume is either one cubic foot,[1] or one acre-foot.[2] The ratio between the miner's inch and the second-foot is not always given the same, owing to the variation in the meaning of miner's inch. Thus, the second-foot is sometimes declared equal to fifty inches,[3] or to forty inches,[4] or to thirty-eight and four-tenths inches.[5] Some further discussion of the miner's inch is given in the note.[6]

The term "miner's inch" cannot be definite without the specification of the head or pressure.[7]

[25] E. g., Colorado, M. A. S. 2467; Montana, Stats. 1907, p. 489, sec. 10; Nebraska, Comp. Stats. 1903, sec. 6428; Nevada, Comp. Laws, 1900, Stats. 1907, p. 30, sec. 6; New Mexico, Stats. 1905, p. 270, sec. 3; North Dakota, Stats. 1905, c. 34, sec. 47; Oklahoma, Stats. 1905, p. 274, c. 21, sec. 27; South Dakota, Stats. 1905, p. 201, sec. 44, Stats. 1907, p. 180, sec. 45; Utah, Stats. 1905, c. 108, sec. 48; Washington, Pierce's Codes, sec. 8942; Wyoming, Rev. Stats. 968.

[1] E. g., Colorado, M. A. S. 2467.

[2] E. g., Utah, Oklahoma, South Dakota, and New Mexico statutes just cited.

[3] New Mexico, North Dakota and South Dakota statutes, *supra;* Nebraska, Comp. Stats. 1903, sec. 6440; Cobbey's Ann. Stats., sec. 6786. The State Engineer of Idaho adopts the same ratio. The same is the usual practice in California although the statutory definition is forty.

[4] Montana Stats. 1907, p. 489, sec. 10. The same is the equivalent of the California statute of 1901, page 660, quoted above. The same was also accepted in Gardner v. Wright, 49 Or. 609, 91 Pac. 286. The Arizona inch is the same.

[5] Colorado as given in Bulletin 118, U. S. Dept. Agric. Exper. Sta., p. 73, and enacted (*semble*) in 2 M. A. S., sec. 4643.

[6] Speaking of the miner's inch, it was recently held (Gardner v. Wright, 49 Or. 609, 91 Pac. 286): "This designation, however, is not sufficiently definite to be a safe guide at all times in ascertaining when the rights of a person awarded a given number of inches under six-inch pressure, etc., are being invaded. (Citing this book, first edition, pages 147, 175; Newell's (Practical) Irrigation, p. 128; Troutwine on Civil Engineering, p. 546; Merriman's Treatise on Hydraulics (1904), pp. 122, 123, 124.) It is evident that the only reliable method by which any certain number of inches of water, when awarded under this method of measurement, can always be determined, is on the basis of what is termed by engineers as 'second-feet,' or quantity of water flowing past a certain point in a given space of time. The ratio recognized by the authorities cited and rule quoted is that one inch of water under six-inch pressure equals one-fortieth of a 'second-foot'—that is, forty miner's inches furnish a flow of water equal to one cubic foot (seven and one-half gallons) per second of time—which ratio we find substantially accurate, and will be adopted here." See, also, Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728; Whited v. Cavin (Or. 1909), 105 Pac. 396.

[7] Longmire v. Smith, 26 Wash. 439, 450, 67 Pac. 246, 58 L. R. A. 308; Ison v. Sturgill (Or.), 109 Pac. 579, specifying six-inch pressure. The term "head of water," as used with reference to water for irrigation purposes, has been said to be the quantity enter-

One acre-foot equals 43,560 cubic feet, or 325,850 gallons second-foot of water running for twenty-four hours would about one and ninety-eight hundredths acre-feet; therefo second-foot running eight months would equal about fou dred and seventy-five acre-feet. One second-foot running months would cover seventy acres nearly seven feet deep amount of water sufficient to cover the ground two and o feet deep is generally considered plenty if beneficially therefore, one second-foot should, it has been said, be suffic irrigate one hundred to two hundred acres.[8] A secon equals seven and forty-eight hundredths United States gall second.

In Colorado[9] the State Engineer shall furnish a rating t be used in measuring the water flowing to or from a stream into which it has been discharged for conveyance. a recent Oregon statute, a "horse-power" is defined as fi dred and fifty pounds of water per second of time for ea of available fall.[10] In connection with pumping and city supply the term "gallons per minute" is usually used "acre-foot" is the usual storage unit. A table of equi will be found in a publication of the United States Depa of Agriculture.[11] Some foreign methods are mentioned following note.[12]

(3d ed.)

§ 487. **Duty of Water.**—Legislation has, recently, in States, specified the minimum of beneficial use for irrigation

ing the intake of any canal or ditch. Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728. The term usually, however, indicates pressure and not quantity. Head of water and grade of ditch should be given, it is held in Logan v. Guichard (Cal. 1911), 114 Pac. 989.

8 Hough v. Porter, *supra*.

9 3 M. A. S., 1905 ed., 2286c.

10 Or. Stats. 1909, c. 221, sec. 3.

11 Water Supply Paper, 250, page 11 (Office of Experiment Stations, United States Department of Agriculture).

12 In Spain, "This unit is called a 'thread of water,' and the volume of the stream when all in use is divided into one hundred and thirty-eight 'threads,' each canal taking its proportionate part of the whole, according to a fixed schedule. These divi not made by fixed volumes aliquot parts of the total di Armard on Spanish Irrigat 24, 25, given in Hall's Irriga velopment, Part I, p. 384. dinia, "The module of wate quantity which, under simp sure, and with a free fall through a quadrilateral rec opening, so placed as that tw sides shall be vertical, with a of two decimeters, a height decimeters, and opening in a t against which the water rest maintained, with its surface free, at a height of four d above the lower edge of the Sardinian Code, sec. 643, Hall's Irrigation Development p. 245.

tween fifty and eighty acres per second-foot of water, and so fixed the amount of water that can be allotted to each appropriator. In Idaho the statute specifies one second-foot for fifty acres.[13] In Nebraska, New Mexico, Oklahoma, South Dakota and Wyoming, it is one second-foot for each seventy acres.[14] In North Dakota it is one second-foot for each eighty acres.[15] In Nevada the statute specifies three acre-feet per year for five months, adding one-half an acre-foot each succeeding month up to nine months.[16] Measurement by volume, rather than by flow, recommended by many engineers.[17] In North Dakota a special statute governing flood waters from coulees specifies a maximum of two acre-feet per year for any irrigating season.[18] Under the United States Reclamation Service about one and one-half acre-feet per season is allowed.[19]

In the absence of statute, the duty of water is sometimes figured in inches per acre; an inch per acre being considered liberal.[20] But in the absence of statute it is not a settled matter.[21] In Oregon it was held that when a duty of water is adopted as the basis of decree (e. g., one and one-half to three acre-feet per

[13] Stats. 1903, p. 233, sec. 9, as amended 1905, p. 174. Unless the State Engineer otherwise specifies (which he will only in very unusual cases), and subject to local customs and rules. Gerber v. Nampa Irr. D., 16 Idaho, 1, 100 Pac. 80, says the duty of water is about one inch per acre.

[14] Nebraska, see statutes, *infra;* N. M. Stats. 1905, p. 270, sec. 4; Okl. Stats. 1905, p. 274, c. 21, sec. 29; S. D. Stats. 1905, p. 201, c. 132, sec. 46; Stats. 1907, p. 373, sec. 47; Wyo. Rev. Stats., 872.

[15] N. D. Stats. 1905, c. 34, sec. 49; Rev. Codes (1905), sec. 7604 et seq.

[16] Stats. 1909, p. 31, c. 31. Three acre-feet per year was first enacted Stats. 1903, p. 18, sec. 2; then repealed in Stats. 1905, p. 66; then re-enacted in Stats. 1907, p. 30, sec. 5; then amended in 1909 as above.

[17] Three acre-feet per year are equivalent to about one second-foot for one hundred and sixty acres, or about a miner's inch for each three acres.

[18] N. D. Stats. 1909, p. 179.

[19] Whited v. Cavin (Or), 105 Pac. 396.

[20] Gardner v. Wright, 49 Or. 609, 91 Pac. 286; Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728; Whited v. Cavin (Or.), 105 Pac. 396; Ison v. Sturgill (Or.), 109 Pac. 579; Porter v. Pettengill (Or.), 110 Pac. 393; Gerber v. Nampa Irr. Dist., 16 Idaho, 1, 100 Pac. 80; United States v. Conrad Inv. Co. (Or.), 156 Fed. 130. An inch per acre held sufficient to allow for loss by seepage and evaporation. Nevada D. Co. v. Canyon etc. Co. (Or.), 114 Pac. 86.

[21] In Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728, the quantity allowed, under the evidence, was from one-third to two-third inches per acre.

In Whited v. Cavin (Or.), 105 Pac. 396, it was held that ten second-feet, or four hundred inches, was ample for the irrigation of plaintiff's land having an area of four hundred and forty acres, and that seventeen inches per acre is obviously never required for the irrigation of any land.

In one case the aggregate amount of land owned by the respondents was 15,000 acres; amount of water claimed by them was 51,200 inches, making an average of about three and one-half inches of water to the acre. There was no uniformity among the respond-

year), it nevertheless is subject to the rule of actual use, and may be lessened by supplemental order on proof of lesser necessity.[22]

In California, with the exception of a late statute regarding artesian wells, there is no statute or rule of law upon the matter, but the duty of water is there probably the highest in the world.[23] According to measurements made in 1906, the average net duty of water for single irrigations of alfalfa in a certain district is approximately seven-tenths acre-foot, costing seventy cents per acre of land.[24] In the report of the Department of Agriculture for 1896, Mr. Newell, now head of the Reclamation Service, discusses the duty of water, and shows that the amount of acres per second-foot now allowed in most statutes is very generous as compared with the practice in Southern California where the water serves many more acres per second-foot than these statutes specify, and such an amount in Southern California would be considered wasteful.[25]

ents in this particular. The lowest claim made was one inch to the acre, the highest, seven and one-third inches to the acre, by one of the largest landowners in the valley. Union M. Co. v. Dangberg, 81 Fed. 73.

22 Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 731. Mr. Justice King said: "In determining the 'duty of water,' or quantity essential to the irrigation of any given tract of land, we must take into consideration the character, the climatic conditions, the location and altitude of the lands to be irrigated, the kind of crops, period of time irrigated, and necessary manner of irrigation, as well as many other contingencies not arising here. The 'head' of water, or quantity entering the intake of any canal or ditch, must also be considered. A large body of water, used at one time and upon the same tract, will reclaim a larger quantity of land proportionately than will a small supply; for example, one miner's inch might prove inadequate in many instances for the proper irrigation of more than a small fraction of an acre, while one hundred inches, or two and one-half second-feet, if under the control of and used by one person and at one time, might properly irrigate three hundred acres of the same kind of land. Applying these principles in the case at hand, where there are no small bodies or tracts involved, we think the water users, by the adoption and use of the more modern and economical methods now more generally applied and in use, will find that a constant flow of from one-third to two-thirds of an inch per acre will prove adequate for the proper irrigation of the lands, being, with ninety days' continuous flow, one and one-half to three 'acre-feet,' which is more than allowed by the government reclamation service in Klamath county." Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, at 1102, 102 Pac. 728, citing 6 Am. Rep. of Reclamation Serv., p. 195.

23 Regarding artesian wells Stats. 1907, p. 122, sec. 3, as amd. 1909, c. 427, provide that permitting over five per cent of the water received on the land to escape is waste, and that one-tenth of a miner's inch per acre each year is the proper duty of artesian water (equivalent, apparently, to an inch for ten acres, and to a second-foot for four hundred acres).

24 Bulletin 207, Office of Experiment Stations, United States Department of Agriculture.

25 Report of U. S. Dept. Agric. for 1896.

The average for eleven ditches in Utah was fifty acres per second-foot.[1] Results collected by the Office of Experiment Stations of the United States Department of Agriculture during the past few years show that on several canals in Montana the average duty of water was nearly four feet in depth over the surface; in Colorado, four feet; in Idaho, six feet; in New Mexico and Washington, nearly eight feet; and in Wyoming for 1903, nearly ten feet; the general average for eleven Western States being over five feet.[2]

In determining the duty of water as applied to the conditions in any particular case, evidence should be from actual experiment and measurement, if possible.[3] Opinion evidence is of less value than experiment, as to which the head of water influences its duty, the less the head the greater the quantity needed to spread it over the land, and evidence should be as definite as possible.[4]

(3d ed.)

§ 488. Duty of Water as Affected by Loss in Transmission.—In a publication of the United States Department of Agriculture[5] it is shown that old canals lose about fifty per cent between the stream and the lands. New canals lose about sixty per cent between stream and land, ten per cent being lost in the laterals. Upon the land itself, about twenty-five per cent is lost when the water is applied by wetting the entire surface; reduced to a loss of twelve and one-half per cent when applied in deep furrows. A general discussion is made of the duty of water under varying conditions of climate, soil, type of canal or lateral, etc., and it is concluded: "From the foregoing discussion of losses of water it is apparent that not more than fifty per cent of the water diverted from streams reaches the lands for which

[1] Bulletin 124, Office of Exp. Sta., U. S. Dept. Agric., p. 32.

[2] Professor Samuel Fortier, in "Water and Forest" for July-October, 1906. Concerning the duty of water, see Gardner v. Wright, 49 Or. 609, 91 Pac. 286; United States v. Conrad Inv. Co. (Or.), 156 Fed. 130.

The State Engineer of Wyoming reports an average depth of two and fifty-nine hundredths feet. Report of St. Engr. for 1907–1908.

Upon the Hondo River in New Mexico the State Engineer reports two hundred acres per second-foot. Bulletin 215, Office of Experiment Stations, United States Department of Agriculture.

[3] Farmers' etc. Co. v. Riverside Irr. Dist. (1909), 16 Idaho, 525, 102 Pac. 481.

[4] Whited v. Cavin (Or.), 105 Pac. 396.

[5] Review of Ten Years of Irrigation Investigations, Annual Report of Office of Experiment Stations for the year ending June 30, 1908.

it is intended, the balance being lost in transit. There are, further, large losses by evaporation from the soil and by percolation beyond the reach of plant roots. It is conservative, therefore, to state that not more than one-third of the water diverted from streams contributes to the growth of plants. It has been shown that a large part of the losses mentioned can be stopped. In many sections the point has already been reached where a more economical use of water is the only source of supply for increasing the area irrigated, and this condition is constantly becoming more common."[6]

In calculating the amount actually used, the amount lost in necessary fluming must be added, even though there would be no loss if the water were transported in some other way as, for example, by a pipe-line.[7] But use in poor and leaky flumes will be enjoined,[8] or any waste from faulty means of conveyance, that can be saved by careful appliances.[9] The fact that a pipe-line conveys water with much less loss by seepage and evaporation than a ditch does not necessarily show that there is waste within this limitation.[10] "Conveying it through a ditch, even, will always cause some loss and, if the distance is great, or the soil loose or porous the loss will be considerable. This, within any reasonable expense, is generally unavoidable. But, however this may be, if the appropriation has been made before others acquired rights in the stream, after that no change can be made to their detriment. The first appropriator must continue to use it in at least as economical a manner as before, and cannot change the method of use so as to materially increase the waste."[11]

It has been held that it is the general rule of large ditches that seepage usually exists from their headgate along down their line until the ditch gradually winds its way from the river upon the

[6] "On the basis of studies made by the Department it has been estimated that the water at present turned into the main canals in the arid region can be made to serve approximately double the area now irrigated with it, since not much more than half the water entering the canals reaches the land, and there are large losses in application." Report of the Secretary of Agriculture for 1909.

[7] Barrows v. Fox, 98 Cal. 63, 32 Pac. 811. But see Courthouse etc. Co. v. Willard, 75 Neb. 408, 106 N. W. 463.

[8] Barrows v. Fox (Cal.), 30 Pac. 768. But see same case on rehearing just cited.

[9] Town of Sterling v. Pawnee Co., 42 Colo. 421, 94 Pac. 339, 15 L. R. A., N. S., 238.

[10] Barrows v. Fox, 98 Cal. 63, 32 Pac. 811.

[11] Roeder v. Stein, 23 Nev. 92, 42 Pac. 867.

In issuing permits, the State Engineer of South Dakota makes a reasonable allowance for probable loss in transmission. Rept. of St. Engr. for 1908.

level lands. "All irrigation canals must of necessity seep more or less along this portion of their lines, and will so continue until prevented by other means than ordinary diligence in their construction, and we do not think the time has yet been reached in this State when the owners of such enterprises can be held to such a high degree of diligence in their construction as to be compelled to prevent them from seeping at all," etc.[12]

Where a right to the use of water is acquired through and by the construction of a ditch tapping any source of water supply, and the users thereafter elect to take the water thus diverted from other points on the stream, due allowance must be made for loss by evaporation, including such loss as may occur under different methods of use and distribution, which loss must, so far as practicable of ascertainment, be deducted from the quantity awarded under the original diversion and method of use.[13]

(3d ed.)

§ 489. **Summary.**—To sum up the rules concerning the amount of water to which an appropriator is entitled:

The amount is limited to that originally claimed, as stated in the notice of appropriation or application for permit, or determined by the general plan and purpose of the appropriator where the appropriation is by actual diversion without notice, as still permitted in California and the States that have not adopted water codes, and possibly also in them; if the capacity of the ditch is less than the amount claimed, then limited to the amount actually diverted, which can never exceed the capacity of the ditch; if less than both the above is actually used, then to the amount actually used within a reasonable time, several years being allowed an irrigator for expansion (but in California probably not more than five years, and under State water codes usually less than five years), during which time his priority to the unused amount is preserved, and later comers can obtain only such temporary rights therein as will not interfere with his use when ready.

In some States it has been provided by statute what quantity of water shall be allotted for irrigation, being usually between fifty and eighty acres per second-foot of flow; while in Oregon a

[12] Middlekamp v. Bessemer etc. Co. (1909), 46 Colo. 102, 103 Pac. 280, 23 L. R. A., N. S., 795.

[13] Hough v. Porter, 51 Or. 318, 98 Pac. 1083.

similar result is judicially reached by presumption without statute. There is no such rule in California or Colorado, but an inch per acre (or one second-foot for forty acres) seems to be generally regarded as more than sufficient for all but exceptional cases.

§§ *490–495. (Blank numbers.)*

CHAPTER 22.

LIMITATIONS ON CHANGE OF MODE OF ENJOYMENT.

A. GENERAL PRINCIPLES.

§ 496. The right is independent of the mode of enjoyment.
§ 497. Same.
§ 498. No injury to others allowed.
§ 499. Right of change chiefly a matter upon public lands.
§ 500. Freedom of change gradually passing away.

B. CHANGE OF MEANS OF USE.

§ 501. Change of ditches, etc.
§ 502. Same.
§ 503. Same.

C. CHANGE OF POINT OF DIVERSION.

§ 504. Change of diversion.
§ 505. Same.
§ 506. Statutory restrictions.
§ 507. Same.

D. CHANGE OF PLACE OF USE.

§ 508. Change of place of use.
§ 509. Statutory restrictions.
§ 510. Change on sale of water-right.

E. CHANGE OF PURPOSE OF USE.

§ 511. Change of purpose.
§ 512. Conclusion.
§§ 513–521. (Blank numbers.)

A. GENERAL PRINCIPLES.

(3d ed.)

§ 496. The Right is Independent of the Mode of Enjoyment.—By appropriating a stream the law has always considered that a right of property was conferred, and being property, the owner may enjoy it as he will, so long as he does no injury to others, just as he may a farm or a horse or other property. The law, hence, has always regarded the right as independent of means or place or purpose of use or of point of diversion. The litigation upon this question has always been addressed to the contention that the right was limited to its initial mode of enjoyment, and that a change forfeits priority and can only be made by new

appropriation. The decisions, now passed into legislation, almost universally, and with but a few exceptions, decided against the contention, and have settled the rule that change of means, place, or purpose of use or of diversion does not forfeit priority. "A priority to the use of water is a property right which is the subject of purchase and sale, and its chapter and method of use may be changed, provided such change does not injuriously affect the right of others."[1]

The law to this effect took its shape very early. It was early decided that the place of use may be changed without loss of priority. It was absolutely necessary in the early California mining days, when the law of appropriation arose and when new ground was being continually opened up. In Maeris v. Bicknell[2] it was held that branches could be run to new mining claims without loss of priority, and that the main ditch itself could be extended to new localities. The right to change the place of use was hence first established. It was next held in Kidd v. Laird[3] that the point of diversion or taking the water could likewise be changed. These two decisions were relied on in all jurisdictions,[4] and passed into statutes.[5] The right to change the purpose of use has always been assumed to follow from these two cases and those following them, rather than having ever been actually independently decided.

(3d ed.)

§ 497. **Same.**—The right is hence independent of point of diversion and of manner, place or purpose of use. As to the point of diversion, the Wyoming court said:[6] "We are not aware of any rule

1 Seven Lakes etc. Co. v. New Loveland etc. Co., 40 Colo. 382, 93 Pac. 485, 17 L. R. A., N. S., 329.

2 7 Cal. 261, 68 Am. Dec. 257, 1 Morr. Min. Rep. 601.

3 15 Cal. 161, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571.

4 For example, "We think that the rule announced in Kidd v. Laird, 15 Cal. 162–180, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571, 'that in the absence of injurious consequences to others any change which the party chooses to make is legal and proper' is the only true rule under which the rights of the prior appropriator can be fully exercised, and his rights and the rights of all other persons fully protected. The right to change, so limited, includes the point of diversion, and place and character of use." Fuller v. Swan River P. M. Co., 12 Colo. 19, 19 Pac. 836, 16 Morr. Min. Rep. 252.

5 For example, Cal. Civ. Code, secs. 1412, 1415; Pierce's Washington Code, sec. 5139. In the Nevada Stats. 1907, p. 30, sec. 26, Stats. 1909, p. 31, it is provided: "Any person changing his place of diversion or manner of use, as specified in this act, shall not thereby lose any priority of right upon the stream he may have heretofore acquired."

See statutes of other States below.

6 Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210.

which restricts as to location the point of diversion in initiating an appropriation, except the probable requirement that it be so located as to render the proposed diversion feasible in view of the intended use, and possibly that, if the proposed point of diversion be situated upon lands of another, the appropriator shall secure a right of way for his ditch or works to be constructed on such lands.[7] So far as the mere right of appropriation is concerned, no obligation is imposed upon a party to divert the water at the nearest possible point to his land or within any particular district." As to the place of use, the Colorado court said:[8] "In the absence of legislation to the contrary, we think that the right to water acquired by priority of appropriation thereof is not in any way dependent upon the *locus* of its application to the beneficial use designed. And the disastrous consequences of an adoption of the rule contended for forbid our giving such a construction to the statutes as will concede the same, if they will properly bear a more reasonable and equitable one." As to purpose of use, and as a concise statement of the view of the law upon the general independence of the right upon its mode of enjoyment, the following case is one of the earliest and most explicit, and an authority usually relied on in later cases:

"Suppose a party taps a stream of water for the purpose of surface mining in a given locality, and afterward finds that the ground will not pay or that ground farther on will pay better, may he not abandon the former and extend his ditch to the latter without losing his priority? Or, suppose, after working off the surface, he finds quartz, may he not erect a mill and convert the water into a motive power without forfeiting his prior right? Suppose he appropriates the water for the purpose of running a sawmill, and, after the timber is exhausted, he finds that a gristmill will pay—may he not convert the former into the latter without surrendering his priority to someone who may have subsequently and in the meantime, tapped the stream?

"We think all this may be done, and are unable to suggest a plausible reason why it may not. In cases like the present, a party acquires a right to a given quantity of water by appropriation and use, and he loses that right by nonuse or abandonment. Appropriation, use, and nonuse are the tests of his right; and

[7] Cf. sec. 221 et seq., *supra*.
[8] Coffin v. Left Hand Ditch Co., 6 Colo. 443.

place of use and character of use are not. When he has made his appropriation, he becomes entitled to the use of the quantity which he has appropriated at any place where he may choose to convey it, and for any useful and beneficial purpose to which he may choose to apply it. Any other rule would lead to endless complications, and most materially impair the value of water-rights and privileges."[9]

(3d ed.)

§ 498. No Injury to Others Allowed.—The law, being thus addressed to the preservation of the prior right, at the same time prohibits any invasion of the rights of others existing at the time of the change. "*Sic utere tuo ut alienum non laedas*" is an old maxim of the law. That no one must be injured by the change is as well settled as the right to make the change.

Consequently, a change in place of diversion, place of use, or purpose of use, which necessitates, for example, the diversion of an additional quantity of water, is not permitted as against existing claimants on the stream.[10] An appropriator, when the stream becomes clogged up with debris, cannot raise his dam (which is equivalent to moving his point of appropriation up stream) if the water thereby is caused to flood mining claims above.[11] Where a person had appropriated water for placer mining, and the water had been

[9] Davis v. Gale, 32 Cal. 34, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604.

"The right to water acquired by prior appropriation is not dependent upon the place where the water is used. A party, having obtained the prior right to the use of a given quantity of water, is not restricted in such right to the use or place to which it was first applied. It is well settled that a person entitled to a given quantity of the water of a stream may take the same at any point on the stream, and may change the point of diversion at pleasure, and may also change the character of its use, if the rights of others be not affected thereby." Union etc. Min. Co. v. Dangberg, 81 Fed. 73.

"A person entitled to the use of water may change the point of its diversion, and may use it for other purposes than that for which it was originally appropriated, provided always, however, other parties are not injured thereby. Rev. Codes, sec. 4842. Even in the absence of this statutory declaration the rule would be the same." Head v. Hale, 38 Mont. 302, 100 Pac. 222.

[10] Ortman v. Dixon, 13 Cal. 33; McDonald v. Bear River Co., 13 Cal. 220, 1 Morr. Min. Rep. 626; McKinney v. Smith, 21 Cal. 374, 1 Morr. Min. Rep. 650; Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Nevada etc. Co. v. Powell, 34 Cal. 109, 91 Am. Dec. 685, 4 Morr. Min. Rep. 253; Higgins v. Barker, 42 Cal. 233, 7 Morr. Min. Rep. 525; Santa Paula etc. Works v. Peralta, 113 Cal. 38, 45 Pac. 168; Smith v. Corbit, 116 Cal. 587, 48 Pac. 725; Diez v. Hartbauer, 46 Colo. 599, 105 Pac. 868; Vogel v. Minnesota etc. Co., 47 Colo. 534, 107 Pac. 1108; Windsor Co. v. Hoffman Co. (Colo.), 109 Pac. 423; Whited v. Cavin (Or.), 105 Pac. 396; Pomeroy on Riparian Rights, sec. 79; Perry v. Calkins (Cal.), 113 Pac. 136.

[11] Nevada etc. Co. v. Powell, 34 Cal. 109, 91 Am. Dec. 685, 4 Morr. Min. Rep. 253.

used by lower proprietors for farming purposes, the first appropriator's successors could not change the use so as to deprive the agricultural appropriators of the water.[12] An appropriation of water is limited, in quantity as well as in time, to the extent of the appropriation, and, where water was taken from a ditch for mining only through the winter months up to June 1st, the right of appropriation was limited to that period, and cannot be changed to the injury of existing users.[13] A system of exchanges of water between reservoir owners could not be sustained, where its effect would be to convert junior into senior rights.[14] A change of point of diversion upstream which, without lessening surface flow, lessens seepage (underflow) to injury of intermediate users, cannot be made.[15] Some other authorities are quoted in the note.[1]

No change will be permitted to result in any greater draft upon the river than before the change, and the use after the change is in all ways measured and fixed (where it conflicts with exist-

[12] Head v. Hale, 38 Mont. 302, 100 Pac. 222.

[13] Davis v. Chamberlain, 51 Or. 304, 98 Pac. 154.

[14] Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co., 44 Colo. 214, 98 Pac. 729.

[15] Bates v. Hall, 44 Colo. 360, 98 Pac. 3. Subsequent appropriator protected against change by prior. Smith v. Duff (1909), 39 Mont. 382, 133 Am. St. Rep. 587, 102 Pac. 984.

[1] The Oregon court lays down the law in several recent cases. "Altnow's position is that he is entitled to use the entire amount of water appropriated by him, if he needs that amount, anywhere, for any purpose, without reference to anyone else, and irrespective of that use upon others.' In other words, his claim seems to be that by his appropriation he acquired a prior right to the amount of water appropriated by him, and is entitled to use it at any time or place, provided he needs it and puts it to a beneficial use. But this is not the law as we understand it, if the contemplated change in the use will injuriously affect rights which have been lawfully acquired subsequent to his appropriation." Williams v. Altnow, 51 Or. 275, 95 Pac. 200, 97 Pac. 539. And in another case: "The parties hereto are each limited, in the application of the water adjudged to them, to the specific tracts upon which it has heretofore been applied, except in such instances as where it may be practicable to change the place of use without substantial injury to others whose rights are here determined; that is to say, if by changing the place of use, when the water is needed by others, the quantity returning to the stream after changing the place of use as compared to its previous application is substantially diminished, or if, by reason of such change, the 'run off' reverts to the stream or channel below the point diverted by another, thereby reducing the supply at such point, it must necessarily operate to the injury of the rights of such other party, and the change must not be permitted." Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728, citing Wiel on Water Rights, 2d ed., sec. 47; Williams v. Altnow, 51 Or. 275, 95 Pac. 200, 97 Pac. 539. "While well settled that a change of use and place of use of water by an appropriator may in some instances be permitted, such right is always limited to changes that do not impair the rights of others interested in the water of the stream." Hough v. Porter, *supra*.

ing owners) by the same limitations which the law would impose upon its use before the change.[2] The mere fact of use of more land does not show the inhibited injury to others, however, since consistent with a more efficient use of the same amount of water.[3]

The consent of the party injured will remove the objection.[4] The burden of showing that the change injures others is upon those opposing the change.[5] The person injured must be a party to the suit to make the point material. An injury to strangers to the suit, such as other water users at points intermediate on the stream between the old and new places of diversion or use, cannot be considered.[6]

The limitation against injury to others has now universally passed into statutes in all States; for example, in sections 1412, 1415 of the California Civil Code, where changes are authorized "if others are not injured by such change." The limitation is taken from the original cases of Maeris v. Bicknell and Kidd v. Laird, above referred to.

In applying the limitation thus generally stated, that no rights existing at the time the change is made must be infringed, the rights contemplated by the rule are those of other owners of the *natural resource*, appropriators on the same *natural* stream. Does it apply to the claims (which are bare claims and cannot ripen into a right)

2 Seven Lakes etc. Co. v. New Loveland etc. Co., 40 Colo. 382, 93 Pac. 485, 17 L. R. A., N. S., 329. In a Colorado case (Baer etc. Co. v. Wilson, 38 Colo. 101, 88 Pac. 265): "If appellant was the only appropriator, it would have the right to change the point of diversion or place of use of the water as frequently as desired, because there would be none having rights which might be affected; but, when a subsequent appropriator makes his diversion, he acts under the belief that the water appropriated by his senior will continue to be used as it was at the time of the making of the appropriation of the junior. So a subsequent appropriator has a vested right as against his senior to insist upon the continuance of the conditions that existed at the time he made his appropriation." (Citing Handy Ditch Co. v. Louden Canal Co., 27 Colo. 515, 62 Pac. 847.) See, also, Windsor Co. v. Hoffman Co. (Colo.), 109 Pac. 423.

3 Fulton etc. Co. v. Meadow etc. Co., 35 Colo. 588, 86 Pac. 748. Citing Platte Valley Irr. Co. v. Central Trust Co., 32 Colo. 102, 75 Pac. 391; Ft. Lyon Canal Co. v. Chew, 33 Colo. 392, 81 Pac. 37; Cache La Poudre I. Co. v. L. & W. R. Co., 25 Colo. 144, 71 Am. St. Rep. 123, 53 Pac. 318. And saying: "The mere fact that it is the intention of appellee to apply the water, diverted from its original headgate into the new headgate and new ditch, upon a larger acreage, does not even presumptively establish that more water, measured in time or quantity, will be used than was diverted through the original headgate, nor will it presumptively establish injury to the vested rights of others."

4 Crescent etc. Co. v. Montgomery, 143 Cal. 248, 76 Pac. 1032, 65 L. R. A. 940. Consent to change point of diversion. Miller v. Douglas, 7 Ariz. 41, 60 Pac. 722; Bates v. Hall, 44 Colo. 360, 98 Pac. 3; Saunders v. Robison, 14 Idaho, 770, 95 Pac. 1057.

5 Jacob v. Lorenz, 98 Cal. 332, 33 Pac. 119.

6 *Infra*, sec. 626 et seq.

of those using the waste discharge from ditches or other artificial watercourses, at a distance from streams, without owning rights in the natural resource itself, from which the supply comes? This is a matter of much difficulty in the philosophy of the law of watercourses—the distinction between the natural resource and artificial flows of water—and reference in regard thereto is made to a previous chapter.[7]

(3d ed.)

§ 499. Right of Change Chiefly a Matter upon Public Lands.—These rules, having arisen with the doctrine of appropriation itself, must be understood in the light of the origin of that doctrine, as having arisen upon the public domain. When the region is a new one, and the lands are largely public, and there are few appropriators of water, there is practically no one to be injured. The government is alone concerned, and under the act of 1866 acquiesces in the utmost freedom to the appropriator so far as the government is concerned (the doctrine of "free development");[1] and the only question being as to continuance of the right, the right continues and its priority is not lost by the change. But as the lands become settled and appropriations also increase, the government is no longer the only one concerned. Private rights of others are now also concerned. Hence, while in the early days the chief consideration was the freedom of change without loss of priority, in latter days the prohibition of injury is becoming the more important; as settlement advances, will become the most important, and in time practically prohibit change altogether.

The prohibition of injury (so far, at least, as concerns ditches, point of diversion and means of use) practically limits changes to acts done on land that is public land at the time of the change. It is an instance of the philosophy of the doctrine of appropriation as it arose (and is still applied) in California, wholly confined to the public land. Under the Colorado doctrine, which departed from this rationale, the limitation against injury to private landowners was at first also departed from.[1a] It was afterward restored (in all matters except only as to riparian right to the water itself, which Colorado does not recognize).

[7] *Supra*, sec. 51 et seq., especially sec. 61.

[1] *Supra*, sec. 88 et seq.

[1a] *Supra*, c. 10.

Changes of ditches, point of diversion or means of use, any change which injures existing landowners or existing appropriators, is not to-day allowed anywhere in the West. No change whatever can be made on land passed into private hands at the time of or subsequent to the appropriation, so far as such acts change the character of the servitude, and this practically prohibits any change of ditches or other works on such land at all.[2] Likewise, no change which (under the California doctrine) *increases* the interference with riparian water-rights of subsequent patentees;[3] nor, under any doctrine, which interferes with any existing appropriator, subsequent or prior in time of use. They have acquired vested rights in the stream or neighboring land which receive full protection against later acts of the prior appropriator.

The landowner need show no damage from the change; it is enough to constitute an *injury*, or infringement of right, that the character of the servitude will be changed. Injunction will be granted without a showing of damage, because it is a violation of right of ownership of the land.[4] "Much reliance appears to be placed upon the fact that it was not shown that there was any appreciable value to the land appropriated for the ditch [newly substituted for a flume]. This is entirely immaterial. It was plaintiff's land, however poor it might be, and the fact that it apparently has no great present value will not justify one who has no legal right thereto in appropriating the same. . . . . There can be nothing in the contention that, because defendants acquired their right of way over public unoccupied lands of the United States, they have the right, as against one acquiring the land from the government subject to their easement, to change the location thereof upon his land. He took his land subject only to the right of way as thus located."[5]

(3d ed.)

§ 500. **Freedom of Change Gradually Passing Away.**—The prohibition of injury is rapidly overshadowing the right of

2 *Supra*, sec. 221 et seq., appropriation on private land; *infra*, sec. 501 et seq., changes of ditches.

3 *Supra*, sec. 257. As against settlers prior in settlement to the appropriation it cannot exist at all in California. *Ibid.*

4 The doctrine of *injuria sine damno*. See *infra*, sec. 642.

5 Vestal v. Young, 147 Cal. 721, 82 Pac. 383; citing McGuire v. Brown, 106 Cal. 660, 39 Pac. 1060, 30 L. R. A., N. S., 384.

change, as the lands pass into private hands, and the United States withdraws lands that remain public. The right of change was chiefly an instance of the freedom *of the public domain* exercised in pioneer days; and to-day, under the policy of conservation, changes even on public land are prohibited except by special permit, just as the acquisition of new rights of way.[6]

A further force is the modification which the law of appropriation as a whole is undergoing within itself.[7] As this book has endeavored to keep steadily before the reader, the law of appropriation, having arisen as a possessory right upon the public domain (converted into a freehold by the act of 1866), took on the features of a system based upon the idea of possession of the stream, more than of any specific use made. Actual diversion (taking possession) created the right; capacity of ditch (the amount in possession) measured the right; voluntary abandonment (intentional relinquishment of possession) alone caused a loss of right. Use was represented by the requisite of *bona fide intention*, and nonuse was represented by being merely evidence of an *intention* to abandon *possession*. Coming to the matter of this chapter, the possession could be carried and changed from place to place, or from purpose to purpose, or the point of diversion shifted up or down stream, without losing priority if no one was injured. The rule permitting changes is but one instance of the possessory origin of the law of appropriation, and is being affected by the general transition in the law of appropriation from a possessory to a specific use system. In this change, actual diversion has been much displaced by actual use as the creation of the right; capacity of ditch has almost wholly disappeared as a measure of the right; intentional abandonment is being steadily displaced by nonuse as *per se* causing loss of right; and recent legislation is being directed against changes, and making the right inhere inseparably in the initial mode of use,[8] or else permitting change but only after a hearing in court or with consent of the State Engineer, which is to be given sparingly, as below considered.

[6] Sierra Buttes Co. (Nov. 19, 1909), 38 Land Dec. ——. See *supra*, sec. 430 et seq.

[7] See cross-references *supra*, sec. 139.

[8] In 1909 it was enacted in Wyoming: "Water-rights cannot be detached from the lands, place or purpose for which they are acquired, without loss of priority." Wyo. Laws 1909, c. 68, sec. 1.

B. CHANGE OF MEANS OF USE.

(3d ed.)

§ 501. **Change of Ditches, etc.**—It has been said that the appropriator may use the water in any manner necessary to carry out the use for which it was appropriated.[9] In all branches of the law of waters it is immaterial whether the use is in steam boilers, by hydraulic rams, in flumes or pipes, or appliances of whatever kind.[10] The means of use may be changed so long as no one is injured in making the change. That is, the priority is not lost; and whether the change can be made rests on whether the acts done in making it would be lawful under the general law, if done in any other connection.

Where no injury to others, the change may be made without loss of priority. A change in a dam is permissible of no injury to others,[11] and a new ditch may be substituted for an old one if exactly similar and in the same position and no damage results.[12] A change may be made from a stream diversion to well pumping if without injury to others,[13] or from a ditch to a natural depression.[14]

The ditch owner has a right generally to keep his works in repair.[15]

(3d ed.)

§ 502. **Same.**—The point being an illustration of the principle that the law of appropriation was framed for the public lands (where, hitherto, the United States permitted absolute freedom under the act of 1866),[16] the appropriator, in making his change, must in no way impinge upon lands or rights already in private ownership.

9 Stone v. Bumpus, 46 Cal. 218, 4 Morr. Min. Rep. 278; Abbott v. Pond, 142 Cal. 393, 76 Pac. 60; Thomas v. Guiraud, 6 Colo. 533.

10 Charnock v. Higuerra, 111 Cal. 473, 52 Am. St. Rep. 195, 44 Pac. 171, 32 L. R. A. 190; Coleman v. Le Franc, 137 Cal. 214, 69 Pac. 1011; Miller etc. v. Rickey, 127 Fed. 573; Thomas v. Guiraud, 6 Colo. 530; Pomeroy on Riparian Rights, sec. 50; Cal. Civ. Code, sec. 1415.

11 Seweard v. Pacific etc. Co., 49 Or. 157, 88 Pac. 963.

12 Greer v. Heiser, 16 Colo. 306, 26 Pac. 770.

13 Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748. See, also, Barton v. Riverside Co., 155 Cal. 509, 101 Pac. 790, 23 L. R. A., N. S., 331; Perry v. Calkins (Cal.), 113 Pac. 136.

14 Parties owning the right to the use of water may change the method of conveying it to the point of use, if such change does not materially prejudice others' rights; and in doing so any dry ravine, gulch, or hollow, as well as the natural channel of a stream, may be used by the appropriator of water in its transmission to the place of use. Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

15 *Supra*, sec. 460; *infra*, sec. 657.

16 *Supra*, secs. 92, 198.

The matter is the same as that fully considered in discussing whether an appropriation can be made on private land,[17] and need not be here further considered than to say that, while the Colorado doctrine allows such appropriation and change as against any landowner claim (riparian right) to the *water* on the land,[18] all jurisdictions to-day deny it as against the landowner's right in the *land* itself,[19] and the result is practically that no change of means of use can be made on private land at all against the landowner's opposition, even though the land was public when the ditch was originally built. Statutes allowing changes on private land even against the will of the landowner must be framed on the lines of condemnation under the power of eminent domain, on due notice and compensation.[20]

As the right to the ditch or other artificial watercourse is an easement, no change can be made against the landowner over whose land the ditch passes that is burdensome to the servient tenement, or that changes the character of the servitude; such as moving a ditch to a new place, or enlarging it.[21] Even if the enlargement or change would benefit the servient estate, the owner thereof has a right to be his own judge of whether he will permit it.[22] At the present day it is important to note that consequently a ditch cannot be changed to a pipe-line, because it is held to be a material change in the character of the servitude.[23] In a case decided by the supreme court of California[24] it is said by Mr. Justice Angellotti: "We need not here discuss the question as to whether defendants might lawfully have constructed a ditch of the same size as their flume along their flume line.[25] They constructed this ditch upon another line, and for

17 *Supra*, sec. 221 et seq.

18 *Supra*, sec. 118.

19 *Supra*, sec. 221.

20 See chapter on eminent domain, *infra*, sec. 604 et seq.

21 Burris v. People's Ditch Co., 104 Cal. 248, 37 Pac. 922; Joseph v. Ager, 108 Cal. 517, 41 Pac. 422; Jacob v. Day, 111 Cal. 571, 44 Pac. 243; North Fork etc. Co. v. Edwards, 121 Cal. 662, 54 Pac. 69; Los Angeles v. Pomeroy, 125 Cal. 420, 58 Pac. 69; Vestal v. Young, 147 Cal. 715, 721, 82 Pac. 381, 383; Kern etc. Co. v. Bakersfield, 151 Cal. 403, 90 Pac. 1052; Colegrove etc. Co. v. Hollywood, 151 Cal. 425, 90 Pac. 1053, 13 L. R. A., N. S., 904; Snyder v. Colorado etc. Co. (Colo. C. C. A.), 181 Fed. 62; Welty v. Gibson, 42 Colo. 18, 93 Pac. 1093.

And cases cited *supra*, sec. 221 et seq. Appropriation on private land.

22 Oahu etc. Co. v. Armstrong, 18 Hawaii, 258.

23 Allen v. San Jose Water Co., 92 Cal. 138, 28 Pac. 215, 15 L. R. A. 93; Oliver v. Agasse, 132 Cal. 297, 64 Pac. 401. *Contra*, Bean v. Stoneman, 104 Cal. 49, 37 Pac. 777, 38 Pac. 39.

24 Vestal v. Young, 147 Cal. 715, 721, 82 Pac. 381, 383.

25 Saying, "See, however, Allen v. San Jose Land & Water Co., 92 Cal. 138, 28 Pac. 215, 15 L. R. A. 93; Barrows v. Fox, 98 Cal. 63, 66, 32 Pac. 811."

this purpose they appropriated to their use different land of plaintiff. The precise location of the right of way had been as definitely and finally fixed by the acts of the defendants as it would have been had the metes and bounds been set forth in an instrument of grant.[1] Defendants had acquired the right to that precise location and no other. The remainder of plaintiff's land was his, free from any right of defendants. We know of no principle of law that would warrant defendants in subjecting, without his consent, another and different portion of his land to their use, even although they abandoned their former location. It is elementary that the location of an easement of this character cannot be changed by either party without the other's consent, after it has once been finally established, whether by the express terms of a grant, or by acts of the parties tantamount in their effect.[2] The granting of a right over one portion of a person's land gives the grantee no right over any other portion. Where such a grantee attempts to exercise his right over some other portion, by subjecting such portion to his use, without the consent of the owner, he deprives the owner of the free use and possession thereof, and his acts, if continued the requisite time, will ripen into an easement, and the owner will be permanently deprived of his property. That such a result injuriously affects the rights of the owner cannot well be questioned. As was said in Burris v. People's Ditch Co.:[3] 'It is well settled that the owner of an easement cannot change its character, or materially increase the burden upon the servient estate, or injuriously affect the rights of other persons.' It is entirely immaterial in this connection that the new line was only from one to twenty feet distant from the old line. It was upon property of plaintiff over which defendants had no right whatever, and the principle is the same as if the new line had been hundreds of feet from the old one." A later case states the same principle, and Mr. Justice Sloss says: "The laying of pipe on a new line, or the substitution of pipe for a ditch or wooden conduit, or for pipe of a smaller size, was therefore not authorized by the mere fact that water had already been conducted across the highway in another manner."[4]

1 Saying, "See 14 Cyc. Law & Pr., pp. 1161, 1205."

2 Saying, "See Jaqui v. Johnson, 27 N. J. Eq. 526, 552."

3 104 Cal. 248, 37 Pac. 922.

4 Colegrove etc. Co. v. Hollywood, 151 Cal. 425, 90 Pac. 1053, 13 L. R. A., N. S., 904.

As against persons other than the landowner (that is, existing appropriators of water) no change can be made to their injury, either. For example, reservoirs cannot be added to an irrigation system if thereby other appropriators will suffer injury.[5] Raising a dam higher is not within an appropriator's right against subsequent appropriators.[6]

(3d ed.)

§ 503. **Same.**—The ditch-owner, likewise, cannot be forced to make a change by the landowner. The latter cannot force the former to substitute a pipe-line for his ditch,[7] even though the pipe-line would be a more efficient way of handling the water, minimizing loss in transmission.[8]

In this connection it has recently been said in Oregon that while old methods under excessive water supply enabled, with the aid of a few dams in the channels and sloughs, irrigation with little expense, the parties must, when the demand for water increases, change their methods of application and use of the water by the construction of ditches, etc., to avoid the waste. The wasteful methods so common with early settlers can, under the light most favorable to their system of use, be deemed, it was held, only a privilege permitted merely because it could be exercised without substantial injury to anyone; and *no right to such methods of use was acquired thereby.*[9] A recent Utah case rules that a prior appropriator of a lake may be forced to change his works so as to admit a later taking of the surplus by another.[10] Likewise, in another case [11] it was held that an appropriator using the water by current-wheels, which required a large flowing volume, when he could get the same power by wheels of a different type requiring much less water, could be forced by a subsequent claimant to make the change, or, at all events, could get no relief for interference with his current-wheels. The real tendency of these decisions has already been considered elsewhere;[12] they represent, in reality, a new departure in the law of appropriation.

[5] Colorado etc. Co. v. Larimer etc. Co., 26 Colo. 47, 56 Pac. 185; New Loveland etc. Co. v. Consolidated etc. Co., 27 Colo. 525, 62 Pac. 366, 52 L. R. A. 266; Windsor Res. Co. v. Lake Supply Co., 44 Colo. 214, 98 Pac. 729.

[6] Greeley etc. Co. v. Von Trotha (Colo.), 108 Pac. 985.

[7] Gregory v. Nelson, 41 Cal. 278, 12 Morr. Min. Rep. 124.

[8] Barrows v. Fox, 98 Cal. 63, 32 Pac. 811.

[9] Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, at 1102, 102 Pac. 728.

[10] Salt Lake City v. Gardner (Utah), 114 Pac. 147.

[11] Schodde v. Twin Falls etc. Co., 161 Fed. 43, 88 C. C. A. 207.

[12] *Supra*, sec. 310.

Recent statutes contain provisions for forcing a ditch or canal owner to change his ditch.[13] To some extent, such statutes must evidently depend for their validity upon condemnation under the power of eminent domain, after hearing and compensation.[14] So, to some extent, must the foregoing rulings, as is recognized in the Utah case just cited.

C. CHANGE OF POINT OF DIVERSION.

(3d ed.)

§ 504. Change of Diversion.—A change of point of diversion may be made if done without injury to the rights of others (a question of fact), otherwise not.[15]

[13] A common provision is that, for economy of supply, one may be forced by the water officials to substitute a flume or pipe for a ditch. E. g., Wyo. Rev. Stats. 930; Or. Stats. 1909, c. 216, sec. 55; Utah Stats. 1911, c. 104, p. 145, sec. 10. An Idaho statute enacts that one may change *another's* lateral from one place on one's land to another. Idaho Stats. 1907, p. 237.

[14] *Infra*, c. 26.

[15] *Alaska.*—Miocene D. Co. v. Campion M. Co., 3 Alaska, 572.

Arizona.—Miller v. Douglas, 7 Ariz. 41, 60 Pac. 722.

California.—Kidd v. Laird, 15 Cal. 116, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571, is the leading case. The other California cases are cited under "change of place of use," as the decisions have usually treated the two questions together. Civ. Code, 1412, 1415. Compare Barton v. Riverside Co., 155 Cal. 509, 101 Pac. 790, 23 L. R. A., N. S., 331, percolating waters.

Colorado.—Bear etc. Co. v. Wilson, 38 Colo. 101, 88 Pac. 265; Wadsworth etc. Co. v. Brown, 39 Colo. 57, 88 Pac. 1060; Crippen v. Glasgow, 38 Colo. 104, 87 Pac. 1073; Coffin v. Left Hand Ditch Co., 6 Colo. 443; Thomas v. Guiraud, 6 Colo. 530; Sieber v. Frink, 7 Colo. 148, 2 Pac. 901; Hammond v. Rose, 11 Colo. 524, 7 Am. St. Rep. 258, 19 Pac. 466; Fuller v. Swan River Min. Co., 12 Colo. 12, 19 Pac. 836, 16 Morr. Min. Rep. 252; Strickler v. Colorado Springs, 16 Colo. 61, 25 Am. St. Rep. 245, 26 Pac. 313; Greer v. Heiser, 16 Colo. 306, 26 Pac. 770; Wyatt v. Larimer etc. Co., 18 Colo. 298, 36 Am. St. Rep. 280, 33 Pac. 144 *(dictum)*; Nichols v. McIntosh, 19 Colo. 22, 34 Pac. 280; Knowles v. Clear Cr. etc. Co., 18 Colo. 209, 32 Pac. 279; Cache La Poudre etc. Co. v. Water etc. Co., 25 Colo. 161, 71 Am. St. Rep. 131, 53 Pac. 331, 46 L. R. A. 175; Handy D. Co. v. Louden I. C. Co., 27 Colo. 515, 62 Pac. 847; New Cache La Poudre etc. Co. v. Water etc. Co., 29 Colo. 469, 68 Pac. 781; Fluke v. Ford, 35 Colo. 112, 84 Pac. 469; Hallett v. Carpenter, 37 Colo. 30, 86 Pac. 317; New Cache etc. Co. v. Arthur etc. Co., 37 Colo. 530, 87 Pac. 799; Robertson v. Wilmoth, 40 Colo. 74, 90 Pac. 95; Lower Latham Co. v. Bijou Co., 41 Colo. 212, 93 Pac. 483; Diez v. Hartbauer, 46 Colo. 599, 105 Pac. 868; 3 Mills' Ann. Stats., 2d ed., secs. 2273d-2273f.

Idaho.—Hill v. Standard Min. Co., 12 Idaho, 223, 85 Pac. 907; Walker v. McGinness, 8 Idaho, 540, 69 Pac. 1003; Hard v. Boise etc. Co., 9 Idaho, 589, 76 Pac. 331, 65 L. R. A. 107.

Montana.—Civ. Code, sec. 1882; Columbia M. Co. v. Holter, 1 Mont. 296; Alder Gulch etc. Co. v. Hayes, 6 Mont. 31, 9 Pac. 581; Meagher v. Hardenbrook, 11 Mont. 385, 28 Pac. 451; Middle Cr. D. Co. v. Henry, 15 Mont. 558, 39 Pac. 1054; Hays v. Buzard, 31 Mont. 74, 77 Pac. 423; Carlson v. City of Helena (Mont.), 114 Pac. 110.

Nebraska.—Cobbey's Ann. Stats., sec. 6751; Farmers' etc. Co. v. Gothenburg etc. Co., 73 Neb. 223, 102 N. W. 487.

Nevada.—Stats. 1907, p. 30; Smith v. Logan, 18 Nev. 149, 1 Pac. 678;

Whether the use is for mining or agriculture, the rule is the same.[16]

The appropriator may have a double point of diversion. He may use a main flume and a branch flume above, as his business requires, sometimes diverting the water by one, and sometimes by the other.[17] An appropriator having rights on two creeks cannot be required to exhaust his rights on one before using the other.[18]

(3d ed.)

§ 505. **Same.**—The point of diversion cannot be changed if the change will injure others.[19] Subsequent appropriators are entitled to as much protection against change in point of diversion by others as are prior appropriators.[20] In the case just cited, the right to change the point of diversion two miles and a quarter up creek was refused. In one case it is said:[21] "This court has repeatedly held that an appropriator could not change his place of diversion of the waters of any stream, if such change in any manner affected a lower appropriator of the waters of such stream, even though the lower appropriator be subsequent in right. The reasons of such conclusion, it seems to us, are well founded. Where the lower appropriator makes his appropriation, he has the right to assume the upper appropriator will continue the use of the water as he found it, and if any change

Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673.

Oregon.—Tolman v. Casey, 15 Or. 83, 13 Pac. 669; Cole v. Logan, 24 Or. 304, 33 Pac. 568; Bolter v. Garrett, 44 Or. 304, 75 Pac. 142; Williams v. Altnow, 51 Or. 275, 95 Pac. 200, 97 Pac. 539; Whited v. Cavin (Or.), 105 Pac. 396.

Utah.—Hague v. Nephi Irr. Co., 16 Utah, 421, 67 Am. St. Rep. 634, 52 Pac. 765, 41 L. R. A. 311.

Statutes to this effect are cited under change of place of use, *infra*, since the statutes, like the decisions, usually consider the two questions together.

[16] Fuller v. Swan R. Co., 12 Colo. 12, 19 Pac. 836, 16 Morr. Min. Rep. 252; Strickler v. Colorado Springs, 16 Colo. 68, 25 Am. St. Rep. 245, 26 Pac. 313.

[17] Hobart v. Wicks, 15 Nev. 418, 2 Morr. Min. Rep. 1.

[18] Norman v. Corbley, 32 Mont. 195, 79 Pac. 1059.

In Utah a statute provides that storage in reservoir shall be regarded as a diversion, and the points of diversion include point where water is taken from the stream, and the center of the dam. Utah Comp. Laws 1907, sec. 1288x6, and 1909, c. 62, p. 84.

[19] Cases in preceding list. Walker v. McGinness, 8 Idaho, 540, 69 Pac. 1003; Columbia Min. Co. v. Holter, 1 Mont. 296, 2 Morr. Min. Rep. 14; Whited v. Cavin (Or.), 105 Pac. 396; Vogel v. Minnesota etc. Co., 47 Colo. 534, 107 Pac. 1108; Montpelier Co. v. Montpelier (Idaho), 113 Pac. 741 (citing the second edition of this book).

[20] Baer etc. Co. v. Wilson, 38 Colo. 101, 88 Pac. 265.

[21] Hill v. Standard Min. Co., 12 Idaho, 223, 85 Pac. 907.

would damage him in the use of his appropriation, the courts will protect him in his rights."[22]

Just as previously pointed out, the rule permitting change of point of diversion arose on the public domain in the early days, there being few private land or water users in existence to be injured. The United States, as to public land, allowed the utmost freedom, and the limitation against injury was less important than the right to make a change; while to-day the lands and waters being much more fully taken up (and the public lands reserved and withdrawn), the prohibition of injury to others is the more important, and the possibility of change is becoming less and less. Just as in regard to change of means of use already considered, the point of diversion cannot be changed against the landowner's opposition when the land on which it lies has passed into private hands, though the landowner suffers no actual damage; it is enough that he took his land subject only to existing conditions, and no others.[23] And likewise upon public land itself the United States to-day is either prohibiting new ditch building, or greatly restricting it by requiring compliance with the Federal Right of Way Acts and the rules laid down by the Forest Service.[24]

(3d ed.)

§ 506. **Statutory Restrictions.**—In Colorado[25] there is a special statutory provision[1] which requires application to court before

[22] The rule is stated in Hargrave v. Cook, 108 Cal. 72, at 80, 41 Pac. 18, 30 L. R. A. 390, as follows: "He may change the point of diversion to another place upon the servient tenement; he is nevertheless limited in so doing to the exigencies of the situation, and has no right to make such change arbitrarily and at will. He may do so when under certain circumstances it is required to enable him to take the amount of water to which he has ownership, but then only when 'others are not injured by the change.' (Citing Civ. Code, sec. 1412.) His rights are the rights of the grantee of an easement, and extend, in the matter of changing the point of diversion, no further than the boundaries of the servient tenement, and even when entering upon this he is under obligation only to make reasonable changes with reasonable care, and also to repair, so far as possible, whatever damage his labors may have occasioned. (Citing Gale and Whately on Easements, 235.) As to lands other than those subject to his easement, and as to other claimants and owners, he can make no change at all which injuriously affects them or their rights."

[23] See McGuire v. Brown, 106 Cal. 660, 39 Pac. 1060, 30 L. R. A. 334; Vestal v. Young, 147 Cal. 715 and 721, 82 Pac. 381, 383; Snyder v. Colorado etc. Co. (C. C. A. Colo.), 181 Fed. 62; Vogel v. Minnesota etc. Co., 47 Colo. 534, 107 Pac. 1108.

[24] *Supra*, secs. 202, 204 et seq., 430 et seq.

[25] For list of citations, see last section.

[1] 3 M. A. S., 1905 ed., 2273d et seq.; Rev. Stats. 1908, sec. 3226 et seq.; Laws 1903, p. 278 et seq.

the change of place of diversion is made, and is based on analogy to the special proceedings for the adjudication of water-rights discussed hereafter.[2] This statutory procedure governing change in point of diversion has been upheld,[3] even as to rights existing at the date of passage of the act or in course at that time, and is not unconstitutional in so doing.[4] The procedure for change of point of diversion must be followed before the change, though made before the act, will receive legal recognition,[5] and is not unconstitutional on that account.[6] Under it, priority of right may at the same time be ascertained, and water-rights settled in the same proceeding.[7] "Under this statute we consider it necessary that a petitioner show a right to the use of a certain quantity of water from a public stream for irrigation as a condition precedent to obtaining a decree permitting a change in its point of diversion. To decree in favor of such change where the volume is not fixed would probably lead to useless litigation between rival claimants and the water commissioner."[8] But in a proceeding to change point of diversion there cannot be decided, it has been held, the question of abandonment.[9]

The right to make the change cannot be tested in different proceedings, such as an action to quiet title,[10] or by making the change and then seeking to enjoin the water commissioner from interfering.[11] In a proceeding by a landowner to change his point of diversion to a point higher up on the stream,[12] owners of land below the point of the original intake cannot object that the owners of lands between the old and new point of diversion have been injuriously affected by the change.[13] The change may be decreed from one district to another district, and defendants will not be heard to say that users in an intervening district,

2 *Infra*, sec. 1222 et seq.

3 New Cache La Poudre etc. Co. v. Water Supply etc. Co., 29 Colo. 469, 68 Pac. 781.

4 New Cache La Poudre etc. Co. v. Water Supply etc. Co., 29 Colo. 469, 68 Pac. 781; Fluke v. Ford, 35 Colo. 112, 84 Pac. 469.

5 New Cache La Poudre etc. Co. v. Arthur Irr. Co., 37 Colo. 530, 87 Pac. 799; Ashenfelter v. Carpenter, 37 Colo. 534, 87 Pac. 800.

6 *Ibid.*

7 Hallet v. Carpenter, 37 Colo. 30, 86 Pac. 317.

8 Bates v. Hall, 44 Colo. 360, 98 Pac. 3.

9 Lower Latham Co. v. Bijou Co., 41 Colo. 212, 93 Pac. 483.

10 Fluke v. Ford, 35 Colo. 112, 84 Pac. 469; Williams v. Conroy, 36 Colo. 117, 83 Pac. 959.

11 New Cache La Poudre etc. Co. v. Arthur etc. Co., 37 Colo. 530, 87 Pac. 799.

12 As authorized by Colorado Laws of 1903, p. 278.

13 Crippen v. Glasgow, 38 Colo. 104, 87 Pac. 1073. See sec. 626 et seq., *infra*.

strangers to the action, might be injured thereby.[14] The Colorado statute[15] provides that, if it shall appear that the rights of others might be injuriously affected, the court shall decree the change upon terms and conditions which would prevent such injurious effect.[16] In the event of the supply of water becoming insufficient to supply the appropriation, the decree permitting the transfer will be construed as permitting only such portion of the appropriation as the amount transferred bears to the whole.[17] Where a water-right is under executory contract of sale, vendor and vendee may join in petition to change point of diversion.[18]

In a proceeding to change point of diversion, it is held that the question of whether the *times* of use claimed by the changer in his old position will be injurious to others in his new one should not be determined, if there is any doubt on the evidence. It should be left until actual controversy upon it arises, unless the change will *per se* necessarily have an injurious result.[19]

The Colorado procedure for changing point of diversion has for its object to allow a remedy by protests in advance of injury.[20] At the same time, if the decree is conclusive, it defeats the remedy where the injury cannot be seen in advance. "The

[14] Lower Latham Co. v. Bijou etc. Co., 41 Colo. 212, 93 Pac. 483.

[15] Sess. Laws 1903, p. 278, c. 124.

[16] See Wadsworth v. Brown, 39 Colo. 57, 88 Pac. 1060, holding that the statutory procedure for change of point of diversion applies to mutual ditch companies.

[17] Hallet v. Carpenter, 37 Colo. 34, 86 Pac. 317.

[18] Bates v. Hall, 44 Colo. 360, 98 Pac. 3.

[19] Where in a proceeding to change the point of diversion of petitioners' water-rights, petitioners desired to change, not only the point of diversion, but the place of use, and to carry the volume of water which they claimed to own through a new ditch, and for the irrigation of other lands, and to fill a reservoir four or five miles beyond the lands, to irrigate which the appropriation was originally made, respondents were entitled to show the changed conditions affecting them which would ensue if the diversion was permitted, and also that petitioners' proposal would result in an enlarged use. Bates v. Hall, 44 Colo. 360, 98 Pac. 3, saying: "In New Cache etc. Irr. Co. v. Water S. & S. Co., 29 Colo. 469, 68 Pac. 781, we said that it was not proper, in a proceeding to change the point of diversion, to go into the question of an enlarged use which the petitioner might make of the water after the point of diversion was changed; but this was immediately qualified by the statement that, if the evidence showed that the changed conditions necessarily, or by reasonable inference, would result in an enlarged use, the petition should not be granted. In the light of the offer made by respondents the court should have permitted pertinent evidence, if any, to show that the proposed change would *necessarily* cause the injury which they alleged would be inflicted."

[20] Crippen v. Glasgow, 38 Colo. 104, 87 Pac. 1073.

change of the point of diversion under these [Colorado] statutes has already produced considerable litigation, and presents most interesting and important questions for solution."[21] The statute is strictly remedial only, the right to make the change where others are not injured having existed in Colorado, as elsewhere, long before the passage of the statute.[22]

Reference should also be made to Part VI of this book concerning the Adjudication of Right.

(3d ed.)

§ 507. **Same.**—Under the recent water codes, the appropriator is usually required by statute to apply to the State Engineer for a permit before changing the point of diversion. The State Engineer is then required to publish nature of the application and to hear any protests or contests of those who claim they will be injured, and to make his decision accordingly.[23] A statute requiring the appropriator to obtain the permission of the Board of Irrigation before changing place of diversion or use has been upheld in Nebraska.[24]

The difficulty with this and the Colorado statutory procedure is in the very thing they seek to accomplish, viz., a determination in advance of the change. Such, however, owing to the lack in men of even the highest training of the gift of prophecy, is bound, in some cases, to turn out impossible. When the State Engineer has issued the permit for the change, and it turns out that he erred in thinking no one would be injured, then recourse must be open to the courts to protect the injured party, as the only way of holding the statute constitutional.[25]

This new legislation is an instance of the change now going on in the law of appropriation from a possessory to a specific use system. So far, the above statutes accept the principle of change, but restrict its exercise. The Wyoming legislature in 1909 went still further, and prohibited change entirely.[1]

21 Mills' Irrigation Manual, p. 68.

22 Lower Latham etc. Co. v. Bijou etc. Co., 41 Colo. 212, 93 Pac. 483.

23 References to these statutes will be found in Part VIII.

24 Farmers' etc. Co. v. Gothenberg etc. Co., 73 Neb. 223, 102 N. W. 487.

25 *Infra*, secs. 1193, 1194. In Utah Stats. 1909, c. 62, p. 84, it is expressly provided that approval of change does not impair vested rights.

1 Stats. 1909, c. 68, sec. 1.

D. CHANGE OF PLACE OF USE.

(3d ed.)

§ 508. Change of Place of Use.—The place of use may be changed if others are not thereby injured.[2] "The person entitled to the use may change the place of diversion, if others are not

[2] *Arizona.*—Biggs v. Utah Irr. Co., 7 Ariz. 331, 64 Pac. 494.

California.—The following decisions uphold change of place of use, and several of them at the same time involve change of means, and purpose of use, and change of point of diversion. Maeris v. Bicknell, 7 Cal. 261, 68 Am. Dec. 257, 1 Morr. Min. Rep. 601; Ortman v. Dixon, 13 Cal. 33; McDonald v. Bear River Co., 13 Cal. 220, 1 Morr. Min. Rep. 626; Kidd v. Laird, 15 Cal. 161, 72 Am. Dec. 472, 4 Morr. Min. Rep. 571; McKinney v. Smith, 21 Cal. 374, 1 Morr. Min. Rep. 650; Butte Table Mountain Co. v. Morgan, 19 Cal. 609, 4 Morr. Min. Rep. 583; Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Junkans v. Bergin, 67 Cal. 267, 7 Pac. 684; Ware v. Walker, 70 Cal. 591, 12 Pac. 475; Ramel v. Irish, 96 Cal. 214, 31 Pac. 41; McGuire v. Brown, 106 Cal. 660, 39 Pac. 1060, 30 L. R. A. 384; Hargrave v. Cook, 108 Cal. 72, 41 Pac. 18, 30 L. R. A. 390; Charnock v. Higuerra, 111 Cal. 473, 52 Am. St. Rep. 195, 44 Pac. 171, 32 L. R. A. 190; Santa Paula etc. Co. v. Peralta, 113 Cal. 38, 45 Pac. 168; Smith v. Corbit, 116 Cal. 587, 48 Pac. 725; San Louis etc. Co. v. Estrada, 117 Cal. 168, 48 Pac. 1075; Vineland etc. Co. v. Azusa etc. Co., 126 Cal. 486, 58 Pac. 1057, 46 L. R. A. 820; Byers v. Colonial etc. Co., 134 Cal. 553, 66 Pac. 732; Craig v. Crafton etc. Co., 141 Cal. 178, 74 Pac. 762; Southern Cal. etc. Co. v. Wilshire, 144 Cal. 68, at 72, 77 Pac. 767; Southside etc. Co. v. Burson, 147 Cal. 401, 81 Pac. 1107; Calkins v. Sorosis etc. Co., 150 Cal. 426, 88 Pac. 1094; Walnut Irr. Dist. v. Burke, 158 Cal. 165–168, 110 Pac. 518.

Colorado.—Coffin v. Left Hand D. Co., 6 Colo. 443; Thomas v. Guiraud, 6 Colo. 530; Hammond v. Rose, 11 Colo. 524, 7 Am. St. Rep. 258, 19 Pac. 466; Fuller v. Swan River etc. Co., 12 Colo. 12, 19 Pac. 836, 16 Morr. Min. Rep. 252; Strickler v. City Colo. Springs, 16 Colo. 61, 25 Am. St. Rep. 245, 26 Pac. 313; Greer v. Heiser, 16 Colo. 306, 26 Pac. 770; Wyatt v. Larimer Co., 18 Colo. 298, 36 Am. St. Rep. 280, 33 Pac. 144; Oppenlander v. D. Co., 18 Colo. 142, 31 Pac. 854; Knowles v. Clear Creek etc. Co., 18 Colo. 209, 32 Pac. 279; Larimer Co. v. Cache La Poudre Irr. Co., 8 Colo. App. 237, 45 Pac. 525; Cache La Poudre Co. v. Water Sup. Co., 25 Colo. 161, 71 Am. St. Rep. 131, 53 Pac. 331, 46 L. R. A. 175; King v. Ackroyd, 28 Colo. 488, 66 Pac. 906; City of Telluride v. Davis, 33 Colo. 355, 108 Am. St. Rep. 101, 80 Pac. 1051; Town of Sterling v. Pawnee Co., 42 Colo. 421, 94 Pac. 431, 15 L. R. A., N. S., 238; Diez v. Hartbauer, 46 Colo. 599, 105 Pac. 868.

Idaho.—Mahoney v. Neiswanger, 6 Idaho, 750, 59 Pac. 561; Hard v. Boise City Irr. & L. Co., 9 Idaho, 589, 76 Pac. 331, 65 L. R. A. 407; Village of Hailey v. Riley, 14 Idaho, 481, 95 Pac. 686, 17 L. R. A., N. S., 86.

Montana.—Civ. Code, sec. 1882; Woolman v. Garringer, 1 Mont. 535, 1 Morr. Min. Rep. 675; Meagher v. Hardenbrook, 11 Mont. 385, 28 Pac. 451; Middle Cr. D. Co. v. Henry, 15 Mont. 558, 39 Pac. 1054; Gassert v. Noyes, 18 Mont. 216, 44 Pac. 959; Power v. Switzer, 21 Mont. 523, 55 Pac. 32; Smith v. Denniff, 24 Mont. 20, 81 Am. St. Rep. 408, 60 Pac. 398, 50 L. R. A. 741; Hays v. Buzard, 31 Mont. 74, 77 Pac. 423.

Nebraska.—Farmers' Irr. Co. v. Gothenburg Irr. Co., 73 Neb. 223, 102 N. W. 487.

Nevada.—Smith v. Logan, 18 Nev. 149, 1 Pac. 678; Union etc. Co. v. Dangberg, 81 Fed. 73.

New Mexico.—Trambley v. Luterman, 6 N. M. 15, 27 Pac. 312.

Oregon.—Wimer v. Simmons, 27 Or. 1, 50 Am. St. Rep. 685, 39 Pac. 6; Nevada Ditch Co. v. Bennett, 30 Or. 59, 60 Am. St. Rep. 777, 45 Pac. 472; Hough v. Porter, 51 Or. 318, 95 Pac.

injured by such change, and may extend the ditch, flume, pipe, or aqueduct by which the diversion is made to places beyond that where the first use was made."[3]

The change may be from one portion of one's land to another, as well as to different land.[4]

It is said in a recent case in Idaho: "There is no statute of the United States, or of this State, which prohibits a desert entryman from disposing of the water used for final proof, separate from the land, after proof has been made. When the water had been used for reclaiming said land, and final proof of the same had been submitted to the government and patent issued therefor, the entryman had complied with the legal requirements prescribed by the government, and took title to his land without any conditions or restrictions. The land became his property to dispose of as he might see fit, either the water and the land together or separately. In the case of Hard v. Boise City Irrigation & Land Co.,[5] this court held that the owner of a water-right, by purchase, or original appropriation, had a right to dispose of the same and sell the water separate and apart from the land. To the same effect is Johnston v. Little Horse Irr. Co.[6] If this be a correct statement of the law, then the trial court erred in its conclusion of law, to the effect that the water applied to the desert entry became appurtenant to the land and inseparable therefrom."[7]

732, 98 Pac. 1083, 102 Pac. 728; Whited v. Cavin (Or.), 105 Pac. 396.

Utah.—Elliott v. Whitmore (Utah), 24 Pac. 673; Patterson v. Ryan (Utah), 108 Pac. 1118.

Washington. — Thorpe v. Tenem Ditch Co., 1 Wash. 566, 20 Pac. 588.

Wyoming.—Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210; Johnston v. Little Horse etc. Co., 13 Wyo. 208, 110 Am. St. Rep. 986, 79 Pac. 22, 70 L. R. A. 341.

Statutes.—These rules are now incorporated in Cal. Civ. Code, secs. 1412, 1415; Wyo. Stats. 1905, p. 147; S. D. Stats. 1905, p. 201, sec. 48; Okl. Stats. 1905, p. 274, sec. 10; N. M. Stats. 1905, p. 270, sec. 6; and the statutes of other States generally. See statutes *infra*, Part VIII.

See, also, Pomeroy on Riparian Rights, secs. 46, 92; Kinney on Irrigation, secs. 154, 156: Gould on Waters, sec. 230; 17 Am. & Eng. Ency. of Law, 485, 497.

It may be interesting to note that in Hawaii, where a peculiar system of its own prevails concerning waters, a water-right is also held not to be inseparable from the land on which first used. Haw. Com. Co. v. Wailuku Co., 15 Hawaii, 611; Lonoaea v. Wailuku Co., 9 Hawaii, 651.

[3] Cal. Civ. Code, sec. 1412.

[4] Santa Paula etc. Co. v. Peralta, 113 Cal. 38, 45 Pac. 168.

[5] 9 Idaho, 589, 76 Pac. 331, 65 L. R. A. 407.

[6] 13 Wyo. 208, 110 Am. St. Rep. 986, 79 Pac. 22, 70 L. R. A. 341.

[7] Village of Hailey v. Riley, 14 Idaho, 481, 95 Pac. 686, 17 L. R. A., N. S., 86.

A change of place of use from one fork to another fork is no injury to an appropriator below the junction of the two forks.[8]

But if the change causes injury to others, it cannot be made against their objection. "Altnow's appropriation was made for the purpose of irrigating land east of the stream. By such appropriation he acquired a prior right to water sufficient for that purpose. He did not, however, acquire title to the water, but only the right to use it for the purposes for which it was appropriated. When not needed for that purpose, it was subject to appropriation by others, and he cannot subsequently change or enlarge his use to their injury."[9] Likewise as to change of place of storage. "The change of place of storage or use from one reservoir to another, if not identical, in principle, is analogous to a change of place of use of irrigating water from one tract of land to another," and cannot be made to the injury of other appropriators.[10] That the change will not be permitted in case it injures others is involved in all the cases cited in this chapter.

The court may permit the change with conditions expressed in the decree to prevent such injury.[11] Only injured parties may object; a water commissioner cannot refuse to give water, on his own motion, because of the change.[12]

(3d ed.)

§ 509. **Statutory Restrictions.**—This rule of change of place of use arose in the early mining days upon public domain where there was no one to be injured; and the irrigation engineers to-day believe it unfortunate in its application to irrigation under conditions of rapid settlement, and the recent water codes contain provisions that "the right to the use of water for irrigation inheres in the land irrigated," and make the appropriation inseparable therefrom (being abandoned when no longer there used), or else separable only after application to the State Engineer, publication of notice, protest of other parties concerned

8 Saunders v. Robison, 14 Idaho, 770, 95 Pac. 1057.

9 Williams v. Altnow, 51 Or. 275, 95 Pac. 200, 97 Pac. 539. See, also, Whited v. Cavin (Or.), 105 Pac. 396; Sanders v. Robison, 14 Idaho, 770, 95 Pac. 1057.

10 Windsor Co. v. Lake Supply Co. (1909), 44 Colo. 214, 98 Pac. 729.

11 Walnut Irr. Dist. v. Burke, 158 Cal. 165, 168, 110 Pac. 518, holding, however, certain conditions as to notice before use improper.

12 Boulder etc. Co. v. Hoover (Colo.), 110 Pac. 75.

and final decision of the State Engineer, subject to review in court. Such statutes exist in numerous States,[13] and the certificates and licenses issued by the State Engineers frequently declare the right to be inseparable from the land named therein.

So far as these statutes have come before the courts, however, the early California cases have been generally cited, and the statutes have not been given great force. In a Wyoming case it was held that the statute requiring appropriators to file a description of the land irrigated, which description is incorporated in the final certificate, does not limit the right to use the water to that land inseparably; on the contrary, the water-right may nevertheless be sold for use on different land;[14] saying that many of the objections urged against this rule of change of place of use are fanciful. In Idaho, likewise, the court refused to give full effect to statutes seeking this same end.[15]

In a Colorado case[16] it is said that the disastrous consequences of the rule making the right dependent on the place of use forbids giving such a construction to statutes as will concede the same, if another construction is possible. In a California case[17] it is said that the rule would lead to endless complications, and materially impair the value of water rights and privileges. Concerning the Nevada statute it is said:[18] "Parties entitled to water are required to make application to the State Engineer before any transfer may be made, but in practice farmers are allowed to use the water to which they are entitled on lands other than those in connection with which the rights were acquired, if others are not injured by the change. That is, if a farmer prefers to use his water on new land and let the old

[13] *Idaho.*—Stats. 1903, p. 223, secs. 5, 8; 1907, p. 507.
Montana.—See Civ. Code, sec. 1900.
Nebraska.—Comp. Stats. 1903, sec. 6436.
Nevada.—Stats. 1905, p. 66; 1907, p. 30, sec. 26.
New Mexico.—Stats. 1907, p. 71, secs. 44, 45.
North Dakota.—Stats. 1905, p. 274, secs. 1, 21, 23, 30, 50.
Oklahoma.—Stats. 1905, p. 274, secs. 21, 30.
Oregon.—Stats. 1909, c. 216, sec. 65.
South Dakota.—Stats. 1905, p. 201, secs. 31, 47; Stats. 1907, c. 180, sec. 48.
Utah.—Stats. 1905, c. 108, sec. 53; Stats. 1909, c. 62, p. 84; Comp. Laws 1907, secs. 1228x8 and 1288x24.
Wyoming.—Stats. 1909, c. 68, sec. 1. This list is not complete.

[14] Johnston v. Little Horse etc. Co., 13 Wyo. 208, 110 Am. St. Rep. 986, 79 Pac. 22, 70 L. R. A. 341.

[15] Hard v. Boise City etc. Co., 9 Idaho, 589, 76 Pac. 331, 65 L. R. A. 407; Boise City etc. Co. v. Stewart, 10 Idaho, 38, 77 Pac. 25, 321.

[16] Coffin v. Left Hand Ditch Co., 6 Colo. 443.

[17] Davis v. Gale, 32 Cal. 32, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604.

[18] Bulletin 168, U. S. Dept. of Agric., Office of Exper. Sta.

land lie fallow, he is allowed to do so. This is done upon the theory that the water would be used on the old land if the farmer was not allowed to use it on the new land, and it makes no difference to the holders of the other rights what land the water is used on." (Being the ground on which the courts originally upheld changes.)

In Arizona and Nebraska, however, statutes limiting the power to change place of use have been given effect.[19] But in Arizona, while the appropriation must be for some definite land, it need not remain the same tract of land.[20] In Oregon recent cases tend to restrict the right to the place of use inseparably.[21]

(3d ed.)

§ 510. Change on Sale of Water-right.—The recent statutory attempts to restrict the place and purpose of use are due to objections raised to changes resulting from sales of water-right, urging that allowing purchasers to use the water for new land or new purposes or different kinds of industries, even if without injury to others, leads to confusion that is inimical to the plan of the water codes, which seek to establish an official list, or register, or "Domesday Book," as it is sometimes said, of water-rights. Frequent changes resulting from sales are not in the line thus contemplated.[22] In the absence of express statutes *contra,* however, the courts hold that a change of place of diversion or use or purpose of use following a sale is as permissible as a change made on any other occasion. The statutes are narrowly construed so as still to hold that the water-right may be sold separate from the land.[23]

19 Slosser v. Salt River Co., 7 Ariz. 376, 65 Pac. 332; Gould v. Maricopa etc. Co., 8 Ariz. 429, 76 Pac. 598; Farmers' Irr. Dist. v. Frank, 72 Neb. 136, 100 N. W. 286. In Clague v. Tri-State Co. (1909), 84 Neb. 499, 133 Am. St. Rep. 637, 121 N. W. 570, sale for use on different land was upheld, however, as to sales prior to the statute.

20 Biggs v. Utah etc. Co., 7 Ariz. 331, 64 Pac. 494.

21 Whited v. Cavin (Or.), 105 Pac. 396; Ison v. Sturgill (Or.), 109 Pac. 579.

22 The difficulty nevertheless remains even when water is inseparable from land. "Another class of transfers is still unprovided for. These are transfers of lands which carry with them the rights of water. There is no provision for making a record of such transfers in the State Engineer's office, and consequently the records do not show correctly the ownership of rights. It is frequently desirable to send notices to water-right holders, and often these notices are not received, because the original owner has transferred his land and water-right and left the State." Bulletin 168, U. S. Dept. Agric. Exper. Sta. The same may also be remarked of rights acquired by adverse use.

23 Frank v. Hicks, 4 Wyo. 502, 35 Pac. 475, 1025; McPhail v. Forney, 4

The water-right may be reserved on a sale of the land.[24] Rental rights are assignable free of the land in Idaho in analogy to similar sales of original appropriations.[25] On a sale, the purchaser may use the water for a new purpose, as from irrigation to city water supply,[1] or from irrigation to storage.[2] That the water-right may be sold separate from land, for use on other land, and for other purposes, is generally held (if the change does others no injury).[3]

While the place of use may thus be changed on a sale, yet if the change is asserted as a reservation on sale of the land, the intent to reserve the water-right on a sale of the land must be affirmatively shown, as elsewhere discussed. Though not inseparable from the land, the water-right may be, and usually is, appurtenant thereto.[4]

So far as statutes attempt to change this rule, reference is further made to previous sections.[5] Such statutes are an unconscious return to common-law principles; for at common law the

Wyo. 556, 35 Pac. 773; Johnston v. Little Horse etc. Co., 13 Wyo. 208, 110 Am. St. Rep. 986, 79 Pac. 22, 70 L. R. A. 341; Crippen v. Comstock, 17 Colo. App. 89, 66 Pac. 1074; Smith v. Denniff, 23 Mont. 65, 57 Pac. 557, 50 L. R. A. 737; Cache La Poudre etc. Co. v. Larimer etc. Co., 25 Colo. 144, 71 Am. St. Rep. 123, 53 Pac. 318; Boise etc. Co. v. Stewart, 10 Idaho, 38, 77 Pac. 25, 32; Bessemer etc. Co. v. Woolley, 32 Colo. 437, 105 Am. St. Rep. 91, 76 Pac. 1054; Strickler v. Colorado Springs, 16 Colo. 61, 25 Am. St. Rep. 245, 26 Pac. 313; Clague v. Tri-State Co. (1909), 84 Neb. 499, 133 Am. St. Rep. 687, 121 N. W. 570 (upholding sales prior to the statute), and other cases cited below, sec. 550 et seq., in discussing the question of "Appurtenance."

[24] Dodge v. Marden, 7 Or. 457, 1 Morr. Min. Rep. 63.

[25] Hard v. Boise etc. Co., 9 Idaho, 589, 76 Pac. 331, 65 L. R. A. 407. *Quaere*, whether this follows in California as a result of Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. 858, 15 L. R. A., N. S., 359. See *infra*, sec. 1324 et seq.

[1] Strickler v. Colorado Springs, 16 Colo. 61, 25 Am. St. Rep. 245, 26 Pac. 313.

[2] Seven Lakes etc. Co. v. New Loveland etc. Co., 40 Colo. 382, 93 Pac. 485, 17 L. R. A., N. S., 329.

[3] Cave v. Crafts, 53 Cal. 135; Coonradt v. Hill, 79 Cal. 587, 21 Pac. 1099; Crooker v. Benton, 93 Cal. 365, 28 Pac. 953; Smith v. Corbit, 116 Cal. 587, 48 Pac. 725; Tucker v. Jones, 8 Mont. 225, 19 Pac. 571; Sweetland v. Olsen, 11 Mont. 27, 27 Pac. 339; Smith v. Denniff, 23 Mont. 65, 57 Pac. 557, 24 Mont. 20, 81 Am. St. Rep. 408, 60 Pac. 398, 50 L. R. A. 741; Simmons v. Winters, 21 Or. 35, 28 Am. St. Rep. 727, 27 Pac. 7; Coventon v. Seufert, 23 Or. 548, 32 Pac. 508; Turner v. Cole, 31 Or. 154, 49 Pac. 971; Toyaho Co. v. Hutchins, 21 Tex. Civ. App. 274, 52 S. W. 101; Snyder v. Murdock, 20 Utah, 419, 59 Pac. 91; Fisher v. Bountiful City, 21 Utah, 29, 59 Pac. 520; Frank v. Hicks, 4 Wyo. 502, 35 Pac. 475, 1025; McPhail v. Forney, 4 Wyo. 556, 35 Pac. 773; Mt. Carmel Co. v. Webster, 140 Cal. 183.

See Windsor Co. v. Hoffman (Colo.), 109 Pac. 423.

[4] See sec. 550 et seq., appurtenance.

[5] Secs. 282, 509, 510.

use of water is inseparably attached to riparian lands, and cannot be severed therefrom by sale or in any other way.[6]

E. CHANGE OF PURPOSE OF USE.

(3d ed.)

§ 511. Change of Purpose.—A change of purpose for which the water is used was at the start of the doctrine of appropriation in California treated as a distinct question from change of place.[7] It was urged in several cases that the right was limited to the purpose for which first appropriated and that a use for a new purpose could be obtained only by new appropriation. This view obtained some footing in the early decisions.[8] But it never took a firm hold. In McDonald v. Bear River Co.[9] it was held that use for a sawmill could be changed to use for a gristmill, and in Davis v. Gale,[10] it was said (*obiter*) that use for placer mining could be changed to use for quartz mining without loss of priority. The more recent cases are in this line, though they do not go into the question closely. They disregard any distinction between change of place of use (well established) and change of purpose of use. The rule has rather been assumed as applying to change of purpose than independently decided, though just as well settled to-day. The rule now is that there is no limitation on change of purpose of use except that others must not be injured by the change.[11] In Montana, "section

[6] *Infra*, sec. 847.

Speaking of a certain European country, it is said (Hall's Irrigation Development, Part I, page 387): "The regulations of some of the canals provide heavy penalties for an attempted sale, temporary or permanent, of a water turn or right, and irrigators are not allowed even to lend their water to others without the permission of every other irrigator from the canal, and the formal consent of those who might be injured by such action." In reading this, perhaps it should be remembered that the law of riparian rights is the basic law of European countries. *Infra*, secs. 685 et seq., 1027 et seq.

[7] E. g., Maeris v. Bicknell, 7 Cal. 261, 68 Am. Dec. 257, 1 Morr. Min. Rep. 601.

[8] E. g., Ortman v. Dixon, 13 Cal. 33; McKinney v. Smith, 21 Cal. 374, 1 Morr. Min. Rep. 650; Hill v. Smith, 27 Cal. 476, 4 Morr. Min. Rep. 597; Nevada etc. Co. v. Kidd, 37 Cal. 282, at 315; and compare Lowden v. Frey, 67 Cal. 474, 8 Pac. 31; Shenandoah etc. Co. v. Morgan, 106 Cal. 409, at 418, 39 Pac. 802, and note in 43 Am. Dec. 28; Farnham on Waters, sec. 677.

[9] 13 Cal. 220, 1 Morr. Min. Rep. 626.

[10] 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604.

[11] Ramelli v. Irish, 96 Cal. 214, 31 Pac. 41; Jacob v. Lorenz, 98 Cal. 332, 33 Pac. 119; Gallagher v. Montecito etc. Co., 101 Cal. 242, 35 Pac. 770; Hargrave v. Cook, 108 Cal. 72, 41 Pac. 18, 30 L. R. A. 390; though it should be noted that only change of place of use is specifically covered by section 1415, California Civil Code. Accord, Pomeroy on Riparian Rights, sec.

1882 of the Civil Code recognizes the right of an appropriator or owner of a water-right to change the place of diversion, as well as the use and the place of use. It therefore does not follow that, because water has been appropriated for a particular use, it forever thereafter must be applied to that use."[12] As was said by Justice Field in Atchinson v. Peterson:[13] "A different use of water subsequently does not affect the right." The change may be made on a sale of the water-right, the purchaser using it for a new purpose.[14]

In a Nebraska case[15] it was held, relying on the California cases, that a change could be made from use for power purposes to use for irrigation. A change may be made from use for crops requiring early irrigation to other crops requiring late irrigation, remembering always that others must not be injured by the change;[16] from mining to agricultural purposes, and *vice versa*[17] (provided there is no injury to others);[18] or from irrigation, mining or manufacturing to electric power;[19] or from culinary use to irrigation.[20] In a Colorado case a change was permitted from irrigation to a city water supply,[21] though on the other hand, Colorado prohibits, by statute, a change from domestic use to irrigation.[22] Likewise a change has been permitted in Colorado from direct irrigation to storage for use later in the season.[23]

65; Kinney on Irrigation, sec. 154; Farnham on Waters, sec. 677; and see cases collected in 60 Am. St. Rep. 813, note.

See Kaoloea Co. v. Stewart, 4 Hawaii, 416, upholding change from domestic use to other uses. N. D. Stats. 1905, c. 34, sec. 51; Rev. Codes (1905), sec. 7604 et seq.

12 Hayes v. Buzard, 31 Mont. 74, 77 Pac. 427. Other Montana decisions upholding change of purpose of use are Woolman v. Garringer, 1 Mont. 535, 1 Morr. Min. Rep. 675; Power v. Switzer, 21 Mont. 523, 55 Pac. 32.

13 20 Wall. 514, 22 L. Ed. 414, 1 Morr. Min. Rep. 583.

14 *Supra*, see change on sale.

15 Farmers' etc. Irr. Co. v. Gothenburg Irr. Co., 73 Neb. 223, 102 N. W. 487.

16 Seven Lakes etc. Co. v. New Loveland etc. Co., 40 Colo. 382, 93 Pac. 485, 17 L. R. A., N. S., 329.

17 Farmers' Co. v. Gothenburg Co., *supra (dictum)*.

18 Smith v. Duff, 39 Mont. 382, 133 Am. St. Rep. 587, 102 Pac. 984.

19 Thompson v. Pennebaker (Wash.), 173 Fed. 849, 97 C. C. A. 591 *(dictum)*. See Whitehair v. Brown (1909), 80 Kan. 297, 102 Pac. 783, change from flour-mill to electric light plant. But see Cal. Stats. 1911, c. 406, sec. 3, saying that change to water-power from other uses can only be made by new appropriation under this act.

20 Patterson v. Ryan (Utah), 108 Pac. 1118.

21 Strickler v. Colorado Springs, 16 Colo. 61, 25 Am. St. Rep. 245, 26 Pac. 313.

22 Rev. Stats. 1908, secs. 3178, 3179; Laws 1891, p. 402, sec. 2.

23 Seven Lakes etc. Co. v. New Loveland etc. Co., 40 Colo. 382, 93 Pac. 485, 17 L. R. A., N. S., 329.

The change of purpose of use is, however, governed by the same rules as those of change of place of use, and, in fact, frequently treated as the same question. Consequently the change cannot be made if others are injured by the new use,[24] as where a change was made from irrigation to storage needing additional water and different times of flow. This is not permissible.[25] Where the appropriation is originally of running water for irrigation, storage reservoirs cannot be introduced to the injury of others,[1] but may, in the absence of such injury.[2] An easement on land cannot be changed to use for other purposes than those for which acquired if it changes the character of servitude.[3] Use for a mill, which returns the water to the stream, cannot be changed to use for storage or irrigation, when to do so would not return the water to stream, and would thus take it from lower appropriators, though subsequent in time of appropriation.[4] This, in Colorado, is sometimes phrased by saying that a priority "cannot be made to do double duty," meaning, apparently, that cumulative purposes of use, whereby the water is used over again before discharged from control, cannot be made to injury of others. Having appropriated water only for actual irrigation in the irrigation season, it cannot be so used and also stored in the nonirrigating season, which is said to make the priority do "double duty."[5] That the change injures others not parties to the action cannot be considered.[6]

Besides the prohibition of injury to others, there are further to be noted the recent statutory checks upon changes already mentioned, which are being extended to change of purpose as well as other changes.[7]

[24] Compare Cal. Civ. Code, sec. 3512.

[25] Colorado etc. Co. v. Larimer etc. Co., 26 Colo. 47, 56 Pac. 185.

[1] New Loveland etc. Co. v. Consolidated etc. Co., 27 Colo. 525, 62 Pac. 366, 52 L. R. A. 266.

[2] Seven Lakes etc. Co. v. New Loveland etc. Co., 40 Colo. 382, 93 Pac. 485, 17 L. R. A., N. S., 329.

[3] Drake v. Russian R. Co. (1909), 10 Cal. App. 654, 103 Pac. 167.

[4] Windsor Co. v. Lake Supply Co., 44 Colo. 214, 98 Pac. 729.

[5] Seven Lakes Co. v. New Loveland Co. (1907), 40 Colo. 382, 93 Pac. 485, 17 L. R. A., N. S., 329. See, also, Cache La Poudre Co. v. Hawley, 43 Colo. 32, 95 Pac. 317; Diez v. Hartbauer, 46 Colo. 599, 105 Pac. 868, regarding double duty.

[6] Seven Lakes Co. v. New Loveland Co., *supra*. See *infra*, sec. 626 et seq.

[7] E. g., Wyo. Stats. 1909, c. 68, sec. 1. But section 3 thereof permits change from an unpreferred use to a preferred use with consent of board of control and condemnation of any existing unpreferred rights impaired. See, also, as to change of purpose, S. D. Stats. 1907, c. 180, sec. 46.

(3d ed.)

§ 512. Conclusion.—The rule permitting changes is an instance of the possessory origin of the law of appropriation upon the public domain, and is disappearing, though more slowly than the other possessory characteristics of the early law. The disappearance is resulting from the passage of lands into private hands, for the law prohibits injury to them; from the withdrawal of public lands, destroying the freedom of change there; and from the internal transition in the law of appropriation from a possessory system to a system of law making the right inhere in the specific initial mode of use.

§§ *513–521. (Blank numbers.)*

CHAPTER 23.

POLLUTION.

§ 522. Western questions.
§ 523. Under the common law of riparian rights.
§ 524. Under the law of prior appropriation.
§ 525. Materiality of interference.
§ 526. Same.
§ 527. Mining debris.
§ 528. Priority.
§ 529. Injunctions.
§ 530. Conclusions.
§§ 531–535. (Blank numbers.)

(3d ed.)

§ 522. Western Questions.—The injury to a water-right usually complained of in the West is diversion or diminution of quantity. There are other ways, however, in which a water-right may be infringed, such as injurious retardation and slowing of velocity without diversion;[1] or acceleration of velocity; or pollution and fouling of quality. Retardation and acceleration have hardly at all entered into the Western law, although an important matter in the Eastern mill communities; but pollution has been an important matter because of the extensive use of water in mining. In this industry water in large quantities is required, not only for its power in running machinery, but still more for its use in loosening and carrying away earth in placer mining, and for diluting and carrying the crushed rock in ore milling; in both of which processes after use it is discharged in large volume heavily laden with "tailings" or earthy pulp. In the early days the conflict was between different miners who needed the same water and for whom its use, when too heavily charged with debris, was impaired; in latter days, between miners and agriculturists whose use below for irrigation and domestic use was impaired, and upon whose land the debris was brought down and accumulated.

The litigation in the West has usually been decided under the law of prior appropriation, and not under the common law; but they are for convenience considered together here.

[1] See Schodde v. Twin Falls Co., *supra*, sec. 310.

(3d ed.)

§ 523. Under the Common Law of Riparian Rights.—So far as the use of water is alone concerned, the test of wrongful pollution under the law of appropriation is different in principle from that at common law between riparian proprietors. At common law the rights of riparian owners are equal and correlative—each has a right to a reasonable use of the stream, and the test of whether the pollution by a riparian owner complained of is wrongful to another riparian owner is whether it is excessive so as to be unreasonable under all the facts, and not merely whether it interferes with the lower riparian owner. Where the question is solely between riparian owners, and domestic use is not involved (as, for example, two riparian miners), the test remains whether the pollution is carried to an unreasonable or excessive degree. "When questions arise between riparian owners respecting the right of one to make a particular use of the water in which they have a common right, the right will generally depend on the reasonableness of the use and the extent of the detriment to the lower owner."[2]

Where the pollution interferes with drinking or other domestic use, but little latitude is allowed at common law, because domestic or "natural uses" are preferred uses at common law.[3] Likewise, no question of reasonableness can arise at common law where one party is a *nonriparian* owner.[4] There has hence, at common law, been some tendency to class pollution as a wrong *per se*, but properly this (if at all) is true only where it interferes with drinking or domestic use, or where it is caused by a nonriparian proprietor; and not as between riparian owners alone, when domestic use is not involved.

We would sum up this matter by saying that if the pollution is by a nonriparian owner, or if, when caused by a riparian owner, it goes to an unreasonable degree or interferes with domestic use, then it is wrongful at common law, and it is no excuse (at least,

[2] Tetherington v. Donk Co. (1908), 232 Ill. 522, 83 N. E. 1048; McNamara v. Taft (1908), 196 Mass. 597, 83 N. E. 310, 13 L. R. A., N. S., 1044 (but holding the pollution in the case to interfere with domestic use and also to go to an unreasonable degree on the facts); Boyd v. Schreiner (Tex. Civ. App. 1909), 116 S. W. 100; Ohio Oil Co. v. Westfall, 43 Ind. App. 661, 88 N. E. 354 (oil pollution). See *infra*, sec. 799 et seq.

[3] *Infra*, sec. 740.

[4] Stockport W. W. v. Potter, 3 Hurl. & C. 300, 10 Jur., N. S., 1005; People ex rel. Ricks W. Co. v. Elk R. Co., 107 Cal. 221, 48 Am. St. Rep. 125, 40 Pac. 521. See *infra*, secs. 814 et seq., 817.

to an action at law for damages)[5] that the pollution is in the exercise of an otherwise legitimate business such as mining; yet between riparian owners where domestic use is not involved (for example, between two riparian miners or mill owners), the test remains whether the interference with each other goes to an unreasonable degree in consideration of the equal rights of both to make a reasonable use of the stream.[6]

[5] *Infra*, sec. 648 et seq.

[6] "A lower riparian owner is entitled to protection by injunction from the pollution of the stream which prevents his *reasonable use* of it in the absence of special equities or qualifying circumstances which take the case out of the general rule." Headnote to Thropp v. Harper's Ferry etc. Co., 142 Fed. 690, 74 C. C. A. 22.

A riparian proprietor may enjoin pollution of a stream though there is another stream on his land which he might use. Brown v. Gold Coin Min. Co., 48 Or. 277, 86 Pac. 361. To cut trees and allow them to fall into a stream and interrupt it, or to decay there and pollute it, is not within the reasonable uses allowed a riparian owner, and he will be enjoined. Fisher v. Feige, 137 Cal. 39, 92 Am. St. Rep. 77, 69 Pac. 618, 59 L. R. A. 333. Pollution by cattle fouling the water may be wrongful, and enjoined. Barton v. Union Cattle Co., 28 Neb. 350, 26 Am. St. Rep. 340, 44 N. W. 454, 7 L. R. A. 457. (See McEvoy v. Taylor, 56 Wash. 357, 105 Pac. 851, holding such pollution not wrongful in that case.) A lower riparian owner may get an injunction against city sewage. Peterson v. Santa Rosa, 119 Cal. 387, 51 Pac. 557; Nevil v. City of Princeton (Ky. Civ. App.), 118 S. W. 363. In granting such an injunction a recent case (Markwardt v. City of Guthrie, 18 Okl. 32, 90 Pac. 26, 9 L. R. A., N. S., 1150, 11 Ann. Cas. 581) says, after examination of authorities therein cited: "From a careful examination and consideration of these authorities, and many others, we have reached the conclusion: (1) That the settled doctrine of the English courts, as well as some of our State courts, is that a lower riparian proprietor is entitled to recover damages for the pollution of the waters of a stream by a municipal corporation, by the discharge of sewage into the stream, on the broad ground of common sense and natural justice; (2) that the supreme court of the United States and a number of the State courts base their decisions on the ground that it is a taking of private property for public use, within the meaning of the Federal constitution; (3) that other States hold that it is a damage to property, within the meaning of their constitutional inhibitions against the taking or damaging of property without just compensation; and (4) a number of the States hold that the lower riparian proprietor is entitled to recover damages for injury to his health, comfort and repose, on the ground that it is the maintenance of a nuisance. While these decisions are based upon different ground, yet, upon whatever ground they may rest, they all, with the exception of the decisions of the Indiana courts, seem to uniformly hold that, under such circumstances, damages are recoverable, and many of them hold that, where the evidence is clear and convincing, injunction will lie to restrain the continuance of the nuisance."

Pollution was held wrongful at common law in Elliott v. Ferguson (Tex. Civ. App.), 103 S. W. 453 (a cemetery); Mexia etc. Co. v. Johnson (Tex. Civ. App. 1909), 120 S. W. 534 (oil polluting stream, action for damages at law); Worthen v. White etc. Co., 74 N. J. Eq. 647, 70 Atl. 471 (waste from paper pulp factory enjoined); City of Aberdeen v. Lytle Log etc. Co. (Wash.), 108 Pac. 945 (lumber rotting in stream); Tetherington v. Donk Co. (1908), 232 Ill. 522, 83 N. E. 1048 (mine refuse); Williams v. Haile Min. Co. (S. C.), 66 S. E. 1057 (mine refuse enjoined); Alabama Co. v. Vines, 151 Ala. 39°,

A right to pollute may, of course, arise by contract as between the contracting parties.[7]

(3d ed.)

§ 524. **Under the Law of Appropriation.**—But under the law of prior appropriation the appropriators' rights are not correlative.[8] A prior one has an exclusive right independent of, and not relative to, those later in time, and the test, on principle, is not whether the pollution does unreasonable interference with the use of the prior appropriator, but whether it does any material interference at all. If it does, it cannot be excused on the ground of being a reasonable use, such as, on clear facts between two riparian owners where domestic use is not involved, it might at common law. The prior appropriator has an exclusive right to the purity of the stream as he found it, and cannot in *any* degree be subordinated to later claimants on the ground that such subordination is necessary to allow use by the subsequent appropriator.[9]

44 South. 377; Wood v. Waud, 3 Ex. 772 (action at law); Bailey v. Clark (1902), 1 Ch. 649 (injunction).

See, also, cases collected in 10 Am. & Eng. Ann. Cas. 487, note, 773, note; 14 Harvard Law Review, 485; 18 Harvard Law Review, 149; 22 Harvard Law Review, 276 and 544. See further, in this connection, Straight v. Hover, 79 Ohio St. 263, 87 N. E. 174, 22 L. R. A., N. S., 276; Ferguson v. Firmenich Co., 77 Iowa, 576, 14 Am. St. Rep. 319, 42 N. W. 448; Hayes v. Waldron, 44 N. H. 580, 84 Am. Dec. 105; Strobel v. Kerr Co., 164 N. Y. 303, 79 Am. St. Rep. 643, 58 N. E. 142, 51 L. R. A., N. S., 687, 21 Morr. Min. Rep. 38; Pennington v. Brinsop Co., L. R. 5 Ch. D. 769; Bowling Coal Co. v. Ruffner, 117 Tenn. 180, 100 S. W. 116, 9 L. R. A., N. S., 923, 10 Ann. Cas. 581; Beach v. Sterling Co., 54 N. J. Eq. 65, 33 Atl. 286; Western Paper Co. v. Pope, 155 Ind. 394, 57 N. E. 719, 56 L. R. A., N. S., 899.

But see Helfrich v. Catonsville Co., 74 Md. 269, 28 Am. St. Rep. 245, 22 Atl. 72, 13 L. R. A. 117; McEvoy v. Taylor, 56 Wash. 357, 105 Pac. 851; Barnard v. Sherley, 135 Ind. 547, 41 Am. St. Rep. 454, 34 N. E. 600, 35 N. E. 117, 24 L. R. A. 568; Pa. Coal Co. v. Sanderson, *infra*, sec. 650; Salem Co. v. Hyland, 74 Ohio St. 160, 77 N. E. 751.

Western authorities upon pollution under the common law of riparian rights are few.

[7] Schwab v. Smuggler Union etc. Co. (Colo.), 174 Fed. 305, 98 C. C. A. 160.

[8] *Supra*, sec. 310.

[9] See Hill v. King, 8 Cal. 336, 4 Morr. Min. Rep. 533, and Bear R. Co. v. New York Mining Co., 8 Cal. 327, 68 Am. Dec. 325, 4 Morr. Min. Rep. 526, in which this difference between the common law and the law of appropriation is discussed. The former represents the law of appropriation; the latter (as between two riparian miners) the common law of riparian rights, and tries to apply the rules of correlative use to appropriators. Hill v. King, however, represents the prevailing law of exclusive right to the prior appropriator as between two miners. See this discussed *supra*, sec. 310.

(3d ed.)

§ 525. **Materiality of Interference.**—The prior appropriator having an independent and exclusive right, any material interference therewith is wrongful, however reasonable it might have been between riparian owners. The rules of the common law concerning reasonableness have no application. The question is whether the fitness of the water for the purpose of the prior appropriator is substantially or materially lessened to any degree at all.[10]

In practice, very little latitude is allowed either at common law or under the law of appropriation when pollution interferes with farming or domestic use; still, upon principles of law as distinguished from questions of fact, the common-law rule is more liberal in allowing (aside from cases of domestic or "natural" uses) a "reasonable" interference between riparian owners (for example, between two riparian miners), while the law of appropriation upon principle allows none at all against the prior appropriator.

(3d ed.)

§ 526. **Same.**—The following are some examples of what has been held an unlawful deterioration of the quality of the water

[10] *Supra*, sec. 131, exclusive right; and *infra*, sec. 450.

The burden of showing the materiality of the interference is upon the plaintiff, as is the ultimate burden of proof in any suit, and consequently, for example, a placer miner can have no action where later comers above muddy the stream, but still leave it fit for his purpose. Atchison v. Peterson, 87 U. S. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583; Bear River Co. v. New York Co., 8 Cal. 327, 68 Am. Dec. 325, 4 Morr. Min. Rep. 526; Butte etc. Co. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769, 4 Morr. Min. Rep. 552; Phoenix etc. Co. v. Fletcher, 23 Cal. 481, 15 Morr. Min. Rep. 185; Hill v. Smith, 27 Cal. 476, 4 Morr. Min. Rep. 597; Montana etc. Co. v. Gehring, 75 Fed. 384, 21 C. C. A. 414.

In Hill v. Smith, 27 Cal. 476, at 484, 4 Morr. Min. Rep. 597, the court says: "It may be that a slight diminution or deterioration will impair his use of the water, and it may be that such use would not be impaired by a very considerable reduction in quantity or quality. The question must be determined in view of the use to which the water is applied and the other circumstances developed by the testimony." Concerning this case see, further, *supra*, sec. 310.

In this connection says Lindley on Mines, second edition, section 841: "While the privilege of depositing such tailings in the streams must be reasonably exercised, and so as not to materially impair or destroy rights acquired by a lawful prior appropriator, yet to say that the discharge of such tailings is a nuisance *per se*, or to restrict it within unreasonable limits, is to interdict the prosecution of a lawful enterprise and practically to confiscate property of inconceivable value. Should any such stringent rule be invoked in regard to either quartz or hydraulic mining, the industry would be abandoned, awaiting the advent of the magician who will separate gold and silver from the earth and rocks without the aid of water."

against prior appropriators: If a later miner so muddies a stream that it cuts the hose of prior hydraulic miners below;[11] if one miner's tailings clog a prior miner's tail-race,[12] or fill a prior appropriator's ditch;[13] if sawdust is thrown into a stream;[14] if one pollutes water with oil so that it kills cattle.[15] Rendering the water dangerous to health is a crime.[16] Injunctions against pollution are granted, for example, where the pollution is caused by sewage,[17] or by location of a cemetery on higher ground,[18] or by gasworks.[19] Pollution is classed as a nuisance.[20]

(3d ed.)

§ 527. Mining Debris.—In Pennsylvania[21] an exception is made in favor of miners to the use of streams to carry off waste, as against agriculturists upon the stream below. In California an early attempt was made to establish that principle, and in some cases[22] it was held that a channel is a natural outlet for the discharge of tailings by all miners, without liability therefor. But it was soon settled that the law does not recognize any such right to a channel merely as a way of necessity,[23] and that no partiality is given to miners.[24] Consequently injunctions were granted against mining in the following cases because it mate-

11 Hill v. Smith, 27 Cal. 476, 4 Morr. Min. Rep. 597.

12 Gregory v. Harris, 43 Cal. 39, 14 Morr. Min. Rep. 91.

13 Logan v. Driscoll, 19 Cal. 623, 81 Am. Dec. 90, 6 Morr. Min. Rep. 172; Junkens v. Bergin, 67 Cal. 267, 7 Pac. 684.

14 Phoenix etc. Co. v. Fletcher, 23 Cal. 481, 15 Morr. Min. Rep. 185.

15 Benjamin v. Gulf Ry., 49 Tex. Civ. App. 473, 108 S. W. 408.

16 *Infra*, sec. 658.

17 Todd v. City of York, 3 Neb. (Unof.) 763, 92 N. W. 1040; People ex rel. Lind v. City of San Luis Obispo, 116 Cal. 617, 48 Pac. 723; Peterson v. Santa Rosa, 119 Cal. 387, 51 Pac. 557; Markwart v. City of Guthrie, 18 Okl. 32, 90 Pac. 26, 9 L. R. A., N. S., 1150, 11 Ann. Cas. 581.

18 Jung v. Neraz, 71 Tex. 396, 9 S. W. 344.

19 Beatrice Gas Co. v. Thomas, 41 Neb. 662, 43 Am. St. Rep. 711, 59 N. W. 925.

20 Crane v. Winsor, 2 Utah, 248, 11 Morr. Min. Rep. 69.

21 Sanderson v. Pennsylvania Coal Co., 86 Pa. 401, 27 Am. Rep. 711, 11 Morr. Min. Rep. 60, 102 Pa. 370; Pennsylvania Coal Co. v. Sanderson, 94 Pa. 302, 39 Am. Rep. 785, 11 Morr. Min. Rep. 79, 113 Pa. 126, 57 Am. Rep. 445, 6 Atl. 453. The case has been usually criticised. See *infra*, sec. 650.

22 Sims v. Smith, 7 Cal. 148, 68 Am. Dec. 233, 13 Morr. Min. Rep. 161; Bear River etc. Co. v. New York etc. Co., 8 Cal. 327, 68 Am. Dec. 325, 4 Morr. Min. Rep. 526. Compare Yunker v. Nichols, 1 Colo. 551, 8 Morr. Min. Rep. 64; *supra*, sec. 223.

23 Esmond v. Chew, 15 Cal. 137, 5 Morr. Min. Rep. 175; Wixon v. Bear River etc. Co., 24 Cal. 367, 85 Am. Dec. 69, 1 Morr. Min. Rep. 656; Levaroni v. Miller, 34 Cal. 231, 91 Am. Dec. 692, 12 Morr. Min. Rep. 232; Stone v. Bumpus, 40 Cal. 428, 4 Morr. Min. Rep. 271; Gregory v. Harris, 43 Cal. 38, 14 Morr. Min. Rep. 91.

24 *Supra*, secs. 85, 307.

rially injured prior appropriators (or landowners) who were engaged in agriculture; sluice mining;[25] hydraulic mining.[1] In a recent case concerning quartz mining[2] it is said: "Believing that the quartz and granite can be pulverized and the tailings impounded by the construction and maintenance of a proper dam, the decree of the lower court will be reversed, and one entered here perpetually restraining the defendant, its agents and servants, from the further operation of its mill until it has made suitable provision to prevent injury to plaintiff's irrigating ditches, and to the water used by him from the creeks for household and for stock purposes."

Some other cases enjoining pollution by mining by a subsequent appropriator are given in the note.[3] In Robinson v. Black Diamond Coal Co.[4] debris from coal mining was carried far down stream and there, when the stream overflowed, covered agricultural ground. The court there said that the long distance made no more difference than if the debris had been dumped on the fields after being carried there by carts or cars.[5]

The right to the use of a stream for depositing debris from mines is discussed by Judge Lindley.[6] Many cases from the various States of the Union are cited and discussed by the author. He closes his text as follows: "No positive rule of law can be laid down to define and regulate such use with entire precision.

[25] Lavaroni v. Miller, 34 Cal. 231, 91 Am. Dec. 691, 12 Morr. Min. Rep. 232; County of Sierra v. Butler, 136 Cal. 547, 69 Pac. 418; County of Yuba v. Kate Hayes etc. Co., 141 Cal. 360, 74 Pac. 1049; McCarthy v. Gaston etc. Min. Co., 144 Cal. 542, 78 Pac. 7. See, also, Salstrom v. Orleans Min. Co., 153 Cal. 551, 96 Pac. 292, discussing also the measure of damages for pollution.

[1] Logan v. Driscoll, 19 Cal. 623, 81 Am. Dec. 90, 6 Morr. Min. Rep. 172; People v. Gold Run etc. Co., 66 Cal. 138, 56 Am. Rep. 80, 4 Pac. 1152; Hobs v. Amador etc. Co., 66 Cal. 161, 4 Pac. 1147; County of Yuba v. Cloke, 79 Cal. 239, 21 Pac. 740; Miller v. Highland Ditch Co., 87 Cal. 430, 22 Am. St. Rep. 254, 25 Pac. 550; Woodruff v. North Bloomfield Co., 18 Fed. 753, 9 Saw. 441; United States v. North Bloomfield Co., 81 Fed. 243; North Bloomfield v. United States, 88 Fed. 64, 32 C. C. A. 84.

[2] Brown v. Gold Coin etc. Co., 48 Or. 277, 86 Pac. 361.

[3] Carson v. Hayes, 39 Or. 97, 65 Pac. 814; Golden etc. Co. v. Superior Court, 65 Cal. 187, 3 Pac. 628 (by hydraulic mining); Eureka Lake etc. Co. v. Superior Court, 66 Cal. 311, 5 Pac. 490 (hydraulic mining); Montana etc. Co. v. Gehring (Mont.), 75 Fed. 384, 21 C. C. A. 414; Humphreys T. Co. v. Frank, 46 Colo. 524, 105 Pac. 1093 (mine water).

[4] 57 Cal. 412, 40 Am. Rep. 118.

[5] Mr. Justice Ailshie, in Hill v. Standard Min. Co., 12 Idaho, 223, 85 Pac. 907, distinguishes between pollution of the quality of the water as a fluid, and filling up the bed of the stream by dumping material in it and making it overflow. See Tennessee etc. Co. v. McMillan, 161 Ala. 130, 49 South. 880.

[6] 2 Lindley on Mines, sec. 840.

As to this all courts agree. It is a question of fact to be determined by the jury."

In a recent case it is said: "We do not mean to say that the agriculturist may captiously complain of a *reasonable use* of water by the miner higher up the stream, although it pollutes and makes the water slightly less desirable, nor that a court of equity should interfere with mining industries because they cause slight inconveniences or occasional annoyances, or even some degree of interference, so long as such do no substantial damage, but to permit a subsequent appropriator to so pollute or burden the stream with debris as substantially to render it less available to the prior appropriator causes him to lose the rights he gained by appropriation as readily as would the diversion of a portion of the water which he appropriated."[7]

As a result of the California cases on hydraulic mining, Congress has prohibited it in California on the ground of interference with the navigability of the Sacramento and San Joaquin Rivers, making it a misdemeanor unless under permission from the "Debris Commissioner."[8] This prohibition is made to extend to whatever the words "hydraulic mining" or "mining by the hydraulic process" meant in 1893 when the act was passed. Whether it would prohibit such things as working over tailings or dumps or other artificial banks of earth by water under pressure is not clear.[9] It has been held that a permit from the commissioner does not relieve from liability for damage or pollution, though the works be carried on in strict compliance with the directions of the commissioner. An injunction may, nevertheless, be granted.[10]

(3d ed.)

§ **528. Priority.**—We have been considering the question from the view of injury to the prior appropriator. The principles on which the law of appropriation rests should apply with equal

[7] Arizona Copper Co. v. Gillespie (Ariz.), 100 Pac. 465. See McCarthy v. Bunker Hill etc. Co. (Idaho, 1908), 164 Fed. 927, 92 C. C. A. 259.

[8] 27 Stats. at Large, 507, the substance of which is given in Part VIII below, in the collection of Federal statutes.

[9] If emphasis is laid on the words "hydraulic process," as in Lindley on Mines, second edition, section 848 et seq., such work would clearly be within the act. If emphasis is laid on the word "mining," it might, perhaps, not. The effect of the act, and the question of pollution as applied to mining are discussed at length in Lindley on Mines, second edition, section 852 et seq.; Pomeroy on Riparian Rights, section 76.

[10] County of Sutter v. Nichols (1908), 152 Cal. 688, 93 Pac. 872, 15 L. R. A., N. S., 616, 14 Ann. Cas. 900.

force where the case is reversed, and the injury is to the subsequent claimant. If the prior claimant appropriated the stream on public land for the purpose of depositing tailings, sawdust or other material in it, and so used the water at the time the subsequent claimant arrived, the continuance of the pollution of the stream should be lawful as one of the characteristics in which the law of appropriation is a departure from the common law of riparian rights. It was so held in Sims v. Smith.[11] It is similar in principle to O'Keiffe v. Cunningham,[12] where it is said that tailings can be deposited on public land by a prior appropriation (i. e., location) of the land for that purpose, and Jacob v. Day,[13] where it was held that tailings can be "rushed" across land in a ditch, if the ditch was on the land while public, prior in time to the title of the occupant of the land. There is no distinction in principle between the right acquired by priority to deposit tailings on public land, rush them in a ditch on public land, or deposit them in streams on public land. They are equally rights to which exclusive use should be acquired by priority on public lands.[14]

How far priority will sanction the pollution is, however, left in doubt by the "Debris Cases," holding that hydraulic mining was a public nuisance in those cases, and that the right to continue a public nuisance could not be maintained under a claim of either priority or prescription.[15] Following this, pollution has been declared to be a public nuisance.[16] In People v. Elk River etc. Co.[17] pollution of a stream was said to be a public nuisance if it interferes with use by a considerable number of persons on the banks of a stream though non-navigable.

In a Colorado case [18] tailings from a stamp-mill were enjoined at the suit of a power company, though to some extent at least

11 7 Cal. 148, 68 Am. Dec. 233, 13 Morr. Min. Rep. 161.

12 9 Cal. 589, 9 Morr. Min. Rep. 451.

13 111 Cal. 571, 44 Pac. 243.

14 Consider Sullivan v. Jones (Ariz.), 108 Pac. 476, a quarrel between sheepmen on public land.

15 See cases cited above, and People v. Gold Run etc. Co., 66 Cal. 138, 56 Am. Rep. 80, 4 Pac. 1152; Woodruff v. North Bloomfield Co., 18 Fed. 801, 9 Saw. 441, especially.

16 Conrad v. Arrowhead etc. Hotel Co., 103 Cal. 399, 37 Pac. 386; People ex rel. Ricks v. Elk River etc. Co., 107 Cal. 214, 48 Am. St. Rep. 121, 40 Pac. 486 (a dairy); People ex rel. Ricks v. Elk River etc. Co., 107 Cal. 221, 48 Am. St. Rep. 125, 40 Pac. 531 (a sawmill); Arizona etc. Co. v. Gillespie (Ariz.), 100 Pac. 465. See McCarthy v. Bunker Hill etc. Co. (1908), 164 Fed. 927, 92 C. C. A. 259.

17 Cited in the preceding note.

18 Suffolk etc. Co. v. San Miguel etc. Co., 9 Colo. App. 407, 48 Pac. 828. Commented upon in Humphreys T. Co. v. Frank, 46 Colo. 524, 105 Pac. 1093.

the stamp-mill had discharged tailings into the stream before the power company began. (The number of stamps thereafter, however, had been increased.) In a recent Idaho case it was held that no prescriptive right to pollute can arise because it is a continuous injury.[19] Idaho has a constitutional provision[20] that appropriations for mining in mining districts shall take precedence over those for agriculture. The same case held that the preference to mining in the Idaho constitution has no application to questions involving pollution of streams.[21] The miner in this case had a priority over the agriculturist by virtue of the constitution; hence this is a decision that priority cannot sanction pollution. In a Texas case enjoining pollution by waste from oil wells, it was held no defense that the pollution was without negligence and the natural consequence of a lawful business.[22] It has been held in California that the utmost care cannot excuse pollution.[23]

In Conrad v. Arrowhead etc. Hotel Co.[24] where the pollution consisted in refuse from a hotel and not mining debris, the court states the rule as follows: "Locators and appropriators of the waters of a stream have no rights antecedent to the date of their location. If others have, prior to their location, decreased the quantity of the water flowing in such streams, or caused a deterioration of its quality, the subsequent locator cannot complain. Familiar examples of the application of this rule as between appropriators are of frequent occurrence in the mining regions of this State, where water is diverted from flowing streams, upon which mining has destroyed the purity of the water. In such cases the appropriator takes the water with his eyes open—takes it as he finds it, and as to him the like continued deterioration is *damnum absque injuria.*" This would seem to be correctly stated upon principle, so far as concerns claimants taking up public land or water subsequent to the commencement of the pollution. But so far as the writer can gather from

19 Hill v. Standard etc. Co., 12 Idaho, 223, 85 Pac. 912.

20 Art. 15, sec. 3.

21 *Semble* accord, McCarthy v. Bunker Hill etc. Co., 164 Fed. 927, 92 C. C. A. 259, though denying injunction.

22 Teel v. Rio Bravo Oil Co., 47 Tex. Civ. App. 153, 104 S. W. 423, disapproving Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 57 Am. St. Rep. 445, 6 Atl. 453, cited *supra*. Also Humphreys T. Co. v. Frank, 46 Colo. 524, 105 Pac. 1093.

23 Salstrom v. Orleans Min. Co. (1908), 153 Cal. 551, 96 Pac. 292, discussing also the measure of damages. Compare the "smoke cases," such as Bliss v. Anaconda etc. Co., 167 Fed. 342.

24 103 Colo. 399, 87 Pac. 886.

the decisions, any material pollution will be held wrongful against both prior and subsequent claimants.[25]

Concerning the pollution of underground waters, some references are given in the note.[1]

A right to pollute may, of course, exist by contract as between the parties thereto.[2]

(3d ed.)

§ 529. **Injunctions.**—Further authorities and discussion will be found under the sections upon injunctions,[3] as some of the most important principles of equity jurisdiction upon injunction have arisen out of the conflict, in regard to pollution, between mining men and agriculturists.

A few other matters may be also mentioned.

If settling tanks can be arranged to catch debris, injunction against pollution may be modified to permit experiments for building them.[4] *Quære*, whether a municipality can condemn water-rights on a stream for the purpose of *polluting* it with sewage.[5]

How far the rights of strangers to a suit are material in a case has given rise to great conflict in connection with pollution. At law it is perfectly settled that only the rights of defendant and plaintiff can be regarded, and the court cannot consider injury to others who have not taken part in the suit.[6] But where the

25 Concerning pollution, see Bulletin 152, Water Supply Paper, U. S. Geol. Survey.

1 Kinnaird v. Standard Oil Co., 89 Ky. 468, 25 Am. St. Rep. 545, 12 S. W. 937, 7 L. R. A. 451; Ballard v. Tomlinson, 29 Ch. D. 115, 122, 126; Sherman v. Fall River etc. Co., 5 Allen (Mass.), 213; Alston v. Grant, 3 El. & Bl. 128; Turner v. Mirfield, 34 Beav. 390; Womersley v. Church, 17 L. T., N. S., 190; Clark v. Lawrence, 6 Jones Eq. 83, 78 Am. Dec. 241; Greencastle v. Hazelett, 23 Ind. 186; Wahle v. Reinbach, 76 Ill. 322, 326; Upjohn v. Richland Township, 46 Mich. 549, 41 Am. St. Rep. 178, 9 N. W. 845; Brown v. Illius, 27 Conn. 84, 71 Am. Dec. 49; Dillon v. Acme Oil Co., 49 Hun (N. Y.), 565, 2 N. Y. Supp. 289; Barnard v. Sherley, 135 Ind. 547, 41 Am. St. Rep. 454, 34 N. E. 600, 35 N. E. 117, 24 L. R. A. 568; Long v. Louisville etc. Ry., 128 Ky. 26, 107 S. W. 203, 13 L. R. A., N. S., 1063, 16 Ann. Cas. 673. See 19 L. R. A. 95, note; Ballentine v. Public Service Corp., 76 N. J. L. 358, 70 Atl. 167. See, also, the note in 123 Am. St. Rep. 574.

2 Schwab v. Smuggler Union etc. Co. (Colo.), 174 Fed. 305, 98 C. C. A. 160.

3 *Infra*, sec. 650.

4 Arizona Copper Co. v. Gillespie (Ariz.), 100 Pac. 465. See Atchinson v. Peterson, 87 U. S. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583; Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240, 4 Morr. Min. Rep. 504.

5 Village of Twin Falls v. Stubbs, 15 Idaho, 68, 96 Pac. 195.

6 *Infra*, sec. 626 et seq. E. g., Long v. Louisville etc. Ry., 128 Ky. 26, 107 S. W. 203, 13 L. R. A., N. S., 1063, 16 Ann. Cas. 673.

pollution comes within criminal statutes (as, for example, when injurious to health), or becomes a public nuisance, the rights of the public may probably be considered (though no public officer appears in court) even at law.[7] At all events, questions of pollution frequently involve the public interest to such an extent that *in equity*, exercising its extraordinary jurisdiction of injunction, such outstanding and unrepresented interests are sometimes made a controlling consideration in granting or refusing the injunction.[8]

Statutes frequently make the pollution of water criminal.[9]

(3d ed.)

§ 530. **Conclusions.**—The following appears to be the state of the authorities:

(a) Pollution by a nonriparian owner to the impairment of the value of riparian land is always wrongful at common law, without regard to its degree; likewise a nonriparian owner cannot complain of pollution by a riparian owner. Nonriparian owners as such have no standing in court at common law so far as they would impair the land or restrict the use of a riparian owner.

(b) Pollution by one riparian owner impairing the domestic use of another riparian owner is wrongful at common law without regard to its degree, because domestic uses are preferred uses at common law; but where domestic use is not involved, questions of pollution between riparian owners (for example, two riparian miners) are to be governed by the test of whether the pollution is carried to an excessive degree in consideration of the equal right of both riparian owners to make a reasonable use of the stream.

(c) Under the law of appropriation, pollution *by a subsequent appropriator* is wrongful if it, to any material degree, impairs the use of the prior appropriator, and there can be no question involved whether the impairment is unreasonable or excessive. There must, however, be an actually material impairment, and of this the complainant has the burden of proof.

(d) Under the law of appropriation, upon principle, pollution *by a prior appropriator* against a subsequent appropriator would

7 *Supra*, debris cases.

8 *Infra*, sec. 648 et seq.

9 See *infra*, sec. 658, crimes. For example, Alaska, Carter's Annotated Code of 1900, secs. 5, 33; Cal. Stats. 1907, p. 492; Wyo. Stats. 1907, p. 44.

always seem *damnum absque injuria*, if it existed at the time the subsequent appropriation was made; but the weight of authority is that, on the ground of public nuisance, priority will not sanction pollution where it impairs domestic use of a subsequent appropriator, or impairs the health or agriculture of a community subsequently formed upon the bank of the stream, though the pollution began while the stream was upon public land before the community was formed.

§§ *531–535. (Blank numbers.)*

CHAPTER 24.

ALIENATION AND DISPOSAL OF RIGHT—CONTRACTS—CONVEYANCES.

A. CONTRACTS BETWEEN PRIVATE PARTIES EXCLUSIVE OF PUBLIC SERVICE COMPANIES.

§ 536. Right of contract.
§ 537. Subject matter of water contracts.
§ 538. Contracts (continued).
§ 539. Assignment.
§ 540. Contracts with public service companies are governed by special rules.

B. CONVEYANCES.

§ 541. Water-rights may be conveyed.
§ 542. Formalities on transfer.
§ 543. Subject matter of conveyance.
§ 544. Construction and operation of conveyance.
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C. APPURTENANCE.

§ 550. Whether the water-right is an appurtenance to land.
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§ 552. Whether passes on sale of land when appurtenant thereto.
§ 553. Upon subdivision of land.
§ 554. Appurtenance (concluded).

D. PAROL SALE.

§ 555. Parol sales of possessory rights on the public domain.
§ 556. Parol sales and licenses in equity.
§ 557. Conclusion.
§§ 558–565. (Blank numbers.)

A. CONTRACTS BETWEEN PRIVATE PARTIES (EXCLUSIVE OF PUBLIC SERVICE COMPANIES).

(3d ed.)

§ 536. Right of Contract.—A reference to the cases at large will disclose contracts of all kinds made by the appropriators whereby the water is apportioned between them, sold or dealt

with like other property. The court in an early case[1] says: "It can be transferred like other property."[2] One case may be stated to show the great freedom in this respect.[3] A homestead claimant had sold a water-right of appropriation and a ditch appurtenant to the land, before final proceedings. The United States statutes prohibit a homestead claimant from disposing of his land before he acquires full title. This was held not to interfere with the sale of the ditch and water-right acquired by appropriation. A similar question arose in another case.[4] It was held that an Indian may make an appropriation. The United States statutes, however, forbid the sale of lands by Indians. The court seems to have thought that the sale of a water-right was not within this prohibition.

Beside the general principles considered in this chapter, reference is made to other places in the book where contracts are considered in particular connections.[5]

(3d ed.)

§ 537. **Subject Matter of Water Contracts.**—Where a contract concerns water in a reservoir, ditch, pipe, or other waterworks or structure that has reduced it to possession, the water therein is private property, the subject of contract as a *corpus*, and so far as it is property, is personal property.[6] Occasionally contracts may have such specific water as their subject matter. A contract with a house-supply company in a city is an example of this, the substance itself (as a liquid) being the subject of the contract, and a contract with such a company, so far as it is one of sale,[7] is for the sale of personal property.[8] Other illustrations

1 McDonald v. Bear R. Co., 13 Cal. 220, at 233, 1 Morr. Min. Rep. 626. In Washington (Pierce's Code, sec. 5136) almost identical words are used.

2 See People's Ditch Co. v. Fresno Canal Co. (1907), 152 Cal. 87, 92 Pac. 77; Fresno Canal Co. v. Park, 129 Cal. 437, 62 Pac. 87; Barkley v. Tieleke, 2 Mont. 59; Thompson Co. v. Pennebaker (Wash.), 173 Fed. 849, 97 C. C. A. 591, citing the second edition of this book.

3 Mt. Carmel etc. Co. v. Webster, 140 Cal. 183, 73 Pac. 826. See Village of Hailey v. Riley, 14 Idaho, 481, 95 Pac. 686, 17 L. R. A., N. S., 86, holding similarly as to a desert entryman *after* final proof. But see Cascade etc. Co. v. Railsback (Wash.), 109 Pac. 1062, holding *contra* as to a sale for *power* use.

4 Lobdell v. Hall, 3 Nev. 507.

5 Contracts concerning ditches, *supra*, sec. 458. Contracts with riparian owners, *infra*, sec. 844 et seq. Contracts by water users' associations, *infra*, sec. 1415. Of irrigation districts, *infra*, sec. 1356 et seq. Between tenants in common, *supra*, sec. 320. Concerning percolating water, *infra*, sec. 1172. See, in general, the index at the end of the book.

6 *Supra*, secs. 30 et seq., 35.

7 Primarily it is a contract of *service* rather than of sale. *Infra*, sec. 1324.

8 People ex rel. Heyneman v. Blake, 19 Cal. 595, Field, J., quoted *supra*,

may be instanced. Thus, if one artificially manufactures water from oxygen and hydrogen, and leads it in a ditch from the factory to a bottling works, and contracts with me about the water in the ditch, it is obviously a contract concerning personalty. So if one has a spring of medicinal waters and collects the water in a reservoir preparatory to bottling, and contracts to sell *one reservoir full*, it would be a sale of personal property. Likewise, if he sells me so many gallons from the reservoir measured by a meter. The specific particles sold could be marked and set aside. The very body of water in the reservoir at time of purchase may have peculiar mineral properties not again occurring, so that the purchaser desires just that very water. In such supposable cases it is the *corpus* of water, a specific body of the substance in specie, that is contracted about.

But such situations are unusual. Contracts for irrigation or water-power or similar uses usually have in view a natural stream, and then the usufructuary "water-right" in the stream (and not the water itself) alone constitutes private property; the water itself therein cannot be the subject of contract because it is not the subject of ownership.[9] Contracts between private parties[10] for irrigation usually deal with "water-rights" or the "*usufruct*," or continual flow and use of the natural stream as a natural water resource. While the city supply water company above considered sells the householder only so many gallons or cubic feet of liquid measured by a meter, not professing to grant a perpetual flow from a natural stream, nor to confer upon the householder any "water-right," on the other hand, if the man above supposed, who bought a reservoirful of mineral water, buys instead (as he usually does) the right to have the mineral water flow from the spring which supplies the reservoir, he would be contracting concerning the water-right—concerning realty and not personalty. As a general principle, it is the *water-right* which irrigation and similar contracts have for their subject

sec. 35; Spring Valley W. W. v. Schottler, 110 U. S. 347, 4 Sup. Ct. Rep. 48, 28 L. Ed. 173, quoted *supra*, sec. 33; Hesperia etc. Co. v. Gardner, 4 Cal. App. 357, 88 Pac. 286. Compare Carothers v. Phil. Co., 118 Pa. 468, 12 Atl. 314; Ohio Oil Co. v. Indiana, 177 U. S. 190, 20 Sup. Ct. Rep. 576, 44 L. Ed. 729, 20 Morr. Min. Rep. 466; citing State ex rel. Corwin v. Indiana etc. Co., 120 Ind. 575, 22 N. E. 778, 6 L. R. A. 579; People's Gas Co. v. Tyner, 131 Ind. 277, 31 Am. St. Rep. 433, 31 N. E. 59, 16 L. R. A. 443, 17 Morr. Min. Rep. 481.

[9] *Supra*, c. 1.

[10] Regarding this question in contracts with public service irrigation companies, see *infra*, sec. 1324 et seq.

matter, and hence, as a rule, they concern real property—granting an interest in the ditch and water-rights of the grantor.[11] A grant of a water-right involves no title to the *corpus* of water in a natural stream, but only a *usufruct*—the right to the flow and use of the stream.[12]

Further reference is specially made to the opening chapters of the book.

(3d ed.)

§ 538. **Contracts (Continued).**—Appropriators may settle their rights by contracts;[13] but agreements must be in writing within the statute of frauds,[14] unless the parol agreement was intended to be permanent and has been executed, or there has been part performance such as will take the case out of the statute in equity.[15] A parol license if unexecuted or if not intended permanent is revocable, and is revoked by death.[16]

A contract being to supply water from a specific canal, failure of the supply in the canal from natural causes relieves the canal owner from liability for the failure to supply the water,[17] and is not failure of consideration such as to allow recovery of advance payments;[18] but it would be otherwise where the contract referred to no specific canal.[19] Prevention by injunction at suit

11 See *infra*, sec. 1324 et seq.

12 Kidd v. Laird, 15 Cal. 161, at 180, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571; McDonald v. Askew, 29 Cal. 200, at 207, 1 Morr. Min. Rep. 660; Johnston v. Little Horse Co., 13 Wyo. 208, 110 Am. St. Rep. 986, 79 Pac. 22, 70 L. R. A. 341; Mayor v. Commissioners, 7 Pa. 363. In Duckworth v. Watsonville Co., 150 Cal. at 532, 89 Pac. 338, Mr. Justice Shaw said: "The claim of the respondents that the grant by Mrs. McKinley of the rights pertaining to the land described in the deeds extended only to the water then standing in the lake, and that as soon as that water was exhausted by use, runoff or evaporation, the rights ceased to exist, is utterly baseless, and needs no discussion further than to deny it." See concurring opinion of the same justice in Same v. Same (Cal.), 110 Pac. 927. See, also, Booth v. Chapman, 59 Cal. 194; Booth v. Trager, 44 Colo. 409, 99 Pac. 60.

13 Biggs v. Utah etc. Co., 7 Ariz. 331, 64 Pac. 494.

14 Bree v. Wheeler, 4 Cal. App. 109, 87 Pac. 255; Schilling v. Rominger, 4 Colo. 100; Oliver v. Burnett (1909), 10 Cal. App. 403, 102 Pac. 223. A parol contract to furnish water "at all times" is void under the statute of frauds as a contract not to be performed within a year. Metropolitan etc. Co. v. Topeka etc. Co. (Kan.), 132 Fed. 702.

15 See *infra*, sec. 555 et seq.

16 See *infra*, sec. 556.

17 See Fresno Milling Co. v. Fresno Canal etc. Co., 126 Cal. 640, 59 Pac. 140, *semble*. See Evans v. Prosser etc. Co. (Wash.), 113 Pac. 271, holding, however, that if more efficient appliances could remedy the deficiency, there is no excuse.

18 Farmers' etc. Co. v. Brambaugh, 81 Neb. 641, 116 N. W. 514.

19 Cf. Wilson v. Alcatraz Co., 142 Cal. 188, 75 Pac. 787 (oil)., See Redwater Co. v. Jones (S. D.), 130 N. W. 85.

of a third party does not excuse for breach of contract to furnish water.[20]

A contract for conveyance of a "good and sufficient water-right" is fulfilled by tender of certificates in a mutual irrigation company.[21] Contracts may be made for "developing" underground water.[22]

One who buys a right to a specific quantity of water has, against his grantor, unlimited right of disposal thereof, and may resell it to others in whole or part,[23] provided the grantor is not in public service.[24] An agreement whereby one acquires from another the right to a specific quantity of water in general terms passes a right as between the parties without regard to the use made of the water. The covenantor cannot follow the water after its delivery to the covenantee, who consequently may, when not needing all himself, license use of the surplus to his neighbors for a rental.[25] In the case just cited it is said: "As he had purchased the right to the use of all the waters conveyed from the irrigation ditch, he was entitled to an unrestricted control over that use. He was not limited by any contract with defendant upon the subject. He is not taking any more water than he purchased, and is not using himself or licensing to his neighbors more than he bought. Having purchased the use of a given quantity, if he cannot use it all himself, we see no reason why he cannot sell the right to a temporary use of it to his neighbors, as wanted, for a beneficial purpose. To hold that he cannot do so would be to impose a restriction for which no warrant is found in the agreement of purchase, and would be in effect to deprive him of a valuable incident to the ownership of this character of property, the right to dispose of its use to others when it is not required for use by the owner himself. There is no law which will impose the limitation contended for by appellant."

[20] Sample v. Fresno etc. Co., 129 Cal. 222, 61 Pac. 1085. *Contra*, Fresno Milling Co. v. Fresno Canal Co., 126 Cal. 640, 59 Pac. 140, under express provision in the contract for such excuse.

[21] Fairbanks v. Rollins (Cal.), 54 Pac. 79. See Nampa Irr. Dist. v. Gess, 17 Idaho, 552, 106 Pac. 993.

[22] Painter v. Pasadena Co., 91 Cal. 74, 27 Pac. 539; Roberts v. Krafts, 141 Cal. 20, 74 Pac. 281.

[23] Calkins v. Sorosis etc. Co., 150 Cal. 426, 88 Pac. 1096.

[24] Leavitt v. Lassen Irr. Co. (1909), 157 Cal. 82, 106 Pac. 404. See *infra*, sec. 1324 et seq.

[25] Calkins v. Sorosis Fruit Co., 150 Cal. 426, 88 Pac. 1094.

Some miscellaneous matters regarding contracts are given in the note.[1]

(3d ed.)

§ 539. **Assignment.**—Covenants concerning water-rights may run with the land.[2] A personal covenant or agreement on the part of a water company (not in public service) to supply water will be binding upon a new water company purchasing the lands and plant of the old company with notice. The agreement is binding in equity not only in favor of the original covenantee, but in favor of a grantee from him.[3]

Under the California Civil Code, a contract may create a lien for rates and rentals on the land supplied with water, which will

1 Rodgers v. Pitt, 129 Fed. 932 (agreement between co-owners); Bradley v. Harkness, 26 Cal. 77, 11 Morr. Min. Rep. 389 (partnership in ditches as distinguished from tenancy in common); Cacne etc. Ditch Co. v. Hawley, 43 Colo. 32, 95 Pac. 317 (ditch company's contract to supply reservoir company excess of water over needs of ditch company's stockholders held illegal as requiring a priority to do double duty); Farmers' etc. Co. v. Henderson (Colo. 1909), 46 Colo. 37, 102 Pac. 1063 (contract to exempt water-rights from corporation assessment enjoined); Miller v. Wheeler (Wash. 1907), 54 Wash. 429, 103 Pac. 641, 23 L. R. A., N. S., 1065 (agreement regarding use of water negatives abandonment); Gagnon v. Molden, 15 Idaho, 727, 99 Pac. 965 (breach of contract to convey water-right where price is payable in installments); Mathieu v. North Am. Co. (1907), 119 La. 896, 121 Am. St. Rep. 548, 44 South. 721, and Dunbar v. Montgomery (Tex. Civ. App.), 119 S. W. 907 (breach of contract to furnish water for irrigation, public service not involved); Fuller v. Smith (1909), 156 Cal. 177, 103 Pac. 919 (contract for sale pending litigation); Ditch Co. v. Marfell, 15 Colo. 307, 25 Pac. 504, and San Diego Co. v. Sharp, 97 Fed. 394, 38 C. C. A. 220 (contract for water from year to year is terminable by irrigator); Quirk v. Rich, 40 Mont. 552, 107 Pac. 821 (contract supersedes right under general law); McElravy v. Brooks (Colo.), 109 Pac. 863 (rescission by mutual consent, improvements inure to benefit of grantor); Shaw v. Proffit (Or.), 109 Pac. 584 (any benefit to promisor is sufficient consideration, if so intended); Farmers' etc. Co. v. Pawnee etc. Co., 47 Colo. 239, 107 Pac. 286 (forfeiture enforced).

See, also, Miller v. Cal. Pastoral Co., 163 Fed. 462, 90 C. C. A. 8; Great Western Co. v. White, 47 Colo. 547, 108 Pac. 156; Allen v. Swadley, 46 Colo. 544, 105 Pac. 1097.

By statute in Wyoming, voluntary settlements of water-right disputes may be recorded and then cannot be attacked after ten years. Wyo. Stats. 1907, p. 138 et seq.

2 Hottell v. Farmers' etc. Assn., 25 Colo. 67, 71 Am. St. Rep. 109, 53 Pac. 327.

3 Hunt v. Jones, 149 Cal. 297, 86 Pac. 686. See 22 Harvard Law Review, 597, note. See Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. 858, 15 L. R. A., N. S., 359; Leavitt v. Lassen Irr. Co. (1909), 157 Cal. 82, 106 Pac. 404. *Quaere*, whether the rule of equity here invoked is not confined to "negative easements," or to such affirmative covenants only of which equity would order specific performance, in which contracts for continual service are not usually included. Contracts with distributing companies, see *infra*, sec. 1324 et seq.

bind the land whether the water is actually used or not,[4] and even in the hands of a purchaser of the land, though not technically a covenant running with the land,[5] provided the purchaser has notice of the lien.[6] The remedy of the party furnishing the water in such case (if a public service company) is by foreclosure of the lien, not by personal action against the assignee[7] nor by cutting off the water.[8] But the California courts have been technical in construing a contract attempting to create such a lien, and held[9] that a contract worded "to have the force and effect of a covenant running with the land" did not create such a lien. On rehearing in supreme court, this was affirmed, though it was instead held the contract nevertheless bound the property as an interest in real estate.[10] A typical California water-right contract between a company and a consumer was before the California court in the last case, where it was held that, though not creating a contract lien as above, it nevertheless granted an interest in the company's canal and water-rights, so as to bind the same in the hands of an assignee of the water company. However, as to contracts with companies in public service this was practically overruled in Leavitt v. Lassen Irr. Co.,[11] although apparently leaving it in force where public service is not involved. The matter is further discussed in a subsequent chapter.[12]

An option on a water-right may be assigned.[13]

A provision appearing in many water codes is as follows: "All liens on the land provided for in this act shall be superior in right to all mortgages or other encumbrances placed upon the

4 Fresno etc. Co. v. Rowell, 80 Cal. 116, 13 Am. St. Rep. 112, 22 Pac. 53; Same v. Hart, 152 Cal. 450, 92 Pac. 1010.

5 Fresno Canal etc. Co. v. Rowell, 80 Cal. 114, 13 Am. St. Rep. 112, 22 Pac. 53; Fresno Canal etc. Co. v. Dunbar, 80 Cal. 530, 22 Pac. 275; Balfour v. Fresno Irr. Co., 109 Cal. 221, 41 Pac. 876; Fresno Canal etc. Co. v. Park, 129 Cal. 435, 62 Pac. 87. But that is owing to no peculiarity of the law of appropriation; it applies to other contracts also. See Cal. Civ. Code, sec. 1468. See, also, Hoboken Co. v. Mayor etc., 76 N. J. L. 122, 68 Atl. 1099.

6 *Ibid.*, Rowell case.

7 Fresno etc. Co. v. Dunbar, 80 Cal. 530, 22 Pac. 275.

8 Crow v. San Joaquin Co., 131 Cal. 309, 62 Pac. 562, 1058; Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. 404.

9 Stanislaus Water Co. v. Bachman, Cal. App., March 30, 1906.

10 Same v. Same (1908), 152 Cal. 716, 93 Pac. 858, 15 L. R. A., N. S., 359.

11 157 Cal. 82, 106 Pac. 404.

12 *Infra*, sec. 1315 et seq.

13 Thompson Co. v. Pennebaker (Wash.), 173 Fed. 849, 97 C. C. A. 591.

land and the water appurtenant thereto or used in connection therewith, after the passage of this act." [13a]

(3d ed.)

§ 540. Contracts With Public Service Companies are Governed by Special Rules.—Contracts with canal or irrigation companies (public service companies) for supply are separately considered in a later chapter. It has not always hitherto been borne in mind that public service companies are under duties to the public which bring their contracts under some different rules, for the protection of the public, than those between private parties alone.

Where an irrigation company sells its plant to a new company (as, for example, upon foreclosure of mortgage upon the distributing system), it has usually been held in the West that the new company is bound to the terms of the old contracts.[14] This is usually on the holding that the consumer has an interest in the real estate of the distributing system; but where the distributing system is one devoted to public use, it seems now held in California [15] that the consumer's right is one of service as a member of the public, and his contract does not involve an interest in real estate. It consequently seems now the rule in California that contracts will not bind the new company without an express or implied assumption thereof by it; that the consumer's right against the new company is a right of service depending upon the duties of the company to serve the public irrespective of contract, but that the contract will apply against the new company as strong evidence of what would be a proper and reasonable service and charge to all members of the public. The California cases above referred to [16] have been limited as applying only to contracts and transfers between private parties, and not to consumers from public service companies,[17] though throughout the

[13a] S. D. Stats. 1905, p. 201, sec. 55; S. D. Stats. 1907, c. 180, sec. 56. Likewise N. D. Stats. 1905, p. 270, sec. 44; N. M. Stats. 1907, p. 71, sec. 52. *Quaere*, what bearing, if any, has the constitutional provision against impairing the obligation of contracts?

Regarding statutory lien on land for water charges, see, also, Hoboken etc. Co. v. Mayor etc., 76 N. J. L. 122, 68 Atl. 1099.

[14] *Infra*, sec. 1320.

[15] Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. 404, and Lassen Irr. Co. v. Long, 157 Cal. 94, 106 Pac. 409.

[16] Hunt v. Jones, 149 Cal. 297, 86 Pac. 686; Fresno Co. v. Park, 129 Cal. 437, 62 Pac. 87, and Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. 858, 15 L. R. A., N. S., 359.

[17] Lassen Irrigation Cases, *supra*.

West, the status of the law of public service is somewhat unsettled.

As a general principle, rights of consumers from public service companies (irrigation, canal, and other companies supplying the public use) rest upon certain duties of the company to the entire public, and where a contract with such a company exists, it is rather an incidental matter, and governed by different rules, in many respects, than contracts or sales between private parties.[18]

B. CONVEYANCES.

(3d ed.)

§ 541. Water-rights may be Conveyed.—Possessory rights on the public domain (from which the law of appropriation arose)[19] were always recognized as transferable. It is consequently said that a water-right "can be transferred like other property."[20] Water-rights may pass by descent;[21] may be sold on execution;[22] may be mortgaged.[23]

Some special rules, however, may come in regarding parol sales,[24] and sales by public service companies.[25]

[18] *Infra*, sec. 1315.

[19] *Supra*, sec. 82 et seq.

[20] McDonald v. Bear R. Co., 13 Cal. 220, at 233, 1 Morr. Min. Rep. 626. Like realty, Barkley v. Tieleke, 2 Mont. 59; as real estate, Colo. Rev. Stats. 1908, sec. 669.

"Possessory rights on the public domain have always been recognized as transferable, and water-rights can be transferred like other property." Thompson v. Pennebaker (Wash.), 173 Fed. 851, 97 C. C. A. 591, citing this book, 2d ed., sec. 221.

"We grant that the water itself is the property of the public; its use, however, is subject to appropriation, and in this case it is conceded that the owner has the paramount right to such use. In our opinion this right may be transferred by sale so long as the rights of others, as in this case, are not injuriously affected thereby. If the priority to the use of water for agricultural purposes is a right of property, then the right to sell it is as essential and sacred as the right to possess and use." Strickler v. Colorado Springs (1891), 16 Colo. 70, 25 Am. St. Rep. 245, 26 Pac. 313.

[21] Hall v. Blackman, 8 Idaho, 272, 68 Pac. 19. See Griseza v. Terwilliger, 144 Cal. 456, 77 Pac. 1034; Estate of Thomas, 147 Cal. 236, 81 Pac. 539.

[22] Gleason v. Hill, 65 Cal. 17, 2 Pac. 413.

[23] Farm Inv. Co. v. Alta etc. Co., 28 Colo. 408, 65 Pac. 22; Mitchell v. Canal Co., 75 Cal. 464, 17 Pac. 246, both considering a question of after-acquired property. As to which see, also, Stanislaus Water Co. v. Bachman (1908), 152 Cal. 716, 93 Pac. 858, 15 L. R. A., N. S., 359, and Bear Lake Co. v. Garland, 164 U. S. 1, 17 Sup. Ct. Rep. 7, 41 L. Ed. 327.

Upon foreclosure of mortgage, all claimants under the mortgagor must be made parties, or their easements or water-rights will not pass to the foreclosure purchaser. Schwab v. Smuggler Union Co. (Colo. C. C. A.), 174 Fed. 305. See, also, *infra*, sec. 1320, mortgages of plant of public service company.

[24] *Infra*, sec. 555.

[25] *Infra*, sec. 1324 et seq.

(3d ed.)

§ 542. **Formalities on Transfer.**—The conveyance must be in writing, as of an interest in real estate[1] within the statute of frauds.[2] But probably this applies only between the parties to a sale, and cannot be taken advantage of by third persons,[3] and even between the parties parol sales may be effectual in some cases.[4]

The sale must be recorded, as it is within the recording acts, as an interest in real estate,[5] and under the recent water codes, record must usually be made also in the office of the State Engineer.[6] But recording is not necessary *inter partes*.[7] The difference between the statute of frauds and the registry acts in this is that the former is to prevent frauds *between the parties*, while the latter are to prevent frauds *on third parties* by giving them constructive notice. Consequently, actual notice to third parties purchasing subsequent to a prior unrecorded conveyance is equivalent to recording, and a purchaser with notice cannot set up failure of record as invalidating the prior grant, and possession of ditches and water structures by the former grantee is generally, especially where coupled with open use, notice to the world.[8] "The

1 *Supra*, sec. 283 et seq.

2 *California*.—Smith v. O'Hara, 43 Cal. 371, 1 Morr. Min. Rep. 671; O'Neto v. Restano, 78 Cal. 374, 20 Pac. 743; Dorris v. Sullivan, 90 Cal. 279, 27 Pac. 216; Hayes v. Fine, 91 Cal. 391, 27 Pac. 772; Griseza v. Terwilliger, 144 Cal. 456, 77 Pac. 1034; Oliver v. Burnett (1909), 10 Cal. App. 403, 102 Pac. 223.

Colorado.—Child v. Whitman, 7 Colo. App. 117, 42 Pac. 601; Burnham v. Freeman, 11 Colo. 601, 19 Pac. 761; Daum v. Conley, 27 Colo. 64, 59 Pac. 753.

Montana.—Middle Creek Co. v. Henry, 15 Mont. 558, 39 Pac. 1054.

3 Daum v. Conley, 27 Colo. 56, 59 Pac. 753, a point upon which there has been much discussion, depending upon the wording of the statute of frauds as enacted in different States. See, also, Watts v. Spencer, 51 Or. 262, 94 Pac. 39; Featherman v. Hennessey (Mont.), 113 Pac. 751.

4 *Infra*, sec. 555 et seq.

5 Partridge v. McKinney, 10 Cal. 181, 1 Morr. Min. Rep. 185; Lyles v. Perrin, 119 Cal. 264, 51 Pac. 332; Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. 404. See Stanislaus W. Co. v. Bachman (1908), 152 Cal. 716, 93 Pac. 858, 15 L. R. A., N. S., 359, holding "Miscellaneous" to be a proper book for the instrument in that case.

6 E. g., Utah Laws 1905, c. 108, secs. 62, 63, and subsequent Utah acts. In Wyoming, it is enacted: "Every conveyance of a ditch, canal or reservoir, or any interest therein, shall hereafter be executed and acknowledged in the same manner as a conveyance of real estate and recorded as herein provided, and any such conveyance which shall not be made in conformity with the provisions of this act shall be null and void as against subsequent purchasers thereof in good faith and for a valuable consideration." Laws 1907, c. 86, p. 138, sec. 22.

7 Whalon v. North Platte etc. Co., 11 Wyo. 313, 71 Pac. 995; Middle Creek etc. Co. v. Henry, 15 Mont. 558, 39 Pac. 1054; Little v. Gibb, 57 Wash. 92, 106 Pac. 491.

8 Powers v. Perry, 12 Cal. App. 77, 106 Pac. 595 (*dictum*, but holding

open and notorious possession and user of water from an irrigation canal through lateral ditches is constructive notice to a purchaser of the rights of the party so in possession and using the water."[9]

The statute of limitations concerning realty applies to water-rights.[10]

In California, the distinction between sealed and unsealed instruments has been abolished.[11] As to the necessity of a seal where the distinction still prevails, see cases in the note.[12]

The sale is complete on delivery of a deed and possession.[13]

(3d ed.)

§ 543. Subject Matter of Conveyance.—A grant of a water-right is not a grant of property in the *corpus* of the water. A sale does not sell the water itself nor mean the delivery of any specific quantity of water; it merely passes the right to use it and have it flow.[14]

The size of the estate granted may sometimes be a difficult question,[15] especially in cases of public service companies.[16]

no notice upon the facts); Evans v. Lakeside D. Co., 13 Cal. App. 119, 108 Pac. 1027.

[9] Park v. Park (1909), 45 Colo. 347, 101 Pac. 406; McLure v. Koen, 25 Colo. 284, 53 Pac. 1058; Conger v. Weaver, 6 Cal. 548, 1 Morr. Min. Rep. 594. Reasonable diligence would, it is held, require a prospective purchaser of a portion of land to investigate the title to priorities, where three persons after a decree openly continued to use all the water for irrigating their farms as before the decree, and it was constructive notice of their rights though the decree itself did not settle such rights. Park v. Park, 45 Colo. 347, 101 Pac. 403.

As to the effect of possession as notice, see also, the following sections, regarding apparent easements between the parties. The present section refers to third persons.

[10] *Infra*, sec. 579 et seq., adverse possession.

[11] Civ. Code, sec. 1629.

[12] Ortman v. Dixon, 13 Cal. 33; McDonald v. Bear R. Co., 13 Cal. 220, 1 Morr. Min. Rep. 626; Barkley v. Tieleke, 2 Mont. 59, 4 Morr. Min. Rep. 666; Mattis v. Hosmer, 37 Or. 523, 62 Pac. 17, 632.

[13] Booth v. Chapman, 59 Cal. 149.

[14] *Supra*, sec. 537.

[15] A written permission to build a ditch, *held* to grant a perpetual easement. Shaw v. Proffitt (Or. 1910), 109 Pac. 584. An agreement to allow defendants to flow slimes and tailings from a mine through plaintiff's predecessor's flumes, pipes, sluices and reservoirs and onto plaintiff's predecessor's land, *held* to grant an easement which, being an interest in realty, was not lost by foreclosure of a mortgage on plaintiff's property, to which foreclosure defendant was not a party. Schwab v. Smuggler Union Co. (Colo.), 174 Fed. 305, 98 C. C. A. 160. Deed of reservoir site construed and held to pass a fee in the soil and not merely an easement of flooding. Van Slyke v. Arrowhead etc. Co. (1909), 155 Cal. 675, 102 Pac. 816.

[16] *Infra*, sec. 1324 et seq.

(3d ed.)

§ 544. Construction and Operation of Conveyance.—Contracts and conveyances must be certain. "Sufficient to irrigate said land" in a deed is probably too uncertain.[17]

By a written conveyance, priority is preserved.[18]

A sale cannot bind other appropriators not parties to it, nor abridge their rights, nor be valid as against them to their injury.[19] Thus, a grant of an appropriation by a mill owner cannot, as against lower (though subsequent) appropriators, confer any right to make a different use of the water than the mill did, to their prejudice, such as to take the water permanently away for irrigation.[20] It has been held that the grantee cannot sue for damages for a diversion antedating the sale.[21] Mortgages are sometimes postponed to water charges.[22]

Where one agrees to furnish water to another, the conveyance into a single person of all of both parties' rights and duties under such a contract could result in nothing but a merger of these rights and duties and an extinguishment of the contract, since no man can contract with himself and no man can be compelled to furnish water to himself and pay himself therefor.[23]

(3d ed.)

§ 545. Reservations.—Unless otherwise provided by statute, the right may be sold separate from land, since it is independent of title to or possession of land, as is more fully considered elsewhere.[24] Likewise, the water-right and ditch right may be sold separately, and the conveyance of one does not necessarily include the other.[25]

As below considered, though a water-right is usually appurtenant to the land where used, yet it may be reserved on a sale

17 See Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. 404. See as to certainty generally, Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. 858, 15 L. R. A., N. S., 359; Booth v. Trager (1908), 44 Colo. 409, 99 Pac. 60; Thompson v. Pennebaker, 173 Fed. 849, 97 C. C. A. 591. A ditch is sufficiently described in a deed as "Watson Ditch." Murray v. Tulare Irr. Co., 120 Cal. 315.

18 *Infra*, sec. 555 et seq., parol sale.

19 See *supra*, 499; *infra*, sec. 626 et seq.

20 Windsor Co. v. Lake Supply Co., 44 Colo. 214, 98 Pac. 729.

21 Kimball v. Gearhart, 12 Cal. 27, 1 Morr. Min. Rep. 615; Rianda v. Watsonville etc. Co. (1907), 152 Cal. 523, 93 Pac. 79.

22 *Supra*, sec. 539.

23 Mr. Justice Henshaw, in Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. 404.

24 *Supra*, secs. 281, 508 et seq. Under water codes, approval of the State Engineer is necessary.

25 Wold v. May, 10 Wash. 157, 38 Pac. 875; Ada etc. Co. v. Farmers' etc. Co., 5 Idaho, 793, 51 Pac. 990, 40 L. R. A. 485; Rogers v. Riverside etc. Co., 132 Cal. 9, 64 Pac. 95.

of the land. A "reservation" is something extracted from the whole *res* covered by the general terms of the grant, lessening the thing granted from what it would otherwise have been.[1] A grantee's acceptance of a deed containing a reservation to the grantor of a priority or appropriation of water for a certain reservoir, when no priority or appropriation had been secured, did not estop the grantee to claim an appropriation of its own for such reservoir.[2]

Implied reservations may exist from circumstances. A conveyance of land is subject to apparent water-right or ditch easements,[3] or those of which the grantee has notice,[4] but not to nonapparent ones of which the grantee has no notice.[5] Even in Colorado one cannot enter upon another's land to build an irrigation ditch which was not there when he acquired the land, contrary to the rule at first asserted in Colorado that all land was held subject to entry by irrigators to build ditches across it.[6]

(3d ed.)

§ 546. Sales of Uncompleted Works—After-acquired Property.—A sale before completion of the appropriation gives the grantee a right to complete it where diligence has been used in the construction work, preserving priority;[7] but where a right has been lost by lack of diligence in construction work,[8] or by nonuser and abandonment,[9] there is nothing to sell and a conveyance passes nothing. A sale between notice and completion, while acting diligently, is valid, and the purchaser's completion relates back to the original notice.[10] Rights of purchasers from

1 Hough v. Porter, 15 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

2 Windsor R. Co. v. Lake Supply Co., 44 Colo. 214, 98 Pac. 729.

Reservations in deeds construed: See Kelly v. Hynes (Mont. 1910), 108 Pac. 785; Peterson v. McDonald, 13 Cal. App. 644, 110 Pac. 465; Ballard v. Titus, 157 Cal. 673, 110 Pac. 118; German etc. Soc. v. McLellan (1908), 154 Cal. 710, 99 Pac. 194.

3 Baldock v. Atwood, 21 Or. 73, 26 Pac. 1058; Shaw v. Proffitt (Or.), 110 Pac. 1092. Purchaser of land takes subject to visible dam and ditch easement. Arterburn v. Beard (1910), 86 Neb. 733, 126 N. W. 379. Whether a pipe-line buried in the ground is an apparent easement, left open in Rubio Canyon W. Co. v. Everett (1908), 154 Cal. 29, 96 Pac. 811.

4 Fresno Canal Co. v. Rowell, 80 Cal. 114, 13 Am. St. Rep. 112, 22 Pac. 53.

5 Blake v. Boye, 38 Colo. 55, 88 Pac. 470, 8 L. R. A., N. S., 418.

6 *Supra*, sec. 221 et seq.

7 Nevada etc. Co. v. Bennett, 30 Or. 59, 60 Am. St. Rep. 777, 45 Pac. 472.

8 Colorado etc. Co. v. Rocky Ford etc. Co., 3 Colo. App. 545, 34 Pac. 580.

9 Davis v. Gale, 32 Cal. 26, 9 Am. Dec. 554, 4 Morr. Min. Rep. 604; Kirman v. Hunnewill, 93 Cal. 519, 29 Pac. 124.

10 Beckwith v. Sheldon (1908), 154 Cal. 393, 97 Pac. 867.

a mere squatter, claiming under the doctrine of prior appropriation, relate back to the original diversion.[11] Mortgages or mechanics' liens may attach to property added to water structures in course of completion or afterward acquired.[12]

Sales may be made of permits from the State Engineer to make appropriations, and the purchaser of the permit will stand in the shoes of his vendor.[13] This is usually expressly allowed by statute, with the additional requirement of recording the transfer with the State Engineer.[14] In Idaho the record in the State Engineer's office does not necessarily contain a record of assignments of the permit or transfers made thereof, as no provision is made for recording such assignments or transfers in the State Engineer's office.[15]

The grantor of a water-right which he does not own at the time is estopped by his deed from claiming it if afterward acquired by him.[16] But reservation to a grantee of a priority of appropriation of water for a reservoir, which had not been in fact acquired by the grantor, did not estop the grantee from claiming priority for a subsequent appropriation for such reservoir.[17] The owner of a water-right who accepts a "lease" thereof from another claimant, while he is himself in possession, and who has not at any time received the possession from the lessor, is not estopped by the lease from asserting his title against said lessor.[18]

(3d ed.)

§ 547. **Sale in Parts.**—An appropriation may be sold in parts and a sale of a part is not *per se* void as an abandonment of that part.[19] A sale of a part which, previous to the sale, has in fact

11 Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

12 *Supra*, sec. 541.

13 Whalon v. North Platte etc. Co., 11 Wyo. 313, 71 Pac. 995.

14 E. g., N. M. Stats. 1907, p. 71, sec. 36; S. D. Stats. 1907, c. 180, sec. 32; N. D. Stats. 1905, c. 34, sec. 31.

15 Speer v. Stephenson (1909), 16 Idaho, 707, 102 Pac. 365.

16 *Dictum*, Rianda v. Watsonville W. Co. (1907), 152 Cal. 523, 95 Pac. 79. See Shaw v. Proffit (Or.), 110 Pac. 1092.

17 Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co., 44 Colo. 214, 98 Pac. 729. See Bessemer etc. Co. v. Woolley, 32 Colo. 439, 105 Am. St. Rep. 91, 76 Pac. 1053, holding a certain clause not to pass after-acquired water-right.

18 Strong v. Baldwin (1908), 154 Cal. 150, 129 Am. St. Rep. 149, 97 Pac. 178; citing Oneta v. Restano, 89 Cal. 63, 26 Pac. 788. Compare Swift v. Goodrich, 70 Cal. 103, 11 Pac. 561.

19 Senior v. Anderson, 138 Cal. 716, 72 Pac. 349; McDanold v. Askew, 29 Cal. 200, 1 Morr. Min. Rep. 660; Drake v. Earhart, 2 Idaho, 716, 23 Pac. 541; Strickler v. Colorado

been abandoned for nonuse, will pass nothing, however.[20] Consequently a sale of the surplus one does not need will pass nothing, where the facts show that such lack of need preceded the sale in such a way as to have caused abandonment or forfeiture before the sale, so as to show that the seller at the time of sale had no right to such surplus.[21]

A sale of a part which would injure subsequent appropriators by the new use made of it is invalid against them.[22] But a sale of part is valid between the parties to the sale in any event,[23] the parties becoming tenants in common.[24]

(3d ed.)

§ 548. Lease or Exchange or Other Temporary Disposal.—"Leases" or "loans" or similar transactions in water-rights cannot create the relation of landlord and tenant, since water-rights are incorporeal hereditaments in which tenancy cannot exist. A water-right may be sold outright for use on different land, but cannot be *leased* for temporary use.[25] A "lease" of a water-right does not bring in the law of estoppel that applies between landlord and tenant.[1] The owners of a mining ditch, who took water therefrom for irrigation, by leasing their interest therein, were held to have abandoned their irrigation rights in the ditch.[2]

Colorado permits contracts for the "loan" of water, an anomalous procedure, authorized by statute,[3] but not favored by the court.

Springs, 16 Colo. 61, 25 Am. St. Rep. 245, 26 Pac. 313; Larrimer etc. Co. v. Cache La Poudre etc. Co., 8 Colo. App. 237, 45 Pac. 525; Ft. Morgan Co. v. So. Platte D. Co., 18 Colo. 1, 36 Am. St. Rep. 259, 30 Pac. 1032; Middle Cr. Co. v. Henry, 15 Mont. 558, 39 Pac. 1054; Frank v. Hicks, 4 Wyo. 502, 35 Pac. 475, 1025; Milheiser v. Long, 10 N. M. 99, 61 Pac. 111; Hall v. Blackman, 8 Idaho, 272, 68 Pac. 19; Calkins v. Sorosis etc. Co., 150 Cal. 426, 88 Pac. 1094.

[20] Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Kirman v. Hunnewill, 93 Cal. 519, 29 Pac. 124; Manning v. Fife, 17 Utah, 232, 54 Pac. 111.

[21] *Dictum*, Johnston v. Little Horse etc. Co., 13 Wyo. 208, 110 Am. St. Rep. 986, 79 Pac. 22, 70 L. R. A. 341.

[22] Creek v. Bozeman etc. Co., 15 Mont. 121, 38 Pac. 459.

[23] Calkins v. Sorosis Fruit Co., 150 Cal. 426, 88 Pac. 1094.

[24] Rose v. Mesmer, 142 Cal. 322, 75 Pac. 905.

[25] Slosser v. Salt R. Co. (1901), 7 Ariz. 376, 65 Pac. 332.

[1] Swift v. Goodrich, 70 Cal. 103, 11 Pac. 561; Strong v. Baldwin (1908), 154 Cal. 150, 129 Am. St. Rep. 149, 97 Pac. 178. Cf. Oneta v. Restano, 89 Cal. 63, 26 Pac. 788.

[2] Davis v. Chamberlain, 51 Or. 304, 98 Pac. 154.

A covenant in a lease to furnish water for irrigation held not complied with by furnishing a well with the cap locked, so that water could not be obtained without breaking the lock. Smith v. Hicks, 14 N. M. 560, 98 Pac. 138.

[3] 3 Mills' Ann. Stats., 2d ed., secs. 2271a–2271e; Mills' Ann. Stats. Rev. Supp., sec. 2273c; Rev. Stats. 1908,

The statute provides that the owners of irrigation ditches and water-rights taking from the same stream may exchange with and loan to each other, for a limited time, water to which each may be entitled, for the purpose of saving crops or of using the water in a more economical manner. This is held only to permit an exchange or loan of water under circumstances not injuriously affecting the vested rights of other appropriators, and the beneficiary of the loan must affirmatively plead and prove that the water so loaned could be and was used without injury to other appropriators, including those subsequent in priority to the lenders. So construed, the statute has been held constitutional.[4] Nor can exchanges of water be made under the Colorado law such as to convert a junior into a senior right.[5] Question of exchanges of water between the same or different owners of reservoirs cannot be determined in a statutory action to establish priorities of rights to store water in reservoirs of the district.[6]

(3d ed.)

§ 549. Sales of "Water-rights" by Public Service Companies. Concerning sales of "water-rights," so called, by a distributing company, reference is made to a later chapter. Though the decisions have not always appreciated the distinction, yet, properly speaking, contracts for or sales of water supply by public service companies are, for the protection of the public, governed by different considerations than those between private parties.[7]

C. APPURTENANCE.

(3d ed.)

§ 550. Whether the Water-right is an Appurtenance to Land. The water-right by appropriation is an individual thing or species of property, independent of ownership or possession of

sec. 3232; Laws 1899, p. 236, sec. 3; Ft. Lyon v. Chew, 33 Colo. 392, 81 Pac. 37; Bowman v. Virdin, 40 Colo. 247, 90 Pac. 506. But see Slosser v. Salt River Co., 7 Ariz. 376, 65 Pac. 332. See Kan. Gen. Laws, 1909, sec. 4436.

4 Bowman v. Virdin, 40 Colo. 247, 90 Pac. 506.

5 "If such system of exchange, taken in connection with other parts of the decree in favor of the owner of the Fossil Creek reservoir, is put into practice, it will necessarily convert a junior into a senior right. It will make many of the reservoirs of appellants, which were built and used for storage a decade before Fossil Creek reservoir was conceived, subordinate to the latter. No device or combination of appliances that would produce such a flagrant injustice should be looked upon with favor or sanctioned by a court of equity." Windsor Co. v. Lake Supply Co. (1909), 44 Colo. 214, 98 Pac. 729.

6 Windsor Reservoir & Canal Co. v. Lake Suply Ditch Co. (Colo.), *supra*.

7 *Infra*, sec. 1245 et seq.

any land,[8] and not an easement or servitude upon any other property, but a usufructuary right in a natural stream as a natural resource. As elsewhere considered at length, it may be sold separately from the land (except where the very recent legislation expressly enacts the contrary).[9] It is consequently entirely a matter of the will of the owner whether, on a sale of the land, the water-right shall or shall not pass at the same time.

It is well settled that a water-right *may* pass with land as an appurtenance thereto, or as a parcel thereof,[10] but not *necessarily* so; and whether a water-right passes as an appurtenance involves two questions, viz.: (*a*) Whether the water-right is an appurtenance, and (*b*) whether, being such, it was intended to pass. Both of these are questions of fact in each case.

(3d ed.)

§ 551. Same.—The first question, whether the water-right is an appurtenance, depends on whether it is an incident, necessary to the enjoyment of the land. The water-right is not necessarily appurtenant to or parcel of any land; and whether it is an appurtenance or parcel is a question of fact resting chiefly upon whether it was used specially for the benefit of the land in question.[11] When used for irrigation, there will seldom be doubt of

[8] *Supra*, sec. 281.

[9] *Supra*, sec. 508 et seq.

[10] Quirk v. Falk, 47 Cal. 453, 2 Morr. Min. Rep. 19; Reynolds v. Hosmer, 51 Cal. 305, 5 Morr. Min. Rep. 6; Hungarian etc. Co. v. Moses, 58 Cal. 168; Lower Kings River etc. Co. v. Kings etc., 60 Cal. 408; Fitzell v. Leaky, 72 Cal. 477, 14 Pac. 198; Standart etc. Co. v. Round Valley etc. Co., 77 Cal. 399, 19 Pac. 689; Mitchell v. Amador Canal etc. Co., 75 Cal. 464, 17 Pac. 246; Coonradt v. Hill, 79 Cal. 587, 21 Pac. 1099; McShane v. Carter, 80 Cal. 310, 22 Pac. 178; Crooker v. Benton, 93 Cal. 365, 28 Pac. 953; Clyne v. Benicia etc. Co., 100 Cal. 310, 34 Pac. 714; Dixon v. Schermeier, 110 Cal. 582, 42 Pac. 1091; Smith v. Corbit, 116 Cal. 587, 48 Pac. 725; Williams v. Harter, 121 Cal. 47, 53 Pac. 405; Pendola v. Ramm, 138 Cal. 517, 71 Pac. 624; Senior v. Anderson, 138 Cal. 716, 72 Pac. 349; Pogue v. Collins, 146 Cal. 435, 80 Pac. 623; Nevada etc. Co. v. Bennett, 30 Or. 59, 60 Am. St. Rep. 777, 45 Pac. 472; Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728; Whited v. Cavin (Or.), 105 Pac. 396; Porter v. Pettengill (Or.), 110 Pac. 393; Arnett v. Linhart, 21 Colo. 188, 40 Pac. 355; Gelwicks v. Todd, 24 Colo. 494, 52 Pac. 788; North American Exploration Co. v. Adams, 104 Fed. 404, 45 C. C. A. 185, 21 Morr. Min. Rep. 65. See, also, 65 L. R. A. 407, note, and 17 Ency. of Law, 515.

Utah Laws 1905, c. 108, sec. 617; Idaho Rev. Codes, sec. 3240; Stats. 1901, sec. 9b; Stats. 1903, p. 223, sec. 9, as amended 1905, p. 174, sec. 38; Okl. Stats. 1905, p. 274, secs. 21, 30; S. D. Stats. 1905, p. 201, secs. 31, 47; Stats. 1907, c. 180, sec. 2; and water codes generally. Cf. Cal. Civ. Code, sec. 662.

See, also, cases below cited. See, also, as to rights of consumers from distributing agencies, *infra*, secs. 1324 et seq., 1338.

[11] Quirk v. Falk, 47 Cal. 453, 2 Morr. Min. Rep. 19; Mitchell v. Am-

such necessity.[12] A water-right or ditch right is appurtenant only to such lands of a large tract as had been actually irrigated from it.[13] A water-right is incidental or appurtenant to land when by right used with the land for its benefit.[14]

Whether rights of consumers from public service companies can constitute "appurtenances" like original appropriations is elsewhere considered. They are so treated in Colorado,[15] and recently similar rulings were made in California;[16] but this has been practically overruled in Leavitt v. Lassen Irr. Co.[17] It would seem in California that a purchaser of land upon which water from a public service distribution is used for irrigation takes his right as a member of the public entitled to equal service with the rest of the public, rather than as successor to any individual "water-right."[18]

(3d ed.)

§ 552. Whether Passes on Sale of Land When Appurtenant Thereto.—The second question whether, being appurtenant, it

ador Canal etc. Co., 75 Cal. 464, 17 Pac. 246; Payne v. Cummings, 146 Cal. 426, 106 Am. St. Rep. 47, 80 Pac. 620.

12 Water-right (or ditch) held appurtenant on the facts. Mattis v. Hosmer, 37 Or. 523, 62 Pac. 17, 632; Murray v. Briggs, 29 Wash. 245, 69 Pac. 765; Rickey etc. Co. v. Miller (Nev.), 152 Fed. 14, 81 C. C. A. 207; Pendola v. Ramm, 138 Cal. 517, 71 Pac. 624; Hunstock v. Limburger (Tex. Civ. App.), 115 S. W. 327; Whittlesey v. Porter, 82 Conn. 95, 72 Atl. 593.

Water-right (or ditch) held not appurtenant on facts. Ginocchio v. Amador etc. Co., 67 Cal. 493, 8 Pac. 29; Strickler v. Colorado Springs, 16 Colo. 61, 25 Am. St. Rep. 245, 26 Pac. 313; Bloom v. West, 3 Colo. App. 212, 32 Pac. 846; Crawford v. Minnesota etc. Co., 15 Mont. 153, 38 Pac. 713; Dodge v. Marden, 7 Or. 457, 1 Morr. Min. Rep. 63; Oliver v. Burnett (1909), 10 Cal. App. 403, 102 Pac. 223. The cases to this effect are more fully cited elsewhere herein, in considering sale separate from land on change of place of use, *supra*, sec. 508 et seq.

13 Anaheim W. Co. v. Ashcroft (1908), 153 Cal. 152, 94 Pac. 613.

14 Cal. Civ. Code, sec. 662. Appurtenance defined. Hunstock v. Limburger (Tex. Civ. App. 1909), 115 S. W. 327.

In most of the cases the water appropriation is called an appurtenance. In some (McShane v. Carter, 80 Cal. 310, 22 Pac. 178; Smith v. Corbit, 116 Cal. 587, 48 Pac. 725; Williams v. Harter, 121 Cal. 47, 53 Pac. 405) it is spoken of as an incident to or parcel of the land. In one (Payne v. Cummings, 146 Cal. 426, 106 Am. St. Rep. 47, 80 Pac. 620), the words "appurtenance" and "parcel" are used indiscriminately.

And see Bank of British N. A. v. Miller (Or.), 6 Fed. 545, 7 Saw. 133; Frank v. Hicks, 4 Wyo. 502, 35 Pac. 475, 481, 1025; Idaho Rev. Codes, sec. 3292. See Kinney on Irrigation, sec. 267.

15 *Infra*, sec. 1338.

16 Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. 858, 15 L. R. A., N. S., 359; City of South Pasadena v. Pasadena L. & W. Co. (1908), 152 Cal. 579, 93 Pac. 490.

17 157 Cal. 82, 106 Pac. 404; Lassen Irr. Co. v. Long, 157 Cal. 94, 106 Pac. 409.

18 See *infra*, sec. 1324.

passes on a sale when the deed does not use the word "appurtenances," is a question of the intention of the parties. A water-right by appropriation appurtenant to land may well be separated therefrom, and the land may be sold either with or without the appurtenant water-right.[19] The word "appurtenance" does not mean "inseparable" in this connection,[20] as we have set forth at length in another place in discussing change of place of use.[21] It depends on what the facts show that the parties to the sale meant to do. It is a question of intention, to be drawn from the deed; or, if the deed is silent, to be drawn from the surrounding circumstances, the acts of the parties and parol evidence generally.[22]

The party asserting that it was so intended to pass has the burden of proof,[23] but a showing that the water-right was appurtenant and necessary to the beneficial enjoyment of the land has

19 Cooper v. Shannon, 36 Colo. 98, 118 Am. St. Rep. 95, 85 Pac. 177; Fudickar v. East Riverside Co., 109 Cal. 37, 41 Pac. 1024.

20 Calkins v. Sorosis etc. Co., 159 Cal. 426, 88 Pac. 1094; Or. Stats. 1909, c. 216, sec. 65.

At common law there is a rule generally stated as being that a right appurtenant cannot be turned into a right in gross. This, as applied to water-rights at common law, means that, aside from riparian rights, such appurtenant water-right rests upon contract, and cannot be varied against the owner from whom obtained. But a water-right by appropriation in the West does not rest upon contract between private parties, and requires no permission for its change; it is not a derivative but an original right, and hence not within the common-law rule against assignment in gross. Fudickar v. East Riverside Co., 109 Cal. 37, 41 Pac. 1024. See, also, Ruhnke v. Aubert (Or.), 113 Pac. 38.

21 *Supra*, sec. 508.

22 That passing as appurtenance is a question of intention: Geddis v. Parrish, 1 Wash. 587, 21 Pac. 314; Simmons v. Winters, 21 Or. 35, 28 Am. St. Rep. 727, 27 Pac. 7; Child v. Whitman, 7 Colo. App. 117, 42 Pac. 601; Farmer v. Ukiah Water Co., 56 Cal. 11; Cross v. Kitts, 69 Cal. 217, 58 Am. Rep. 558, 10 Pac. 409; Bank of British N. A. v. Miller (C. C.), 6 Fed. 545, 7 Saw. 163 (saying if in gross, passes as parcel, not as appurtenance); Farm Inv. Co. v. Gallup, 13 Wyo. 20, 76 Pac. 917 (saying it is a question of fact); Clyne v. Benicia Water Co., 100 Cal. 310, 34 Pac. 714; Tucker v. Jones, 8 Mont. 225, 19 Pac. 571; Sweetland v. Olsen, 11 Mont. 27, 27 Pac. 339; Jones v. Deardorff, 4 Cal. App. 18, 87 Pac. 213; Chamberlain v. Amter, 1 Colo. App. 13, 27 Pac. 87; King v. Ackroyd, 28 Colo. 488, 66 Pac. 906; Crippen v. Comstock, 17 Colo. App. 89, 66 Pac. 1074; Bessemer etc. Co. v. Woolley, 32 Colo. 437, 105 Am. St. Rep. 91, 76 Pac. 1051 (saying that the passing as appurtenance is a question of fact depending upon the intention of the grantor, as expressed in the deed or as drawn from the surrounding circumstances, or whether incidental and necessary to the land); Hays v. Buzard, 31 Mont. 74, 77 Pac. 426 (saying the question is, "What rights does the plaintiff appear to have acquired in the water under that deed, in the light of the facts as they then existed, and the behavior of the parties with reference to it down to the commencement of the action?"); Davis v. Randall (1909), 44 Colo. 488, 99 Pac. 322, holding intention to include water-right in suit rebutted.

23 Smith v. Deniff, 24 Mont. 20, 81 Am. St. Rep. 408, 60 Pac. 398, 50 L. R. A. 741.

usually been held sufficient proof of intention to pass it, in the absence of express reservation in the deed, or other evidence to the contrary. Such proof raises a presumption of intention to include the water-right in the sale. "Although a water-right may be appurtenant to the land, it is the subject of property, and may be transferred either with or without the land. Being, therefore, a distinct subject of grant, and transferable either with or without the land, whether a deed to land conveys the water-right depends upon the intention of the grantor, which is to be gathered from the express terms of the deed; or, when it is silent as to the water-right, from the presumption that arises from the circumstances, and whether such right is or is not incident to and necessary to the beneficial enjoyment of the land."[24] In a later case in the same court much the same words were used.[1] In another case it is said: "A deed of a millsite and mill upon which a right to divert water from a stream and to use it to operate a mill has been exercised conveys the water-right as an appurtenance to the mill, in the absence of any reservation of it, of any conveyance of it to another, and of any other evidence that the grantor did not intend to convey it."[2]

The presumption, however, may be rebutted. Reservation or sale separately is open to proof. The expression in the deed that certain specific water-rights shall pass has been held *per se* a reservation of all others not mentioned; that is, the expression of one is sufficient evidence to exclude any presumption of intent to include others not mentioned. Where a deed to land specifically described the water-rights granted, the grantee did not take by implication additional water-rights to irrigate a part of the land which could not be irrigated from the rights granted, even though the parties did not adhere in their use strictly to the terms of the grant.[3]

The declarations of the grantor subsequent to the deed are not admissible in evidence, it appears, upon the question of the intention at the time of sale.[4]

[24] Cooper v. Shannon, 36 Colo. 98, 118 Am. St. Rep. 95, 85 Pac. 177, citing Strickler v. City of Colorado Springs, 16 Colo. 61, 25 Am. St. Rep. 245, 26 Pac. 313; Arnett v. Linhart, 21 Colo. 188, 40 Pac. 355; Bessemer etc. Ry. Co. v. Woolley, 32 Colo. 437, 105 Am. St. Rep. 91, 76 Pac. 1053.

[1] Davis v. Randall (1909), 44 Colo. 488, 99 Pac. 322.

[2] North American etc. Co. v. Adams, 104 Fed. 404, 45 C. C. A. 185, 21 Morr. Min. Rep. 65.

[3] Davis v. Randall (1909), 44 Colo. 488, 99 Pac. 322.

[4] Josselyn v. Daly, 15 Idaho, 137, 96 Pac. 568.

Summing up, it may be said that a water-right of appropriation will not pass on a sale of land if not so intended, and it is hence not strictly accurate to say that a deed of land *per se* passes a water-right used for its irrigation; but in the absence of any evidence of such intent to the contrary it is well settled that an appurtenant water-right of appropriation passes with the land on a sale though not mentioned in the deed, nor the word "appurtenance" used.[5]

[5] *Federal Courts.*—North America etc. Co. v. Adams, 104 Fed. 440, 45 C. C. A. 185, 21 Morr. Min. Rep. 65 (appurtenant to millsite); Wilson v. Higbee (C. C.), 62 Fed. 723; Bank of British N. A. v. Miller (Or.), 6 Fed. 545, 7 Saw. 163; Rickey etc. Co. v. Miller, 152 Fed. 14, 81 C. C. A. 207.

Alaska.—Not pass as appurtenance without special mention or agreement to that effect. Noland v. Coon, 1 Alaska, 36. But from what follows in the opinion, it appears that what is meant is only that it will not pass without mention, in the absence of proof first that it was in fact appurtenant.

California.—Cases cited *supra*. Also Civ. Code, secs. 1084, 1104; Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. 858, 15 L. R. A., N. S., 359; Cave v. Crafts, 53 Cal. 135; Farmer v. Ukiah Water Co., 56 Cal. 11; Cross v. Kitts, 69 Cal. 221, 58 Am. St. Rep. 558, 10 Pac. 409; Clyne v. Benicia Water Co., 100 Cal. 310, 34 Pac. 714; Jones v. Deardorff, 4 Cal. App. 18, 87 Pac. 213; McShane v. Carter, 80 Cal. 310, 22 Pac. 178; Smith v. Corbit, 116 Cal. 587, 48 Pac. 725. See Rianda v. Watsonville etc. Co., 152 Cal. 523, 93 Pac. 79; Corea v. Higuera, 153 Cal. 451, 95 Pac. 882, 17 L. R. A., N. S., 1018; Rubio Canyon W. Co. v. Everett (1908), 154 Cal. 29, 96 Pac. 811, saying that an easement for a pipe-line appurtenant to land passes on a sale of the land "even if the deed had not expressly purported to convey the 'appurtenances' with the land"; Oliver v. Burnett, 10 Cal. App. 403, 102 Pac. 223 (citing Pogue v. Collins, 146 Cal. 435, 80 Pac. 623; Pendola v. Ramm, 138 Cal. 517, 71 Pac. 624; Jones v. Sanders, 138 Cal. 405, 71 Pac. 506). The Civil Code, section 1104, provides: "A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed." See, also, Civ. Code, secs. 1084, 3522.

Colorado.—Cooper v. Shannon, 36 Colo. 98, 118 Am. St. Rep. 95, 85 Pac. 177; Strickler v. City of Colorado Springs, 16 Colo. 61, 25 Am. St. Rep. 245, 26 Pac. 313; Arnett v. Linhart, 21 Colo. 188, 40 Pac. 355; Bessemer etc. Co. v. Woolley, 32 Colo. 437, 105 Am. St. Rep. 91, 76 Pac. 1053, and other cases already cited. An impression formerly prevailed at the bar to the contrary.

Kansas.—Stats. 1911, c. 215, p. 379.

Montana.—Smith v. Denniff, 24 Mont. 20, 81 Am. St. Rep. 408, 60 Pac. 398, 50 L. R. A. 741; Tucker v. Jones, 8 Mont. 225, 19 Pac. 571; Sweetland v. Olsen, 11 Mont. 27, 27 Pac. 339; Crawford v. Minn. Co., 15 Mont. 153, 38 Pac. 713; Sloan v. Glancy, 19 Mont. 70, 47 Pac. 334; Bullerdick v. Hermsmeyer, 32 Mont. 541, 81 Pac. 334; Hays v. Buzard, 31 Mont. 74, 77 Pac. 426.

Nevada.—Rickey etc. Co. v. Miller, 152 Fed. 14, 81 C. C. A. 207; Wilson v. Higbee (Nev.), 62 Fed. 723.

Oregon.—Simmons v. Winters, 21 Or. 35, 28 Am. St. Rep. 727, 27 Pac. 7; Hindman v. Rizor, 21 Or. 112, 27 Pac. 13; Coventon v. Seufert, 23 Or. 548, 32 Pac. 508; Low v. Schaffer, 24 Or. 239, 33 Pac. 678; Nevada Ditch Co. v. Bennett, 30 Or. 59, 60 Am. St. Rep. 777, 45 Pac. 472; Turner v. Cole, 31 Or. 154, 49 Pac. 971; North

The same is true, at common law, of *contractual* water-rights[6] and under the common law of riparian rights the riparian right itself passes *ipso facto* with the riparian land on a sale as part and parcel thereof.[7]

(3d ed.)

§ **553. Upon Subdivision of Land.**—The water-right will pass as an appurtenance in parts on a sale of the land in parts. In subdividing a tract it will be presumed that a water-right passes in proportion to the relative size of the subdivision. The purchaser of part of land for which water was appropriated will be assumed to own the proportion of the water awarded to the entire tract that his tract bears to the entire tract.[8] Where a water-right is appurtenant to a whole tract which is thereafter subdivided, though not alienated, the subsequent use determines which part it becomes appurtenant to, or if use is on both, how much is appurtenant to each.[9] In one case an appropriation was made for the whole of a ranch, which then comprised what now constitutes the lands owned by both appellant and respondent, so that the appropriation became as much appurtenant to one tract as the other. Subsequently, the ranch became divided into two farms, one of which was thereafter mortgaged. It was held that the question as to the particular lands to which this water-right

Powder M. Co. v. Coughanour, 34 Or. 9, 54 Pac. 223; Mattis v. Hosmer, 37 Or. 523, 62 Pac. 17, 632; Oregon etc. Co. v. Allen etc. Co., 41 Or. 209, 93 Am. St. Rep. 701, 69 Pac. 455.

Texas.—Toyaho Cr. Irr. Co. v. Hutchins, 21 Tex. Civ. App. 274, 52 S. W. 101.

Utah.—Smith v. N. Canyon W. Co., 16 Utah, 194, 52 Pac. 283; Snyder v. Murdock, 20 Utah, 419, 59 Pac. 91; George v. Robison et al., 23 Utah, 79, 63 Pac. 819; Comp. Laws, 1907, sec. 1288x32.

Washington.—Geddis v. Parrish, 1 Wash. 587, 21 Pac. 314; Murray v. Briggs, 29 Wash. 245, 69 Pac. 765.

Wyoming.—Frank v. Hicks, 4 Wyo. 502, 35 Pac. 475, 1025; Farm Inv. Co. v. Gallup, 13 Wyo. 20, 76 Pac. 917; Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210. See Johnston v. Little Horse etc. Co., 13 Wyo. 208, 110 Am. St. Rep. 986, 79 Pac. 22, 70 L. R. A. 341.

6 Angell on Watercourses, 7th ed., p. 279 et seq., citing *inter alia*, Hinchcliffe v. Earl of Kinnoul, 5 Bing. N. C. 1, 6 Scott, 650; United States v. Appleton, 1 Sum. 492, Fed. Cas. 14,463; also, Grant v. Chase, 17 Mass. 443, 9 Am. Dec. 161; Hazard v. Robinson, 3 Mason, 272, 278, Fed. Cas. No. 6281; Preble v. Reed, 17 Me. 169; Pickering v. Stapler, 5 Serg. & R. 107, 9 Am. Dec. 336; Swartz v. Swartz, 4 Pa. 353, 45 Am. Dec. 697; Vermont etc. Ry. Co. v. Hills, 23 Vt. 681. See, also, Whittelsey v. Porter (1909), 82 Conn. 95, 72 Atl. 593; Smith v. Dresselhouse, 152 Mich. 451, 116 N. W. 387; Lord Blackburn in Dalton v. Angus, L. R. 6 App. Cas. 825.

7 *Infra*, secs. 711, 844 et seq.

8 Booth v. Trager (1909), 44 Colo. 409, 99 Pac. 60. See Ruhnke v. Aubert (Or.), 113 Pac. 38. *As to subdivision of riparian land under the common law of riparian rights, see infra, secs. 769 et seq., 845 et seq.*

9 Josslyn v. Daly, 15 Idaho, 137, 96 Pac. 568.

was appurtenant must turn upon the use and application of the water as the same existed at the time the mortgage was executed.[10] Where land is partitioned and there is a ditch right across the middle piece for the benefit of another portion, the grantee of such other portion has a right to such ditch as an appurtenance thereto.[11]

Where an estate is divided, the appurtenant rights attach to all the divided portions in the absence of express evidence of a contrary intent. In one case there was an easement appurtenant to an eighty acre tract, in the use of a ditch for irrigation. The owner of the tract divided it and sold a separate ten acres thereof not touching upon the ditch. It was held that the easement became appurtenant to the segregated portion as well as the rest, with the right to extend the ditch to the ten acres over any necessary part (doing the least possible interference thereto) of the rest of the tract, this right to connect the ten acres with the ditch arising not as an easement of necessity ending with the necessity, but arising in grant and by necessary implication in the deed.[12]

The statements made in this section must be understood to carry the qualification made in the preceding section—that the deed be silent, and that there be no evidence showing any intention to the contrary. If there be sufficient evidence of a different intent, such evidence will govern. Thus, where land was granted to the several daughters of the grantor, with specific water-rights appurtenant to each parcel, the fact that they did not strictly adhere to their respective water-rights would not enlarge the rights of a subsequent grantee of one of them. Nor would any one of them be entitled to a share in any water-right other than that specifically granted, even though such other might be indispensable for proper irrigation.[13]

(3d ed.)

§ 554. Appurtenance (Continued).—Where a grant by implication includes a right to take water for irrigation from a given

[10] Josslyn v. Daly, 15 Idaho, 137, 96 Pac. 568.

[11] Oliver v. Burnett (1909), 10 Cal. App. 403, 102 Pac. 223.

[12] Tarpey v. Lynch (1909), 155 Cal. 407, 101 Pac. 10. See, also, Cave v. Crafts, 53 Cal. 135; Kelly v. Dunning, 43 N. J. Eq. 62, 10 Atl. 276; Elliott v. Rhett, 5 Rich. (S. C.) 405, 57 Am. Dec. 750; Wilson v. Higbee (C. C.), 62 Fed. 723; Lampman v. Milks, 21 N. Y. 505.

[13] Davis v. Randall (1909), 44 Colo. 488, 99 Pac. 322.

ditch, the grantor cannot prevent the grantee on the ground that there are other available supplies he could purchase from strangers.[14]

Viewed as independent property rights, ditches and the right to use the water conveyed by them are property subject to taxation; but, when made appurtenant to lands, they have no independent use, and are not separately taxable under Montana statutes. The tax on the land includes the ditch and water, and it is thus already taxed.[15]

Several ditches and water-rights may be so connected by branches as to constitute a single parcel of real property, to be sold as a whole and not separately on execution sale.[16]

A water-right, though acquired after a mortgage and becoming appurtenant to the mortgaged land, will pass to the foreclosure sale purchaser.[17]

Water appropriated for use on certain lands by a trespasser on the lands does not become appurtenant thereto, and a purchaser of the land from the true owner gets no right to the water, but the water-right belongs to the trespasser for use on other land;[18] and, on the other hand, water appurtenant to the land before the trespass remains appurtenant thereto and is not severed therefrom by the trespasser's use, the trespasser being lawfully evicted.[19]

The water-right may be appurtenant to a specific ditch or artificial watercourse through which the waters flow after diversion,[20] or, *vice versa*, the ditch appurtenant to water-right.[21] A further discussion of this point may be found elsewhere.[22]

It has been held that where one has a water-right appurtenant to certain land and grants all his rights to another, he is not

[14] Tarpey v. Lynch (1909), 155 Cal. 407, 101 Pac. 10.

[15] Hale v. Jefferson County (1909), 39 Mont. 137, 101 Pac. 977.

[16] Gleason v. Hill, 64 Cal. 18.

[17] Stanislaus Water Co. v. Bachman, 152 Cal. 716, 93 Pac. 858, 15 L. R. A., N. S., 359. Compare as to after-acquired property, Mitchell v. Canal Co., 75 Cal. 464, 17 Pac. 246; Farm etc. Co. v. Alta etc. Co., 28 Colo. 408, 65 Pac. 22; Bear Lake Co. v. Garland, 164 U. S. 1, 17 Sup. Ct. Rep. 7, 41 L. Ed. 327.

[18] Smith v. Logan, 18 Nev. 149, 1 Pac. 678; Alta etc. Co. v. Hancock, 85 Cal. 228, 20 Am. St. Rep. 217, 24 Pac. 645; Seaward v. Pacific etc. Co., 49 Or. 157, 88 Pac. 963.

[19] Alta etc. Co. v. Hancock, 85 Cal. 228, 20 Am. St. Rep. 217, 24 Pac. 645.

[20] Williams v. Harter, 121 Cal. 47, 53 Pac. 405; Fudickar v. East Riverside etc. Dist., 109 Cal. 29, 41 Pac. 1024; Lower etc. Co. v. Kings etc. Co., 60 Cal. 408; Reynolds v. Hosmer, 51 Cal. 205, 5 Morr. Min. Rep. 6.

[21] Jacob v. Lorenz, 98 Cal. 332, 33 Pac. 119.

[22] *Supra*, sec. 456.

barred from using the water upon other land, but only upon the land first mentioned.[23]

D. PAROL SALE.

(3d ed.)

§ 555. Parol Sale of Possessory Rights on the Public Domain.

In the treatment of parol sale of water-rights, there is a peculiarity afforded by the law of appropriation. If the grantee incurs considerable expense, and makes improvements on the faith of the parol sale, the usual rule of specific performance in equity, the part performance taking the case out of the statute of frauds, applies.[24] But the matter to which we refer is independent of that.

The matter brings us back to the origin of the doctrine of appropriation, as a possessory right on the public domain, and thereby back to the opening chapters of Part II of this book. It was, in pioneer times, declared upon strict legal theory that the California pioneers were trespassers upon public lands. The law did not become settled to the contrary until the act of 1866, when the United States as landowner then "acknowledged and confirmed" their rights. Until that time, the theory that they were mere trespassers showed itself in many forms, such as that, the estate not being one of freehold, a justice of the peace had (it was contended) jurisdiction over mining claims; also that dower did not exist therein, not being a freehold, and other similar contentions, concerning which the reader may consult other books.[25] In one form, especially, this took strong hold in the early decisions, to wit, that a transfer of a mining claim operated as a surrender of the grantor's right and the acquisition of a new one by the grantee on taking possession, so that no writing was needed, and transfers of possessory rights on the public domain were held not within the statute of frauds.[1] The supreme court of the United States affirmed this view.[2] And it crept also into early water decisions,[3] and from reference to them, has partly

23 Duckworth v. Watsonville Co., 158 Cal. 206, 110 Pac. 927, *sed qu.*

24 *Infra*, next section.

25 Yale on Mining Claims and Water Rights, and Lindley on Mines.

1 Table Mt. M. C. v. Stranahan, 20 Cal. 198, 9 Morr. Min. Rep. 457.

2 Union etc. Co. v. Taylor, 100 U. S. 39, 25 L. Ed. 541, 5 Morr. Min. Rep. 323. And later again in Black v. Elkhorn M. Co., 163 U. S. 445, 16 Sup. Ct. Rep. 1101, 41 L. Ed. 221, 18 Morr. Min. Rep. 375, declared this principle to be correct.

3 Smith v. O'Hara, and Chiatovich v. Davis, *infra*.

come down to the present day as a rudimentary survival, long after the theory on which it rested ceased to be operative.

For the "trespasser" theory from the start had strong opposition in the "free development" theory of a grant to the appropriator from the United States—a full title of the dignity of a fee, and equivalent to other freehold interests in realty; the theory which finally prevailed and became law under the act of 1866.[4] Consequently it is, as already shown, now held that transfers of water-rights are ineffectual as transfers without a writing, within the statute of frauds.[5] To-day a sale equivalent to a sale of anything else, operating as a transmission of a right, not as the creation of a new one, is recognized if in writing.[6] The possessory estate thus acquired has been elevated to the dignity of other interests in realty, being recognized as an express grant from the government. But the early theory, as concerns water-rights at least, remains as a survival in this matter of parol sales.

A water-right, then, may be transferred by a parol sale, provided the grantee enters into possession.[7] The same result will be accomplished by a faulty deed.[8] The rights of the grantee, however, are different from those under a true sale, in writing. He does not acquire the grantor's right by transmission; does not step into his shoes; but acquires a new right as an appropriator by actual diversion. Consequently, the grantee loses the priority his grantor had. A parol sale allows claimants between the original appropriation and the date of the parol sale to assert priority in their favor as against the grantee.[9] The California court says: "The objection made by defendant is, that plaintiffs

4 *Supra*, secs. 89, 92 et seq.

5 The rule as to sales of mining claims is now also the same. Costigan on Mining Law, pp. 497, 498.

6 McDonald v. Askew, 29 Cal. 200, 1 Morr. Min. Rep. 660. As to water-rights, cases already cited, and compare California Civil Code, section 1411, "successor in interest." As to mining claims, Lindley on Mines, section 642.

7 Smith v. O'Hara, 43 Cal. 371, 1 Morr. Min. Rep. 671; Griseza v. Terwilliger, 144 Cal. 456, 77 Pac. 1034.

8 Barkley v. Tieleke, 2 Mont. 59, 4 Morr. Min. Rep. 666.

9 Smith v. O'Hara, 43 Cal. 371, 1 Morr. Min. Rep. 671; Griseza v. Terwilliger, 144 Cal. 456, 77 Pac. 1034; Chiatovich v. Davis, 17 Nev. 133, 28 Pac. 239; Salina etc. Co. v. Salina etc. Co., 7 Utah, 456, 27 Pac. 578; Union Mill & Min. Co. v. Dangberg, 81 Fed. 73, citing cases; Low v. Schaffer, 24 Or. 239, 33 Pac. 678; South Tule etc. Co. v. King, 144 Cal. 450, 77 Pac. 1032. See Smith v. Green, 109 Cal. 235, 41 Pac. 1022; Bowen v. Webb (1908), 37 Mont. 479, 97 Pac. 839; Gould on Waters, sec. 234; Pomeroy on Riparian Rights, secs. 58, 89; Kinney on Irrigation, sec. 253. See, also, *supra*, sec. 390, use of abandoned ditches. See Kan. Gen. Laws, 1909, sec. 4436.

could not prove title by a parol sale, the interest conveyed being realty. Plaintiffs answer that the evidence was not offered to prove title, but as declarations against interest and as showing abandonment, to defeat defendant's alleged title, and that the court did not admit the evidence to prove title. Mr. Kinney states the doctrine to be, that the right to the use of the water acquired by prior appropriation, and the structure through which the diversion is effected, must be conveyed by a written instrument, as in the case of real property, and that a verbal sale is nugatory.[10] The author further says, however, that such a sale works an abandonment, and the vendee takes his right simply as a subsequent appropriator in his regular order with subsequent appropriators.[11] Mr. Pomeroy says that abandonment may be express and immediate by the intentional act of the appropriator, or may be implied from his neglect, failure to use due diligence in the construction of his works, nonuse of them after completion and the like. The general doctrine concerning the effect of abandonment is stated to be, that the prior appropriator loses all his exclusive rights to take or use the water which he had acquired. 'A verbal sale and transfer of his water-right by a prior appropriator operates *ipso facto* as an abandonment thereof. Such act shows an unequivocal intent on the part of the appropriator to give up and relinquish all of his interest, and, as it does not effect any transfer thereof to the attempted assignee or vendee, the only possible result is an immediate and complete abandonment.'[12] It is not necessary, we think, to invoke the rule as to an executed parol contract such as arose in Flickinger v. Shaw,[13] nor to pass upon the applicability of the principle there enunciated to the present case. The evidence clearly was admissible to show abandonment, and may be restricted to that object, and thus restricted fully justifies the finding of the court. It was not admitted to prove title, as clearly appears from the ruling of the court. Defendant claimed through Terwilliger, her husband, and offered evidence in support of her claim. It was competent for plaintiffs to show that long before defendant's deed, and continuously for many years, he had treated his right as abandoned,

10 Citing cases.

11 Kinney on Irrigation, secs. 253, 255, 264.

12 Citing Pomeroy on Water Rights, secs. 96, 97.

13 87 Cal. 126, 22 Am. St. Rep. 234, 25 Pac. 268, 11 L. R. A. 134. See next section.

and his verbal sale was admissible as tending to establish this fact. The sale conferred no title upon Musgrave, but the subsequent use by him and his associates and their successors of all the water was an appropriation of whatever water Terwilliger was entitled to prior to the sale."[14]

This principle that the grantee on a parol sale acquires a new right as an appropriator by actual diversion, but that it operates by way of abandonment, forfeiting priority, seems in force in California. But in Montana and Oregon it is losing ground. There the courts have refused to apply it to the case of a settler or squatter who has taken no steps to obtain title by filing upon the land. Such a bare settler has a possessory right to the land which, it is held, may be transferred by parol, and the parol sale will carry the water-right as an appurtenance, preserving priority.[15] In one Montana case[16] the court says: "We are satisfied that a verbal transferee of a settler's claim and water-right appurtenant thereto, who takes possession of the same, is the successor in interest of the original appropriator of the water, that he does not take it by recapture, and that he can avail himself of his predecessor's priority." In this case, Barkley v. Tieleke[17] was held to have arisen out of mining conditions and not to be applicable to appropriations of water for agricultural purposes. Barkley v. Tieleke was disapproved, if not actually overruled, and as it was relied on by Pomeroy,[18] and Pomeroy was relied on by the California court in the late case cited *supra*, this considerably weakens the rule that a parol sale operates by way of abandonment. In Wyoming, while at first disapproved,[19] the principle of the rule has been reasserted in another connection.[20] A recent Oregon case says it is unable to see any reason for the rule, and the usual view to-day is that absence of a writing cannot be raised by strangers to the sale in any event.[21]

[14] Griseza v. Terwilliger, 144 Cal. 456, 77 Pac. 1034. See, also, Duckworth v. Watsonville Co., 158 Cal. 206, 110 Pac. 927, discussed *supra*, sec. 246.

[15] McDonald v. Lannen, 19 Mont. 78, 47 Pac. 648; Wood v. Lowney, 20 Mont. 273, 50 Pac. 794; Hindman v. Rizor, 21 Or. 112, 27 Pac. 13 (citing Oregon cases); Turner v. Cole, 31 Or. 154, 49 Pac. 972; Watts v. Spencer, 51 Or. 262, 94 Pac. 39.

[16] McDonald v. Lannen, *supra*. See, also, Featherman v. Hennessey (Mont.), 113 Pac. 751.

[17] Cited *supra*.

[18] Secs. 58, 89, 96, 97.

[19] Whalon v. North Platte etc. Co., 11 Wyo. 313, 71 Pac. 995; Johnston v. Little Horse Co., 13 Wyo. 208, 110 Am. St. Rep. 986, 79 Pac. 22, 70 L. R. A. 342.

[20] *Supra*, sec. 509, restricting changes of use.

[21] Watts v. Spencer, 51 Or. 262, 94 Pac. 39. *Supra*, sec. 542.

"The right of a person claiming an appropriation of water cannot be tacked to that of a mere squatter, who,

The reasoning on which this rule is based would lead to the harsh result that a parol sale or a faulty deed endangers the rights of the grantor, by working an abandonment of his priority in case the object of the parol sale is not carried out. Until possession is transferred (possession of ditches, etc., since that is equivalent to possession of the water-right), he would not be harmed, as until then the parol sale and abandonment would not be complete. But if the grantee, having taken possession, wishes to retransfer to the grantor, or if, for some reason, the grantor wishes to re-enter, as, for example, in case of default on promises by the grantee, the grantor himself could now claim only as an appropriator by actual diversion, and would have lost his priority. The writer has not seen any decision on the point; but it might properly be held that the abandonment is only conditional; that a parol sale is evidence of an abandonment, but not conclusive, depending on the success of the whole plan of which it was a part. This would be supported by the decision in McGuire v. Brown,[22] where an owner abandoned an old ditch and used the water through a new one, which, it turned out, he had mistakenly built on another man's land without right. This, it was held, gave no right to use the water in the new ditch, but there was not necessarily an abandonment of the right to use it in the old one. However, in Griseza v. Terwilliger,[23] it is said that a parol sale is an unequivocal sign of relinquishment, and works *ipso facto* as an abandonment.

The truth is, that the rule is but a curious survival of the old pioneer law before possessory water-rights on the public domain came to be (as to-day they are) treated as freehold estates. It properly has no ground for existence to-day.[24]

while he may have irrigated the land, has abandoned it (Low v. Shaffer, 24 Or. 239, 33 Pac. 678); but a squatter upon public lands may, *even by parol*, transfer his claim and interest, whatever it may be in this respect, to another, and the rights of the subsequent purchaser and of his successors in interest, if asserted under the doctrine of prior appropriation, relate back to the date of the first appropriation with whom there may be a privity of estate." Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

[22] 106 Cal. 660, 39 Pac. 1069, 30 L. R. A. 384.

[23] 144 Cal. 456, 77 Pac. 1034, citing Pomeroy on Riparian Rights, sec. 89.

[24] In Liggins v. Inge, 7 Bing. 692, 5 M. & P. 712, the law of appropriation of water was regarded as the law of England, and it was laid down that a sale by an appropriator passed no title, but only extinguished his own claim, as an abandonment, and hence was not within the statute of frauds. But the case was soon repudiated both as to its theory of Eng-

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§ 556. Parol Sales and Licenses in Equity.—Water and ditch rights being real property, interests therein can be conveyed or given only by an instrument in writing. Parol sales or licenses are expressly made void or invalid by the statute of frauds. But the requirement of a writing is at best a mere formality which, in practical affairs, men often disregard, and proceed in unwritten transactions until so involved therein that to permit the statute alone to control would work a clear fraud on one by allowing the other to be enriched by what he received under the bargain, while escaping from his own obligation under cover of the statute. To prevent the statute working such frauds, when passed to prevent fraud, courts of equity hold the defaulting party as a constructive trustee, and grant specific performance of parol contracts and sales regarding water-rights where one party has partly performed, taken possession, made improvements, incurred expense and expended his energy on the faith of the parol understanding.[25] One recent case[1] says: "Water-rights are classed as real property, and hence, under the general rule, any agreement relating thereto must be in writing.[2] But in the case at bar the agreement was acted upon by placing a measuring-box in the stream, and actually dividing the water, and by

lish water law and its theory of parol sale, and has come in this latter regard to be upheld only on the principles of equity, in the next section, regarding executed parol license.

[25] *California.*—Flickinger v. Shaw, 87 Cal. 126, 22 Am. St. Rep. 234, 25 Pac. 268, 11 L. R. A. 134; Blankenship v. Whaley, 124 Cal. 300, 57 Pac. 79; Churchill v. Russell (1905), 148 Cal. 1, 82 Pac. 440; Dorris v. Sullivan, 90 Cal. 279, 27 Pac. 216; Bree v. Wheeler, 4 Cal. App. 109, 87 Pac. 255; Bashore v. Mooney, 4 Cal. App. 276, 87 Pac. 553 (citing, also, Griseza v. Terwilliger, 144 Cal. 462, 77 Pac. 1034, and Bates v. Babcock, 95 Cal. 486, 29 Am. St. Rep. 133, 30 Pac. 605, 16 L. R. A. 745. A parol contract to convey land with an easement over remaining land for a pipe-line, being executed, gives the grantee an equitable title to the easement. Rubio Canyon W. Co. v. Everett (1908), 154 Cal. 29, 96 Pac. 811. (But see German etc. Soc. v. McLellan (1908), 154 Cal. 710, 99 Pac. 194, holding the parol reservation of a spring on the sale of land in that case to have been too uncertain to enforce.) See, also, cases below cited regarding parol licenses.

Colorado.—Yunker v. Nichols, 1 Colo. 551, 8 Morr. Min. Rep. 64; Schilling v. Rominger, 4 Colo. 104; McLure v. Koen, 25 Colo. 284, 53 Pac. 1058; Parke v. Parke (1909), 45 Colo. 347, 101 Pac. 403, at 406, saying: "Oral agreements concerning priorities and title to water-rights, followed with its change of possession and application by the claimant, have heretofore been held valid by this court; also that part performance will take it out of the statute of frauds, and equity will enforce the right thus acquired."

Oregon.—Coffman v. Robbins, 8 Or. 278, 8 Morr. Min. Rep. 131; Combs v. Slayton, 19 Or. 99, 26 Pac. 661; Watts v. Spencer, 51 Or. 262, 94 Pac. 39.

[1] Bree v. Wheeler, 4 Cal. App. 109, 87 Pac. 255.

[2] Citing Code Civ. Proc., secs. 1971, 1973; Hayes v. Fine, 91 Cal. 398, 27 Pac. 772; Blankenship v. Whaley, 124 Cal. 304, 57 Pac. 79.

mutual consent of the parties each was placed in possession of one-half thereof. To complete the transfer nothing remained to be done except the execution of a conveyance, conveying a proper proportion of the water to each. Each had a perfect equity, entitling him to a deed from the other. When such is the case, a court of equity, in accordance with its familiar rules, considering that as done which ought to be done, will protect the right obtained as readily and as fully as a legal title." And it is held in another case that the parol grantee can enjoin a stranger from diverting the water.[3]

Upon the same principle, parol licenses to take water or build a ditch, being intended to be permanent, become irrevocable in equity after the licensee has acted upon the same, built his ditch or other works, and incurred large expense.[4] For example, "Go ahead. The more ditches you build, the better it will suit me," was held, when acted upon, to be irrevocable.[5] When thus irrevocable, it is not affected by subsequent conveyance by the licensor to a third person who has notice, express or implied, of the existence of the irrevocable right.[6] At the same time, a parol license is revocable until thus executed, and is revoked when the licensor obstructs it[7] or by the licensor's death,[8] or by a conveyance by

[3] Watts v. Spencer, 51 Or. 262, 94 Pac. 39.

[4] Stoner v. Zucker, 148 Cal. 516, 113 Am. St. Rep. 301, 83 Pac. 808, 7 Ann. Cas. 704; Miller v. Kern etc. Co. (1909), 154 Cal. 785, 99 Pac. 179; Davis v. Martin, 157 Cal. 657, 108 Pac. 866; Coventon v. Seufert, 23 Or. 548, 32 Pac. 508; Maple etc. Co. v. Marshall, 27 Utah, 215, 75 Pac. 369; Jensen v. Hunter (Cal.), 41 Pac. 14; Lavery v. Arnold, 36 Or. 84, 57 Pac. 906, 58 Pac. 524, citing cases; McPhee v. Kelsey, 44 Or. 193, 74 Pac. 401; 75 Pac. 713; Shaw v. Proffitt (Or. 1910), 110 Pac. 1092; Munsch v. Stelter, 109 Minn. 403, 134 Am. St. Rep. 785, 124 N. W. 14; Arterburn v. Beard, 86 Neb. 733, 126 N. W. 379.

In one case it was held that where a man's agents accompany another and his employees to a reservoir and cooperate and assist in laying out pipelines and surveying and locating a canal for conducting water over the former's land, and the latter conducts the work openly, with the former's knowledge, the former standing by and making no objection, but encouraging the latter—the former's conduct amounts to a consent and parol license which is irrevocable when executed. The court said: "The principal contention upon appeal is that this court should recede from the view which is adopted and expressed in Stoner v. Zucker, 148 Cal. 516, 113 Am. St. Rep. 301, 83 Pac. 808, 7 Ann. Cas. 704, and should adopt the contrary view that a parol license, regardless of its nature, is always revocable at the will of the licensor. This question was duly considered in Stoner v. Zucker, *supra*, the conflict in authority was recognized, and the conclusion there expressed deliberately adopted. We perceive no reason for receding from that conclusion." Miller v. Kern Co. (1909), 154 Cal. 785, 99 Pac. 179.

[5] Shaw v. Proffit (Or.), 110 Pac. 1092, holding it to become "a vested easement."

[6] Cases *supra*.

[7] Prentice v. McKay, 38 Mont. 114, 98 Pac. 1081, citing Great Falls etc. Co. v. Great Northern Ry. Co., 21 Mont. 487, 54 Pac. 963.

[8] Jensen v. Hunter (Cal.), 41 Pac. 17.

the licensor to some other party,[9] nor will it, even when executed, be irrevocable if not intended so, but only intended to be temporary and revocable.[10]

These cases enforcing executed parol licenses are based upon the same principles as specific performance, though sometimes called "estoppel."[11]

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§ **557. Conclusion.**—The freedom of disposition of appropriations shows the possessory origin of the law of appropriation; a branch of the law of possessory rights on the public domain. Possession of the stream was the foundation of the right. Actual diversion (the taking of possession) created the right; capacity of ditch (the amount in possession) measured the right; injunctions were granted without present damage; the appropriation was independent of ownership or possession of any land and independent of the place of use or mode of enjoyment and change did not forfeit priority; and, as to contracts or sales, "it could be transferred like other property" as a separate, individual thing. Much of this is still law to-day.[12]

But the very late "water code" legislation, and the tendency of late court decisions, is, as elsewhere considered,[13] to treat the right as one to a specific initial use (such as the requirements of a specific piece of land) rather than to possession of a stream or any specific quantity or flow of water. Hence the innovations introduced by the statutes above referred to; and consequently, also, the reader must be prepared, as time goes on, to find the decisions departing from the (at present) established rules presented in this chapter.

[9] McIntyre v. Harty, 236 Ill. 629, 86 N. E. 581, though this case seems to lay down the same revocability even after the license was acted upon.

[10] Lanham v. Wenatchee Co., 48 Wash. 337, 93 Pac. 522; McIntyre v. Harty, 236 Ill. 629, 86 N. E. 581; Davis v. Martin, 157 Cal. 657, 108 Pac. 866; Lewis v. Patton (Mont.), 113 Pac. 745. See, also, *supra*, sec. 56, and *infra*, sec. 593.

"The evidence in the case, however, is clear that the right to construct the ditch and use the water from Grouse Creek was a mere permissive right, granted by the respondents to the appellant, and that respondents refused either to sell or convey a permanent right. Such right or license was revocable at the will of respondents, and could not be enforced thereafter by the appellant." Weidensteiner v. Mally (1909), 55 Wash. 79, 104 Pac. 143, citing Hathaway v. Yakima Water etc. Co., 14 Wash. 469, 53 Am. St. Rep. 874, 44 Pac. 869; Prentice v. McKay, 38 Mont. 114, 98 Pac. 1081.

[11] As to which, see further *infra*, secs. 593, 655.

[12] See cross-references *supra*, sec. 139.

[13] *Supra*, sec. 139.

§§ *558–565. (Blank numbers.)*

CHAPTER 25.

LOSS OF RIGHT.

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§ **566.** Water-rights of appropriation may, it is true, continue indefinitely, but they may likewise come to an end in several

ways, viz., by abandonment, forfeiture, adverse use, estoppel or eminent domain proceedings.

A. ABANDONMENT.

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§ 567. Abandonment is Voluntary and a Question of Fact.—As the law of appropriation arose as a branch of the law of possessory rights on the public domain, the right, upon its original basis, lasts during the retention of possession of the stream with a *bona fide* intention not to relinquish it. The retention of possession with a *bona fide* intention is a condition upon retention of the right; and the relinquishment of possession with intent to abandon constitutes an abandonment of the right.

To constitute abandonment, properly speaking, there must be a concurrence of act and intent, the relinquishment of possession, and the intent not to resume it for a beneficial use, so that abandonment is always voluntary, and a question of fact.[1]

[1] *Arizona.*—Gould v. Maricopa etc. Co., 8 Ariz. 429, 76 Pac. 598; Marlar v. Maricopa etc. Co. (Ariz.), 76 Pac. 1125; Salt River etc. Co. v. Slosser (Ariz.), 76 Pac. 1125; Brockman v. Grand Canal Co., 8 Ariz. 451, 76 Pac. 602; Patterson v. Ryan (Ariz.), 108 Pac. 1118.

California.—Wood v. Etiwanda W. Co., 147 Cal. 233, 81 Pac. 512; Utt v. Frey, 106 Cal. 397, 39 Pac. 807, quoted *infra;* Integral Quicksilver M. Co. v. Altoona M. Co., 75 Fed. 380, 21 C. C. A. 409; Hewitt v. Story, 64 Fed. 510, 12 C. C. A. 250, 30 L. R. A. 265, and cases *infra.*

Colorado.—People v. Farmers' etc. Co., 25 Colo. 202, 54 Pac. 626; Platte etc. Co. v. Central etc. Co., 32 Colo. 102, 75 Pac. 391; Greer v. Heiser, 16 Colo. 306, 26 Pac. 770; Beaver Brook Co. v. St. Vrain Co., 6 Colo. App. 130, 40 Pac. 1066; New Mercer Co. v. Armstrong, 21 Colo. 357, 40 Pac. 989; Putman v. Curtis, 7 Colo. App. 437, 43 Pac. 1056; Nichols v. Lantz, 9 Colo. App. 1, 47 Pac. 70; Hall v. Lincoln, 10 Colo. App. 360, 50 Pac. 1047; North Am. Exploration Co. v. Adams (Colo.), 104 Fed. 404, 45 C. C. A. 185; Lower Latham D. Co. v. Louden Irr. Co., 27 Colo. 267, 83 Am. St. Rep. 80, 60 Pac. 629; Hector M. Co. v. Valley View M. Co., 28 Colo. 315, 64 Pac. 205; Butterfield v. O'Neill, 19 Colo. App. 7, 72 Pac. 807; Boulder etc. Co. v. Leggett etc. Co., 36 Colo. 455, 86 Pac. 101; Buckers etc. Co. v. Farmers' etc. Co., 31 Colo. 62, 72 Pac. 49; Cooper v. Shannon, 36 Colo. 98, 118 Am. St. Rep. 95, 85 Pac. 175; O'Brien v. King, 41 Colo. 487, 92 Pac. 945; Alamosa Co. v. Nelson, 42 Colo. 140, 93 Pac. 1113.

Idaho.—Welch v. Garrett, 5 Idaho, 639, 51 Pac. 405, 19 Morr. Min. Rep. 193; Ada Irr. Co. v. Farmers' Canal Co., 5 Idaho, 793, 51 Pac. 990, 40 L. R. A. 485; Last Chance etc. Co. v. Bunker Hill etc. Co., 49 Fed. 430, 17 Morr. Min. Rep. 449.

Montana.—Norman v. Corbley, 32 Mont. 195, 79 Pac. 1059; Atchison v. Peterson, 1 Mont. 561; Barkley v. Tielcke, 2 Mont. 61, 4 Morr. Min. Rep. 666; Kleinschmidt v. Greiser, 14 Mont. 484, 43 Am. St. Rep. 652, 37 Pac. 5; Middle Cr. Co. v. Henry, 15 Mont. 558, 39 Pac. 1054; Goon v. Proctor, 27 Mont. 526, 71 Pac. 1003; Hays v. Buzard, 31 Mont. 74, 77 Pac. 423; Gassert v. Noyes, 18 Mont. 216, 44 Pac. 959; Featherman v. Hennessey (Mont.), 113 Pac. 751.

Nebraska.—Farmers' Irr. Dist. v. Frank, 72 Neb. 136, 100 N. W. 286.

Nevada.—Schutz v. Sweeney, 19 Nev. 359, 3 Am. St. Rep. 888, 11 Pac. 253; Lobdell v. Hall, 3 Nev. 507.

Oregon.—Dodge v. Marden, 7 Or. 456, 1 Morr. Min. Rep. 63; Moss v. Rose, 27 Or. 595, 50 Am. St. Rep. 743,

It has been said: "To constitute an abandonment of a water-right, there must be a concurrence of the intention to abandon it and an actual failure in its use."[2] And again: "Abandonment, like appropriation, is a question of intent, and to be determined with reference to the conduct of the parties. The intent to abandon and an actual relinquishment must concur, for courts will not lightly decree an abandonment of a property so valuable as that of water in an irrigated region."[3] In another case it is said: "As abandonment is a matter of intention, it is peculiarly within the province of a trial court to determine from all the facts and circumstances of each particular case whether abandonment has or has not taken place."[4]

The declarations of the party abandoning, as to his intention, are evidence,[5] and he may himself testify as to what his intention was, since his intention is in issue,[6] and evidence of statements out of court may be given in evidence.[7] The party claiming

41 Pac. 666; Wimer v. Simmons, 27 Or. 1, 50 Am. St. Rep. 685, 39 Pac. 6; Turner v. Cole, 31 Or. 154, 49 Pac. 972; Watts v. Spencer, 51 Or. 262, 94 Pac. 39.

South Dakota.—Edgemont Co. v. N. S. Tubbs Co., 2 S. D. 142, 115 N. W. 1130. See Stats. 1907, c. 180.

Utah.—Stalling v. Ferrin, 7 Utah, 477, 27 Pac. 686; Herriman Irr. Co. v. Keel, 25 Utah, 96, 69 Pac. 719; Promontory etc. Co. v. Argile, 28 Utah, 398, 79 Pac. 47.

Washington.—Miller v. Wheeler (1909), 54 Wash. 429, 103 Pac. 641, 23 L. R. A., N. S., 1065.

[2] Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

[3] Miller v. Wheeler, 54 Wash. 429, 103 Pac. 641, 23 L. R. A., N. S., 1065.

[4] Cooper v. Shannon, 36 Colo. 98, 118 Am. St. Rep. 95, 85 Pac. 175.

Facts held to show abandonment. Brockman v. Grand Canal Co., 8 Ariz. 451, 76 Pac. 602; Nichols v. Lantz, 9 Colo. App. 1, 47 Pac. 70; Oviatt v. Big Four Co., 39 Or. 118, 65 Pac. 811; Lamborn v. Bell, 18 Colo. 346, 32 Pac. 989, 20 L. R. A. 241; Rutherford v. Lucerne Canal & P. Co., 12 Wyo. 299, 75 Pac. 445; Ophir Mining Co. v. Carpenter, 4 Nev. 534, 97 Am. Dec. 550, 4 Morr. Min. Rep. 640; Kirman v. Hunnewill, 93 Cal. 519, 29 Pac. 124; Dorr v. Hammond, 7 Colo. 79, 1 Pac. 693; Smith v. Green, 109 Cal. 228, 41 Pac. 1022; Platte Water Co. v. Northern etc. Co., 12 Colo. 525, 21 Pac. 711.

Facts held not to show abandonment. Utt v. Frey, 106 Cal. 392, 39 Pac. 807; Hays v. Buzzard, 31 Mont. 74, 77 Pac. 423; Greer v. Heiser, 16 Colo. 396, 26 Pac. 770; Putnam v. Curtis, 7 Colo. App. 437, 43 Pac. 1056; Welch v. Garrett, 5 Idaho, 639, 51 Pac. 405, 19 Morr. Min. Rep. 193; Promontory Co. v. Argile, 28 Utah, 398, 79 Pac. 47; Farmers' etc. Co. v. New Hampshire etc. Co., 40 Colo. 467, 92 Pac. 290; Sullivan v. Jones (Ariz.), 108 Pac. 476 (three years' nonuser).

[5] Boulder etc. Co. v. Leggett etc. Co., 36 Colo. 455, 86 Pac. 101; Dodge v. Marden, 7 Or. 457, 1 Morr. Min. Rep. 63; Central Trust Co. v. Culver, 35 Colo. 93, 83 Pac. 1065.

[6] Boulder etc. Co. v. Leggett etc. Co., 36 Colo. 455, 86 Pac. 101, holding that on an issue of defendant's abandonment of certain water-rights conferred by a decree, evidence as to whether defendant's officers had any intention or purpose of abandoning the rights so conferred was admissible.

[7] *Ibid.*; Central etc. Co. v. Culver, 35 Colo. 93, 83 Pac. 1064.

there is an abandonment has the burden of proof, which must be clear and definite to a preponderance of evidence.[8]

The rule of abandonment applies as well to rights or priorities decreed in proceedings adjudicating rights as to rights not so decreed,[9] so far as the abandonment rests on new matter subsequent to the decree. But the decree is *res adjudicata* upon any abandonment prior thereto.[10] The question of abandonment cannot be determined in a suit under the special Colorado procedure for changing the point of diversion.[11]

An abandonment of a ditch, however, does not necessarily involve an abandonment of the water-right.[12] The distinction between the water-right and the ditch or other appliances must be borne in mind.[13]

It has been held that abandonment is not complete until another relocates, so that a resumption of use may be made at any time before others intervene,[14] though not after others intervene.[15]

Abandonment may be of part, as well as the whole, of an appropriation.[16]

Abandonment must be made by the owner, without being pressed by any duty, necessity, or utility to himself, but simply because he desires no longer to possess the thing, and further, it must be made without any desire that any other person shall

[8] Hall v. Lincoln, 10 Colo. App. 360, 50 Pac. 1047; Beaver etc. Co. v. St. Vrain etc. Co., 6 Colo. App. 130, 40 Pac. 1066; Platte Valley Irr. Co. v. Central Trust Co., 32 Colo. 102, 75 Pac. 391; Putnam v. Curtis, 7 Colo. App. 437, 43 Pac. 1056; O'Brien v. King, 41 Colo. 487, 92 Pac. 945; Alamosa Co. v. Nelson, 42 Colo. 140, 93 Pac. 1113; Miller v. Wheeler (1909), 54 Wash. 429, 103 Pac. 641, 23 L. R. A., N. S., 1065; McFarland v. Alaska etc. Co., 3 Alaska, 308.

[9] New Mercer etc. Co. v. Armstrong, 21 Colo. 357, 40 Pac. 989; Boulder etc. Co. v. Leggett etc. Co., 36 Colo. 455, 86 Pac. 101; Alamosa Co. v. Nelson, 42 Colo. 140, 93 Pac. 1121; Dracha v. Isola (Colo.), 109 Pac. 748.

[10] O'Brien v. King, 41 Colo. 487, 92 Pac. 945.

[11] Wadsworth D. Co. v. Brown, 39 Colo. 57, 88 Pac. 1060; Lower Latham etc. Co. v. Bijou etc. Co., 41 Colo. 212, 93 Pac. 483.

[12] New Mercer Ditch Co. v. Armstrong, 21 Colo. 357, 40 Pac. 989; Kleinschmidt v. Greiser, 14 Mont. 484, 43 Am. St. Rep. 652, 37 Pac. 5; Wood v. Etiwanda Water Co., 147 Cal. 233, 81 Pac. 512; McGuire v. Brown, 106 Cal. 660, 39 Pac. 1060, 30 L. R. A. 384; Gould v. Maricopa etc. Co., 8 Ariz. 429, 76 Pac. 598; Marlar v. Maricopa etc. Co. (Ariz.), 76 Pac. 1125; Salt River etc. Co. v. Slosser (Ariz.), 76 Pac. 1125; Salt River etc. Co. v. Van Fossen (Ariz.), 76 Pac. 1125.

[13] *Supra*, sec. 456.

[14] Beaver etc. Co. v. St. Vrain etc. Co., 6 Colo. App. 130, 40 Pac. 1066; Tucker v. Jones, 8 Mont. 225, 19 Pac. 571.

[15] Rutherford etc. Co. v. Lucerne etc. Co., 12 Wyo. 299, 75 Pac. 445. Cf. Lindley on Mines, sec. ——.

[16] Alamosa Co. v. Nelson, 42 Colo. 140, 93 Pac. 1113.

acquire the same; for, if it were made for a consideration, it would be a sale or barter, and if without consideration, but with an intention that some other person should become the possessor, it would be a gift. Where for any reason a transaction fails as a sale, it cannot be converted into abandonment.[17] There is no such thing as abandonment to particular persons, or for a consideration.[18] The right once abandoned, it cannot be revived by a sale, and the sale passes nothing.[19]

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§ 568. **Same.**—A sale of the land on which the water is used, without passing the water-right, is not necessarily an abandonment of the water-right,[20] nor is an exhaustion of the mine for which the water was originally used,[21] nor is the posting of a second notice of appropriation necessarily an abandonment of rights under a former notice.[22] These are all evidence, but not conclusive. On the other hand, an abandonment is shown where the ditch was filled in and sown over with grass;[23] also where the land irrigated is abandoned and nonuser of the water ensues for a long time[1] after which a later acquisition of other land does not revive the right against interveners.[2] On abandonment of oil locations, the right to the wells thereon bored for oil ceases also, though water flows from them, there being no intent to appropriate the water to a beneficial use.[3] A typical case of abandonment is where the appropriators' purpose has been accomplished and they disperse, the mine for which they used the water being worked out, the ditches decayed, and two years go by without doing anything.[4]

17 But see *supra*, sec. 555. See Kan. Gen. Laws, 1909, sec. 4436.

18 McLeran v. Benton, 43 Cal. 467; Middle Creek Co. v. Henry, 15 Mont. 556, 39 Pac. 1054; Richardson v. McNulty, 24 Cal. 343, 1 Morr. Min. Rep. 11; Stephens v. Mansfield, 11 Cal. 363; Watts v. Spencer, 51 Or. 262, 94 Pac. 39; Norman v. Corbley, 32 Mont. 195, 79 Pac. 1059; Cache La Poudre Co. v. Water Supply Co., 27 Colo. 532, 62 Pac. 420; Last Chance Co. v. Bunker Hill Co., 49 Fed. 430.

19 Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Kirman v. Hunnewill, 93 Cal. 519, 29 Pac. 124; Colorado etc. Co. v. Rocky Ford etc. Co., 3 Colo. App. 545, 34 Pac. 580.

20 Dodge v. Marden, 7 Or. 457, 1 Morr. Min. Rep. 63.

21 Lowden v. Frey, 67 Cal. 474, 8 Pac. 31.

22 Norman v. Corbley, 32 Mont. 195, 79 Pac. 1059. See Hall v. Lincoln, 10 Colo. App. 360, 50 Pac. 1047, examining evidence and holding no abandonment.

23 Stalling v. Ferrin, 7 Utah, 477, 27 Pac. 686.

1 Jackson v. Indian etc. Co., 18 Idaho, 513, 110 Pac. 251.

2 Rutherford etc. Co. v. Lucerne etc. Co., 12 Wyo. 299, 75 Pac. 445.

3 De Wolfskill v. Smith, 5 Cal. App. 175, 89 Pac. 1001.

4 Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 604, 4 Morr. Min. Rep. 604. For

Where a water-right and ditch were used for mining in the early days but long since discontinued, no right thereunder can be claimed by anyone at the present day.[5] One who uses the works of old-timers with whom he is not connected can claim nothing through such old appropriation; nor if connected with them in interest where their rights have been abandoned; nor, in fact, where one uses even recent works of others, with whom he is not connected, can he claim to tack on to the priority thereof. One using abandoned works must stand or fall on his own acts, irrespective of the use in such works by a former owner.[6] The rights which once pertained to the old pioneer mining ditches have mostly been lost by abandonment long ago, though evidence of the ditches still remains.[7]

(3d ed.)

§ 569. Nonuser is Merely Evidence of Intention to Abandon.—Under the doctrine of abandonment in its possessory origin, nonuser was merely evidence of the intention that the relinquishment should be permanent. The right being viewed as one to possession of the *flow,* nonuse was not *per se* an abandonment but only evidence upon the question of *intention.*[8] The test was whether the nonuser was for an unreasonable time under the circumstances, so as to reasonably indicate a relinquishment of possession and an intent not to resume it for a beneficial purpose; a simple question for the jury similar to the question of the use of reasonable care left to the jury in the law of negligence. Where the nonuser is for an unreasonable time, taking all the surrounding circumstances into consideration, there is an abandonment of the water-right; on the other hand, if it appears to be a reasonable

similar cases where the ditch, etc., was allowed to decay, see Dorr v. Hammond, 7 Colo. 79, 1 Pac. 693; Sieber v. Frink, 7 Colo. 148, 2 Pac. 901; Goon v. Proctor, 27 Mont. 526, 71 Pac. 1003; Noland v. Coon, 1 Alaska, 36; Ison v. Nelson Min. Co., 47 Fed. 199.

[5] Sternberger v. Seaton etc. Co. (1909), 45 Colo. 401, 102 Pac. 108.

[6] *Supra,* secs. 390, 555.

[7] Land v. Johnston (1909), 156 Cal. 449, 104 Pac. 449; Sternberger v. Seaton etc. Co., *supra.*

Where a squatter on public land abandons both water and land, a new locator of the land is a new appropriator, and cannot take the priority of the original one, though he reopens and repairs and uses the old ditches. Head v. Hale, 38 Mont. 302, 100 Pac. 222. The right of an appropriator of public water cannot be tacked to that of a mere squatter, who has abandoned his land. Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

[8] See cross-references *supra,* sec. 139.

time, there is not; and what is a reasonable time is a question of fact for the jury.[9]

If, at the time of acquiring the right, the water-right having been newly created by completion of the preparatory work, there is a failure for an unreasonable time under the circumstances to apply the water to a useful purpose, there is an abandonment. No definite period of time is set in the cases generally. The nonuser is not conclusive, but a question depending upon (under the facts of each case) what is an unreasonable delay; that is, what nonuser under the circumstances reasonably indicates the intent, in that case, not to apply the water to a useful purpose. This has been discussed at length in considering "future needs."[10]

After application and use have begun, a nonuser thereafter owing to breakage of apparatus, during change of plans, or from other cause, is not necessarily an abandonment. Here again the rule of the cases generally is that no definite time is set. The nonuser being for a reasonable time under the circumstances of each case, there is no abandonment. Upon the facts involved, for example, a reasonable time has lasted for one year;[11] three years;[12] eleven years;[13] fourteen years.[14] If work is stopped because the stream naturally ceases to flow (act of God) or because of tunneling or other wrongful act of another person, there is no abandonment.[15] There is no abandonment where the nonuse was during the administration of a decedent owner's estate;[16]

[9] Gross v. Jones (1909), 85 Neb. 77, 127 N. W. 681. See, also, *supra*, sec. 383 (diligence), and sec. 483 (future needs).

[10] *Supra*, sec. 483.

[11] Land v. Johnston (1909), 156 Cal. 449, 104 Pac. 449.

[12] Gassert v. Noyes, 18 Mont. 216, 44 Pac. 959; Sullivan v. Jones (Ariz.), 108 Pac. 476.

[13] North Am. Co. v. Adams (Colo.), 104 Fed. 404, 45 C. C. A. 185, 21 Morr. Min. Rep. 65.

[14] Wimer v. Simmons, 27 Or. 1, 50 Am. St. Rep. 685, 39 Pac. 6.

[15] Santa Barbara v. Gould, 143 Cal. 421, 77 Pac. 151; Putnam v. Curtis, 7 Colo. App. 437, 43 Pac. 1056; Union Min. Co. v. Dangberg, 81 Fed. 73 (nonuser during litigation); Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728 (saying: "Absence from land wrongfully forced does not work a forfeiture of any interest the owner may have therein"; and citing Hoffman v. Smyth, 47 Or. 573, 114 Am. St. Rep. 938, 84 Pac. 80, 8 Ann. Cas. 678).

"The last seven years preceding the trial of the action had been exceptionally 'dry,' and during them the flow of water had ceased earlier in the spring than in former years. The fact that during this period the plaintiffs had not been able to get as much water as theretofore did not destroy the continuity of their use, nor deprive them of the right to use the amount formerly diverted in the event that the flow of the stream should again furnish such amount." Huffner v. Sawday, 153 Cal. 86, 94 Pac. 424.

[16] Turner v. Cole, 31 Or. 154, 49 Pac. 971.

or during temporary shut-down of a mine,[17] or during *bona fide* efforts of a colonization company to induce immigration.[18] What is beneficial user has already been discussed.[19] But if the nonuser is unreasonably continued, here again it will be evidence (not conclusive, but taken with all the circumstances of the case) of an intent not to apply the water to a useful purpose, and an abandonment.[20] During the temporary cessation of use, others may use the water.[21]

The rule concerning nonuser is thus summed up in Utt v. Frey:[22] "The right which is acquired to the use of water by appropriation may be lost by abandonment. To abandon such right is to relinquish possession thereof without any present intention to repossess. To constitute such abandonment there must be a concurrence of act and intent, viz., the act of leaving the premises or property vacant, so that it may be appropriated by the next comer, and the intention of not returning.[23] The mere intention to abandon, if not coupled with yielding up possession or a cessation of user, is not sufficient; nor will the nonuser alone without an intention to abandon be held to amount to an abandonment. Abandonment is a question of fact to be determined by a jury or the court sitting as such. Yielding up possession and nonuser is evidence of abandonment, and under many circumstances sufficient to warrant the deduction of the ultimate fact of abandonment. But it may be rebutted by any evidence which shows that, notwithstanding such nonuser or want of possession, the owner did not intend to abandon." To the same effect it is said in another case[24] concerning an appropriator of water: "It is well settled that lapse of time does not of itself constitute an abandonment, and that it is only a circumstance for the jury to consider in determining whether there has been an abandonment. In other

17 Smith v. Hope etc. Co., 18 Mont. 432, 45 Pac. 632; Featherman v. Hennessey (Mont.), 113 Pac. 751 (flume broke in 1888 and mines shut down until 1894, but some work continued more or less in the meantime, and water was turned into the ditch annually).

18 Nevada etc. Co. v. Bennett, 30 Or. 59, 60 Am. St. Rep. 777, 45 Pac. 472.

19 *Supra*, secs. 378, 481 et seq.

20 Alamosa Co. v. Nelson, 42 Colo. 140, 93 Pac. 1113, and cases cited *supra*.

21 *Supra*, sec. 481 et seq.; *infra*, sec. 642.

22 106 Cal. 397, 38 Pac. 807.

23 Citing Judson v. Malloy, 40 Cal. 299; Bell v. Bed Rock etc. Co., 36 Cal. 214, 1 Morr. Min. Rep. 45; Moon v. Rollins, 36 Cal. 333, 95 Am. Dec. 181; St. John v. Kidd, 26 Cal. 272, 4 Morr. Min. Rep. 404; Richardson v. McNulty, 24 Cal. 345, 1 Morr. Min. Rep. 11; Willson v. Cleveland, 30 Cal. 192.

24 Valcalda v. Silver etc. Co., 86 Fed. 90, 29 C. C. A. 591, 19 Morr. Min. Rep. 233.

words, the question is one of intent. Said the court in Waring v. Crow,[25] 'The intention alone governs.'[1] In Moon v. Rollins[2] it was held that one in possession of land might leave it for a period of five years if he had the intention of returning, and that his mere failure to occupy the land for that period does not necessarily constitute an abandonment."[3]

In a word, nonuser is not *per se* an abandonment.[4] It is, so far as concerns abandonment, only a sign that you "did not want the water any more" and meant to give it up, but may be rebutted by other evidence that you still meant to keep it, unless the nonuse lasted so unreasonably long as to be convincing of what your intention had been when you stopped use.

(3d ed.)

§ 570. **Same.**—Like the rule of reasonable care in the law of negligence, the rule of reasonable time here is indefinite. In cases where there is no evidence of importance bearing on the surrounding circumstances it would be difficult for the jury to say whether the nonuser was for an unreasonable time. It would be enough in such cases to say, as in the law of negligence, that the side claiming there is an abandonment, having failed to convince the jury of the unreasonable length of the nonuser, has failed to sustain the burden of proof, and failed to make out its

[25] 11 Cal. 369, 5 Morr. Min. Rep. 204.

[1] Keane v. Cannovan, 21 Cal. 293, 82 Am. Dec. 738; St. John v. Kidd, 26 Cal. 272, 4 Morr. Min. Rep. 454.

[2] 36 Cal. 337, 95 Am. Dec. 181.

[3] "An easement acquired by deed is not lost by mere nonuser." Walker v. Lillingston, 137 Cal. 401, 70 Pac. 282.

[4] Such is the effect of most of the cases in the first section of this chapter. We happen to have noted here a few particularly:

Utt v. Frey, 106 Cal. 397, 39 Pac. 807; Senior v. Anderson, 115 Cal. 496, 47 Pac. 454; Wood v. Etiwanda Co., 147 Cal. 233, 81 Pac. 512; Sieber v. Frink, 7 Colo. 149, 2 Pac. 901; Dorr v. Hammond, 7 Colo. 79, 1 Pac. 693; People v. Farmers' etc. Co., 25 Colo. 202, 54 Pac. 626; Welch v. Garrett, 5 Idaho, 639, 51 Pac. 405, 19 Morr. Min. Rep. 193; Ada etc. Co. v. Farmers' etc. Co., 5 Idaho, 793, 54 Pac. 990, 40 L. R. A. 485; McCauley v. McKeig, 8 Mont. 389, 21 Pac. 22, 16 Morr. Min. Rep. 1; Gassert v. Noyes, 18 Mont. 216, 44 Pac. 959; Sloan v. Glancy, 19 Mont. 70, 47 Pac. 334; Smith v. Hope Mining Co., 18 Mont. 432, 45 Pac. 632; Lobdell v. Hall, 3 Nev. 507; Dodge v. Marden, 7 Or. 456, 1 Morr. Min. Rep. 63; Turner v. Cole, 31 Or. 154, 49 Pac. 972; Wimer v. Simmons, 27 Or. 1, 50 Am. St. Rep. 685, 39 Pac. 6; Edgemont Co. v. Tubbs Co., 22 S. D. 142, 115 N. W. 1130; Gill v. Malan, 29 Utah, 431, 82 Pac. 471; Promontory Co. v. Argile, 28 Utah, 398, 97 Pac. 47; Sowles v. Minot, 82 Vt. 344, 73 Atl. 1025; Integral etc. Co. v. Altoona etc. Co. (Cal.), 75 Fed. 379, 21 C. C. A. 409; North Am. etc. Co. v. Adams (Colo.), 104 Fed. 404, 45 C. C. A. 185, 21 Morr. Min. Rep. 65; Pomeroy on Riparian Rights, sec. 90; Farnham on Waters, sec. 691; 17 Am. & Eng. Ency. of Law, 517.

case.[5] An attempt has been made to cover such a case by a resort to a presumption of abandonment from nonuser.[6] This was early rejected in California.[7]

The later case of Smith v. Hawkins[8] treats the matter and avoids the difficulty in an entirely new way; viz., on the principles not of abandonment at all, but of forfeiture. This case arbitrarily selects five years as a limit of nonuser under any circumstances. The test of intent is then rejected and the principles of forfeiture acting *in invitum* substituted. Accepting Smith v. Hawkins as law, the rule, as stated above, that nonuser must be considered on the principles of abandonment under test of reasonableness remains unaffected, so long as five years have not elapsed. This is acknowledged in Smith v. Hawkins. That case merely introduces a new principle governing the case at the expiration of the five-year period. That case is further considered below.[9]

The introduction of the principle that nonuser after a definite period of time operates as a forfeiture as distinguished from abandonment was hence introduced in California only recently, and by a decision of the court, not by legislation. In the recent water codes of the arid States this new principle usually finds a place also, as considered below.[10]

(3d ed.)

§ 571. **Discharged Waste and Recapture.**—Where water has been severed from the natural stream and used in an artificial structure that reduces it to possession, we have seen that it has become private property, and is dealt with by the law as a *corpus* (as distinguished from the usufructuary water-right in the natural stream), not longer subject to the law of naturally running waters. In discharging it as waste from the ditches, etc., the question is not one of abandonment of a water-right, but of abandonment of specific particles of water, viz., the very particles that are discharged. The matter is of importance here, but has

[5] Beaver etc. Co. v. St. Vrain etc. Co., 6 Colo. App. 130, 4 Pac. 1066; Platte etc. Co. v. Central etc. Co., 32 Colo. 102, 75 Pac. 391.

[6] Sieber v. Frink, 7 Colo. 148, 2 Pac. 901; Kinney on Irrigation, sec. 257.

[7] Partridge v. McKinney, 10 Cal. 181, 1 Morr. Min. Rep. 185.

[8] 110 Cal. 122, 42 Pac. 453, affirmed in 120 Cal. 86, 52 Pac. 139, 19 Morr. Min. Rep. 243.

[9] Sec. 575.

[10] *Infra*, sec. 576.

been fully treated elsewhere, and the reader is referred to a preceding chapter.[11]

(3d ed.)

§ 572. **Parol Sale or Faulty Deed.**—Owing to the insistence in the early days on the "trespasser" side of possessory rights on the public domain, a conveyance operated on the principle of surrender and admittance, the grantor abandoning, and the grantee receiving his right because of his newly acquired possession. A sale of a possessory right on public land was an unequivocal sign of intent to relinquish on the grantor's part, and hence was evidence of an abandonment.[12]

To-day, possessory rights on public land have (under the "free development" theory) been so far raised into the dignity of real estate [13] that a sale will, if in writing so as to satisfy the statute of frauds, operate as a transmission of title, like any other conveyance, without loss of priority. But still the old view has some survival where the sale is by parol, or by faulty deed. Such a sale, so far as the old rule has survived, is not inoperative. It constitutes an abandonment on the part of the grantor, and the creation of a new right in the grantee as a new appropriator by actual diversion. Priority is lost. Such a sale does not operate as an abandonment, however, until completed by putting the grantee in possession. The mere attempt to abandon (or an unsuccessful attempt at a parol sale) is not enough without the actual relinquishment of possession.[14]

The rule is, however, but a curious survival of "ancient" law before possessory rights on the public domain came to be recognized as freehold estates. It properly has no ground for existence to-day.

(3d ed.)

§ 573. **Failure of Diligence in Construction Work.**—An appropriator seeking the benefit of the doctrine of relation loses the

11 *Supra*, sec. 37 et seq.

12 *Supra*, sec. 555; Black v. Elkhorn Min. Co., 163 U. S. 445, 16 Sup. Ct. Rep. 1101, 41 L. Ed. 221, 18 Morr. Min. Rep. 375.

13 *Supra*, secs. 89 et seq., 283 et seq.

14 The cases are cited, *supra*, sec. 555.

Compare the following: The owners of a mining ditch, who took water therefrom for irrigation, by leasing their interest therein, abandoned their irrigation rights in the ditch. Davis v. Chamberlain, 51 Or. 304, 98 Pac. 154.

Sale is evidence of an abandonment. Miller v. Wheeler (1909), 54 Wash. 429, 103 Pac. 641, 23 L. R. A., N. S., 1065.

benefit of that doctrine if he fails to use diligence in building his ditches and other construction work. But this is not a question of abandonment. It is matter precedent showing that no right was ever obtained against the other claimant who has performed the requisite formalities.[15] The two principles should be kept distinct. That this does not rest on abandonment is shown by the rule that the failure of diligence is immaterial if the diversion and use are nevertheless completed before others intervene.[16] The matter has already been discussed at length.[17]

B. FORFEITURE.

(3d ed.)

§ 574. Failure to Comply With Statute in Making an Appropriation.—Section 1419 of the Civil Code of California is as follows: "Forfeiture. A failure to comply with such rules deprives the claimants of the right to the use of the water as against a subsequent claimant who complies therewith." The rules mentioned are those governing how an appropriation is to be made.[17a]

We have already discussed the cases construing this section, the result being seen that the word "claimants" here used means only those who are engaged in the preparatory work, and seek the benefit of the doctrine of relation. It does not apply to an appropriator by actual diversion,[18] and the section ceases to be applicable after an appropriation is once completed. A completed appropriation is hence not within that section, and so there is not, by this section, any statutory forfeiture of a right once acquired, as distinguished from abandonment, in those States where this section is copied.[19]

[15] Nevada etc. Co. v. Kidd, 37 Cal. 282.

[16] Wells v. Mantes, 99 Cal. 583, 34 Pac. 324.

[17] *Supra*, sec. 364 et seq.

[17a] Cal. Stats. 1911, c. 406, devoted to power uses, contains the following in section 4: "All water or the use of water which has been heretofore appropriated and which has not been put, or which has ceased to be put to some useful or beneficial purpose, or which is not now in process of being put to some useful or beneficial purpose with due diligence in proportion to the magnitude of the work necessary properly to utilize for the purpose of such appropriation such water or such use of water, is hereby declared to be unappropriated."

[18] De Necochea v. Curtis, 80 Cal. 397, 20 Pac. 563, 22 Pac. 198; Wells v. Mantes, 99 Cal. 583, 34 Pac. 324; *supra*, sec. 364 et seq.

[19] "The title to the water does not arise as we have intimated before, from the manifestation of a purpose to take, but from the effectual prosecution of that purpose. This prosecution, therefore, is a necessary element of a title, and the negation of this, the abandonment of the purpose, is not so much matter in avoidance of title,

Such, also, would seem to be the case under those water codes which (as already discussed)[20] include the actual application of the water to a beneficial use within a stated time as a prerequisite to the issuance of a license. A failure to make such application of the water would have the result that no water-right was completed, rather than that a completed one was forfeited.[21] It is held that even the time limit so specified does not work a forfeiture unless the State Engineer or the statute expressly so declares.[22]

(3d ed.)

§ 575. **Smith v. Hawkins.**—If there is any such thing as forfeiture of a water-right, as distinguished from abandonment, it rests, in California, on Civil Code, section 1411, as construed in Smith v. Hawkins.[23] The distinction in principle would be a loss of the right *in invitum*, as distinguished from a voluntary act. Where mere nonuser and no other important evidence, the jury have difficulty in saying when that continuance of nonuser is unreasonable. In Smith v. Hawkins, the difficulty is cut short at the end of five years. Nonuser for five years was held to constitute a loss of right not by abandonment, and hence irrespective of intention, but by forfeiture, *in invitum*. This relieves the jury of a difficult question of fact, but it is an entire departure from the older cases, which left it to the jury, however short or long the time. Smith v. Hawkins, however, is such a clear decision upon the point, fixing a limit of five years, that, though open to the charge of judicial legislation,[24] it is likely to be followed. The material part of the opinion in Smith v. Hawkins is as follows:

"Section 1411 of the Civil Code declares that the appropriation must be for some useful or beneficial purpose, and when the

as it is matter showing that no title was ever obtained." Kimball v. Gearhart, 12 Cal. 27, 1 Morr. Min. Rep. 615.

20 *Supra*, sec. 420.

21 See *supra*, sec. 395 et seq. Cf. Conley v. Dyer, 43 Colo. 32, 95 Pac. 304; Drach v. Isola (Colo. 1910), 109 Pac. 748.

22 Pool v. Utah etc. Co. (Utah), 105 Pac. 289.

23 110 Cal. 122, 42 Pac. 453. The opinion of the court was delivered by Mr. Justice Van Fleet, now judge of the United States district court, affirmed in 120 Cal. 86, 52 Pac. 139, 19 Morr. Min. Rep. 243. See, also, Cal. Stats. 1911, c. 406, sec. 4, quoted in the preceding section.

24 "It would be contradicting a fundamental principle of human nature to allow no effect to the lapse of time, however long, yet the fixing of a *definite* time usually belongs to the legislature rather than the courts." Holmes, J., in Missouri v. Illinois, 200 U. S. 520, 26 Sup. Ct. Rep. 268, 50 L. Ed. 572.

appropriator or his successor in interest ceases to use it for such a purpose, the right ceases. This section deals with the forfeiture of a right by nonuser alone. We say nonuser, as distinguished from abandonment. If an appropriator has, in fact, abandoned his right, it would matter not for how long a time he had ceased to use the water, for the moment that the abandonment itself was complete, his rights would cease and determine. Upon the other hand, he may have leased his property, and paid taxes thereon, thus negativing the idea of abandonment, as in this case, and yet may have failed for many years to make any beneficial use of the water he has appropriated. The question presented, therefore, is not one of abandonment, but one of nonuser merely, and, as such, involves a construction of section 1411 of the Civil Code. That section, as has been said, makes a cessation of use by the appropriator work a forfeiture of his right, and the question for determination is, 'How long must this nonuser continue before the right lapses?'[25]

"Upon this point, the legislature has made no specific declaration, but, by analogy, we hold that a continuous nonuser for five years will forfeit his right. The right to use the water ceasing at that time, the rights of way for ditches and the like, which are incidental to the primary right of use, would fall also, and the servient tenement would be thus relieved from the servitude.

"In this State five years is the period fixed by law for the ripening of an adverse possession into prescriptive title. Five years is also the period declared by law after which a prescriptive right depending upon enjoyment is lost for nonuser; and for analogous reasons we consider it to be a just and proper measure of time for the forfeiture of an appropriator's right for a failure to use the water for a beneficial purpose.

"Considering the necessity of water in the industrial affairs of this State, it would be a most mischievous perpetuity which would allow one who has made an appropriation of a stream to retain indefinitely, as against other appropriators, a right to the waters therein, while failing to apply the same to some useful or beneficial purpose. Though during the suspension of his use, other persons might temporarily utilize the water unapplied by him, yet no one could afford to make disposition for the employ-

25 The previous cases had answered this question by saying any time that the jury considered unreasonable under the circumstances.

ment of the same involving labor or expense of any considerable moment, when liable to be deprived of the element at the pleasure of the appropriator, and after the lapse of any period of time, however great.

"The failure of plaintiffs to make any beneficial use of the water for a period of more than five years next preceding the commencement of the action, as found by the court, results, from what has been said, in a forfeiture of their rights as appropriators."

Upon a second appeal it was said: "On the former appeal, it appeared from the findings that no beneficial use had been made of the water appropriated through plaintiffs' ditch for a period of five years next before the commencement of the action; and it was held that the right of plaintiffs and their grantor to the use of the water being one acquired by appropriation, a failure for that period to devote the water to a useful or beneficial purpose operated, under section 1411 of the Civil Code, to work a forfeiture of plaintiffs' rights thereto for nonuser, as against a subsequent appropriator"; and it was further held on the second appeal, "If plaintiffs could forfeit their future right of appropriation by nonuser, equally will they be held to forfeit less than the whole by like failure. In other words, the necessary result of the principles declared on that appeal is that, no matter how great in extent the original quantity may have been, an appropriator can hold, as against one subsequent in right, only the maximum quantity of water which he shall have devoted to a beneficial use at some time within the period by which his right would otherwise be barred for nonuser."[1]

In a case in the Federal court[2] Smith v. Hawkins was considered, but as less than five years of nonuser was shown, it was held unnecessary to pass upon that case. A Nebraska case seems to approve Smith v. Hawkins.[3] It has recently been cited with approval, though not actually applied, in California.[4]

The statute of limitations is sometimes referred to in other cases in this connection, but with a view to distinguishing the principle of nonuser alone from that of adverse use; that is,

[1] Smith v. Hawkins, 120 Cal. 86, 52 Pac. 139, 19 Morr. Min. Rep. 243.

[2] Integral etc. Co. v. Altoona etc. Co., 75 Fed. 379, 21 C. C. A. 409.

[3] Farmers' etc. Co. v. Frank, 72 Neb. 136, 100 N. W. 286.

[4] Ladd v. Johnston (1909), 156 Cal. 253, 104 Pac. 449, nonuser having lasted only one year; Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Cal. 404.

stating that the limitation period applies to claims of adverse use and not to nonuser at all, and as discouraging claims of abandonment, rather than otherwise. For example: "Such a right cannot be lost by nonuser alone short of the period of the limitation of actions to recover real property."[5] Instead of enforcing forfeiture, such an expression is in derogation thereof.

Smith v. Hawkins is pretty sure to be followed in California. It will place a limit of five years on the right to hold water for future needs in irrigation,[6] an important result of the case. In other States, nonuser of water held for future needs has been allowed to go on for ten years or more, without loss of right,[7] in the absence of statute specifying a shorter time in which the actual use must be accomplished.

(3d ed.)

§ 576. **Forfeiture Under Statutes.**—In Oregon an early statute provided that when a ditch is abandoned and thereafter for one year the claimant shall cease to exercise acts of ownership over the same, he shall be deemed to have lost all claim thereto.[8] In Dodge v. Marden[9] it was found that there was no intention to abandon, and it was held that the year of nonuser was not alone enough; that the statute does not dispense with intent; but, on the contrary, preserves the right for a year after that, granting, so to speak, an extra year of grace to the abandoning appropriator, and is hence diametrically opposed to Smith v. Hawkins instead of supporting it. The court said it would be necessary in showing loss of right "by this statute to show first that he had given up all claims to it, which would be an abandonment, and then that after such abandonment he had ceased for one

[5] People v. Farmers' etc. Co., 25 Colo. 202, 54 Pac. 626; Alamosa Co. v. Nelson, 42 Colo. 140, 93 Pac. 1112. The same words are used in Dodge v. Marden, 7 Or. 456, 1 Morr. Min. Rep. 63, from which this expression is evidently borrowed in the Colorado opinions.

[6] See "Appropriation for Future Needs," *supra*, sec. 483 et seq.

[7] *Ibid.*

[8] Oregon Comp. Stats. 1887, p. 1639, sec. 3833, Act Oct. 29, 1887, sec. 1, being section 7 of the act relating to mines and mining claims, page 685: "Whenever any person, company, or corporation, being the owner or proprietor of any ditch, flume or water-right, have or shall abandon the same, and who shall for one year thereafter cease to exercise ownership over said water-right, ditch or flume, and every company, corporation or person who shall remove from this State, with intent or purpose to change his or their residence, and shall remain absent one year without using or exercising ownership over such water-right, ditch or flume, by a legally authorized agent, shall be deemed to have lost all title, claim or interest therein."

[9] 7 Or. 457, 1 Morr. Min. Rep. 63.

year to exercise any acts of ownership over it." It thus, instead of providing forfeiture, weakens even the rule of abandonment by providing a year of grace not elsewhere given.[10] In Noland v. Coon [11] the Oregon statute referred to in Dodge v. Marden was enforced, an intent to abandon being shown to coexist with the one year (and more) of nonuser, and likewise in another case where a ditch was destroyed and filled up by a landslide and not used again to take out water for ten years, it was held an abandonment within the Oregon act.[12] This Oregon act is frequently referred to as providing forfeiture as distinguished from abandonment, but such reference is not correct, as it thus provides grace instead of forfeiture, and has no force in the direction of forfeiture.

The recent statutes and water codes usually contain a definite period of time after which nonuse causes loss of right. The earliest of these is the Wyoming law of 1888,[13] providing that nonuser for two years (now extended to five years) [14] "shall be deemed an abandonment." This has been held not to apply where such failure results from the unlawful diversion of another. It means a voluntary failure.[15] A Utah statute [16] contained the same provision as section 1411 of the California Civil Code, adding that when one "ceases to use the water for a period of seven years the right ceases; but questions of abandonment shall be questions of fact and shall be determined as other questions of fact." So far as this section has been before the court, the court has always considered it from the view of intention and abandonment; not of forfeiture.[17]

10 In a later Oregon case it is said: "The right to the use of water by nonuser alone cannot be deemed forfeited short of the period prescribed by the statute of limitations for real actions. Dodge v. Marden, 7 Or. 456, 1 Morr. Min. Rep. 63. But such right may become extinguished by any act showing an intent to surrender or abandon the right, after which, if the person having the right ceases its use for one year, his interest is lost." Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

11 1 Alaska, 36.

12 Ison v. Nelson Min. Co., 47 Fed. 199.

13 Rev. Stats., sec. 895.

14 *Infra.*

15 Morris v. Bean, 146 Fed. 434.

16 Now substantially Laws 1905, c. 108, sec. 53, and same in Stats. 1907. See Comp. Laws, 1907, sec. 1288x23.

17 Stalling v. Ferrin, 7 Utah, 477, 27 Pac. 686; Gill v. Malan, 29 Utah, 431, 82 Pac. 471; Promontory etc. Co. v. Argile, 28 Utah, 398, 79 Pac. 47. In the last case, the nonuser did not continue for seven years *consecutively;* otherwise the result, perhaps, might have been different.

A Montana statute contains the same provision. Mont. Civ. Code, sec. 1881.

Seven years of nonuser causes loss of right in Utah;[18] five in Wyoming[19] and Idaho;[20] four in New Mexico;[21] three in North Dakota[22] and South Dakota;[23] two years in Oklahoma.[24]

Such statutes as these will probably be construed in the light of Smith v. Hawkins, as providing for forfeiture *in invitum*, regardless of intent not to abandon. They preserve the possessory test (possession of the stream with a *bona fide intent*) for a definite period of years, but not after that.

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§ 577. **Transitionary State of the Law.**—The evolutionary condition of the law of appropriation at the present time from a possessory system to one based upon a specific use is shown markedly in the present matter. Arising upon the public domain (to which, in California, it remains confined) as a possessory right (though turned into a freehold by the act of 1866), it took on the characteristic features of a system based upon possession of the natural resource, or a portion of its flow. Actual diversion (the taking of possession) created the right; capacity of ditch (the amount in possession) measured the right; changes were permitted, the possession being independent of place or character of use. Beneficial use was represented by the requirement of a *bona fide intention;* and, as concerns loss of right, the right remained until possession was relinquished with actual *intention* to abandon.[25] The law of abandonment of appropriative rights is based upon this possessory origin of the law, concerned more with relinquishment of possession than with failure of use.

To-day, as we have frequently pointed out, the law of appropriation is undergoing a change in which possession of the stream or of its flow is ceasing to be important, and beneficial use is

18 Stats., *supra.*

19 Wyo. Stats. 1905, p. 36; Stats. 1907, p. 138, sec. 12; formerly two years in Stats. 1888, c. 55, sec. 14, Rev. Stats., sec. 895.

20 Idaho Stats. 1905, p. 27; but see Stats. 1907, p. 507, providing that this shall not apply to the doctrine of "annual increase" or "appropriation for future needs." *Supra,* sec. 483.

21 N. M. Stats. 1905, p. 270, sec. 5; Stats. 1907, p. 71; Hagerman etc. Co. v. McMurray (N. M.), 113 Pac. 823.

22 N. D. Stats. 1905, c. 34, sec. 48; formerly four years. Rev. Codes, 1905, sec. 765.

23 S. D. Stats. 1907, p. 373, sec. 46; formerly two years in Stats. 1905, p. 201, c. 132, sec. 45.

24 Okl. Stats. 1905, p. 274, c. 21, sec. 28. Two years in Kansas in some cases. See Gen. Laws, 1909, secs. 4430, 4442.

25 See cross-references, *supra,* sec. 139.

becoming very important. This has been affecting the law of loss of right. The first step away from the possessory test of loss of right was in the above matter, fixing a definite number of years of nonuse after which retention of possession of the flow ceased to be a consideration; five years in California and from two to five years under recent water codes; being the introduction of forfeiture as just considered.

A still further step is now well under way, looking almost solely to beneficial use at time of controversy. As considered under the question of beneficial use,[26] the decisions and statutes to-day are making "beneficial use the basis, the measure and the limit of the right," whether the time during which possession has been held without use has been reasonable or unreasonable, or whether it has exceeded the statutory number of years, or not. For a further consideration of this latest phase the reader is referred to another place.[1] Yet it is not clear that the law *should* wholly disregard the allowance of a reasonable time during which possession, though in nonuse, may be held; nor is it clear that the courts can, if they would, wholly disregard the retention of possession, though without use, for a fixed period of years, when such period is allowed by statute.

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§ 578. Conclusions Regarding Abandonment and Forfeiture.— As accurate conclusions of the present state of the law as the writer can form are as follows:

(a) Abandonment, strictly speaking, occurs only where there has been an actual relinquishment of possession of the flow, and an intention that the relinquishment be permanent. Nonuser is evidence of such intention, but must continue for an unreasonable time before it alone shows such intention. *Per contra,* during a reasonable time, the right to the flow to the capacity of the ditch (the amount in possession) is not lost by abandonment where there is nothing but nonuser to show an intention to abandon, and what is a reasonable time is a question of fact in each case.

(b) By the introduction of the principle of forfeiture in most States, the foregoing becomes true only for a fixed period (usually from two to five years) after which no intention to abandon is

[26] *Supra,* sec. 473 et seq.

[1] See cross-references, *supra,* sec. 139.

be specially pleaded.[19] It has also been held, however, provable by plaintiff under a general allegation of ownership.[20] To support a plea of prescription or estoppel there must be a finding of some definite quantity diverted.[21]

sequent use is established; but no evidence was offered showing an earlier use. Having established these facts, he made a *prima facie* showing of adverse user; and, this having been established, the burden of showing that such user was not a substantial interference with the rights of others was thereby shifted to the parties questioning such claim." Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728; Gardner v. Wright, 49 Or. 609, 628, 91 Pac. 286.

[19] Since actual title passes to the adverse claimant, he should, on principle, it would seem, be allowed to rely thereon by a general allegation of ownership, if a plaintiff, or a general denial of plaintiff's ownership, if a defendant. But the weight of authority that the writer has, supports the text strongly as to the pleading of the defendant though less strongly as to the pleading of plaintiff.

Defendant must plead title by adverse use affirmatively in order to rely thereon. Lux v. Haggin, 69 Cal. 255, at 267, 10 Pac. 674; American W. Co. v. Bradford, 27 Cal. 361, 15 Morr. Min. Rep. 190; Matthew v. Ferrea, 45 Cal. 51; Lux v. Haggin, 69 Cal. 269, 10 Pac. 674; McKeohn v. Northern Pac. Ry., 45 Fed. 464; State v. Quantic, 37 Mont. 32, 94 Pac. 491, quoting and relying on the first edition of this book, page 278. Also the following cases *semble:* Alhambra etc. Water Co. v. Richardson, 72 Cal. 598, 14 Pac. 379; Montgomery v. Locke, 72 Cal. 76, 13 Pac. 401; Chauvet v. Hill, 93 Cal. 407, 28 Pac. 1066; Churchill v. Louie, 135 Cal. 611, 67 Pac. 1052; Montecito W. Co. v. Santa Barbara, 144 Cal. 596, 77 Pac. 1113. He may plead it simply by name and reference to the statute of limitations (Partridge v. Shepard, 71 Cal. 470, 12 Pac. 480; Alhambra etc. Water Co. v. Richardson, 72 Cal. 598, 14 Pac. 379. See Churchill v. Louie, 135 Cal. 608, 67 Pac. 1052; Cal. Civ. Code, p. 458); but if he chooses to allege the facts showing adverse use, he will be held strictly to allegation of all necessary requisites. *Ibid.* The writer has no Western holding that defendant may show title by adverse use under a general denial, though such decisions may exist.

As to plaintiff's pleading, however (complaint or declaration), it is held that a general allegation of ownership suffices. Gillespie v. Jones, 17 Cal. 259; Montecito W. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. 1113; Sullivan v. Dunphy, 4 Mont. 505. But it has also been held to the contrary, and that plaintiff, like defendant, must specifically allege the title by adverse use. Lick v. Diaz, 30 Cal. 65; Heintzen v. Binninger, 79 Cal. 5, 21 Pac. 377. See, also, Cal. Civ. Code, sec. 458, and Winter v. Winter, 8 Nev. 129. See this case commented on in State v. Quantic, *supra.* At all events, if plaintiff chooses to allege the facts showing his adverse use, he, like the defendant, will be held to a strict allegation of all requisites (*Ibid.*), expecting that he need not allege payment of taxes. Ball v. Nichols, 73 Cal. 193, 14 Pac. 831.

Most of the cases above cited dealt with water-rights, but some with lands. Possibly a distinction may exist in that, strictly speaking, one "prescribes" only for incorporeal hereditaments, while he claims land strictly under the statute of limitations; in the former case, relying on the historical fiction of presumption of grant from immemorial use (now shortened by analogy, but by analogy only, to the period of limitations for real estate); while in the latter relying strictly on the statute as having barred all possible claim against him, so as to leave him in the position of an owner; a historical difference in theory, though reaching the same result.

[20] Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. 1113.

[21] Hayes v. Silver Creek etc. Co., 136 Cal. 240, 68 Pac. 704.

A right obtained by prescription may itself, in turn, be lost by adverse use later, or in other ways of loss of right.[22] In one case[23] it is said that an adverse use of land does not necessarily carry with it water used thereon, if there is no adverse use of the water. This would seem to be inconsistent with the rule that the water-right usually passes as an appurtenance to the land.[24]

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§ 580. Effect of Adverse Use or Prescription.—It is said that a grant will be presumed to have been made to the adverse claimant.[25] The rule is thus stated in Smith v. Hawkins:[1] "One who claims a right by prescription must use the water continuously, uninterruptedly and adversely for a period of five years, after which time the law will conclusively presume an antecedent grant to him of his asserted right." The rule is stated in substantially the same terms in Yankee Jim's Union Water Co. v. Crary,[2] saying: "The right of the first appropriator may be lost, in whole or in some limited portions, by the adverse possession of another. And when such person has had the continued, uninterrupted and adverse enjoyment of the watercourse or of some portion of it during the period limited by the statute of limitations for entry upon lands, the law will presume a grant of the right so held and enjoyed by him."[3]

The supposed grant, however, is merely a fiction of the law. It is not a reward of adverse diligence, but a punishment for delay; the law will not look into stale demands. The result is that title

22 City of Los Angeles v. Pomeroy, 125 Cal. 420, 58 Pac. 69; Gardner v. Wright, 49 Or. 609, 91 Pac. 286.

Mere nonuse for five years will extinguish a servitude acquired by enjoyment. Cal. Civ. Code, 811. This applies to a ditch. Los Angeles v. Pomeroy, 125 Cal. 420, 427, 58 Pac. 69; Smith v. Hawkins, 110 Cal. 122, 127, 42 Pac. 453 (*dictum*). *Quaere*, whether this applies to a water-right acquired by adverse use. It would seem not, since a water-right is not a servitude. Title to *land* acquired by adverse possession is not lost by mere nonuse.

Compare Strong v. Baldwin (1908), 154 Cal. 150, 129 Am. St. Rep. 149, 97 Pac. 178, as to nonuse not ending a prescriptive right where claimant ceased to use it personally and licensed use to another on his behalf as agent.

23 Alta Land Co. v. Hancock, 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. 645.

24 *Supra*, sec. 550 et seq.

25 Turner v. Tuolumne etc. Co., 25 Cal. 397, 1 Morr. Min. Rep. 107; Yankee Jim etc. Co. v. Crary, 25 Cal. 504, 85 Am. Dec. 145, 1 Morr. Min. Rep. 196; American Co. v. Bradford, 27 Cal. 360, 15 Morr. Min. Rep. 190; Faulkner v. Rondoni, 104 Cal. 140, 37 Pac. 883.

1 110 Cal. 120, 42 Pac. 453.

2 25 Cal. 509, 85 Am. Dec. 145, 1 Morr. Min. Rep. 196.

3 Yankee Jim's Union Water Co. v. Crary, 25 Cal. 509, 85 Am. Dec. 145, 1 Morr. Min. Rep. 196. Accord, Evans v. Ross (Cal.), 8 Pac. 88.

passes in either view.[4] Actual title passes, such as will support an action to quiet title,[5] or which can be proved under a general allegation of ownership.[6] The continuance of the use is hence no longer a cause of action as a continuing trespass.[7] The title once acquired is as complete as any other.[8]

The question of priority as concerns a right obtained by adverse use has not arisen, but seems a point that may well give difficulty. On the presumed grant theory, the newly-acquired right would retain the priority of the original appropriation, as a grant in writing transmits the right without loss of priority. But if that fiction is laid aside, it would seem that the adverse use gives a right only from the start of the adverse use, as a new appropriator by actual diversion, as in the case of a parol sale.[9] It has been said that the right obtained by adverse use dated only from the first adverse diversion,[10] and that "where a right rests upon the statute of limitations, 'the disseisor acquires a new title founded on the disseisin. He does not acquire or succeed to the title and

[4] Alhambra etc. Water Co. v. Richardson, 72 Cal. 598, 14 Pac. 379; Cal. Civ. Code, 1007; Woodward v. Faris, 109 Cal. 12, 41 Pac. 781; Strong v. Baldwin, 154 Cal. 150, 129 Am. St. Rep. 149, 97 Pac. 178.

[5] Bashore v. Mooney, 4 Cal. App. 276, 87 Pac. 553.

[6] Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 594, 77 Pac. 1113. Also to the effect that not only is the remedy barred, but title actually passes, Wutchumna etc. Co. v. Ragle, 148 Cal. 759, 84 Pac. 162.

[7] Patterson v. Ft. Lyon etc. Co., 36 Colo. 175, 84 Pac. 807. But in Henshaw v. Salt River etc. Co., 9 Ariz. 418, 84 Pac. 908, an action was allowed after the prescriptive period on the ground that it was a continuing trespass and only right of action for past diversion was barred, which would nullify the rule of adverse use entirely.

The injuries to land from water seeping from a properly constructed irrigation ditch which is intended to be permanent constitutes a single cause of action, and as affected by the statutes of limitations accrues at the beginning of the injury. Middelkamp v. Bessemer etc. Co. (1909), 46 Colo. 102, 103 Pac. 280, 23 L. R. A., N. S., 795. Likewise all cause of action from flooding is barred at the end of the statutory period, not from the completion of the structure, but from the first injury. Gulf Ry. Co. v. Moseley (Ind. Ter.), 161 Fed. 72; 88 C. C. A. 236; Greeley Irr. Co. v. Von Trotha (Colo.), 108 Pac. 985.

[8] "No principle of law is better established than that, when title is once acquired by adverse possession for the statutory period, such title remains in the person so acquiring it as completely as if conveyed to him by deed from the owner. (Citing Joy v. Stump, 14 Or. 361, 12 Pac. 929.) Therefore, after the title by such possession became complete, no interruptions were of any avail to plaintiffs, unless actual, open, exclusive, continuous, and adverse, under claim of ownership for the statutory period." Gardner v. Wright, 49 Or. 609, 91 Pac. 286, citing B. & C. Comp. Stats., sec. 4; Pearson v. Dryden, 28 Or. 350, 43 Pac. 166; Oregon Con. Co. v. Allen Ditch Co., 41 Or. 209, 93 Am. St. Rep. 701, 69 Pac. 455.

[9] *Supra*, sec. 555.

[10] Lavery v. Arnold, 36 Or. 84, 57 Pac. 906, 58 Pac. 524; Oregon etc. Co. v. Allen etc. Co., 41 Or. 209, 93 Am. St. Rep. 701, 69 Pac. 455.

estate of the disseisee, but is vested with a new title and estate founded on and springing from the disseisin.' "[11]

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§ 581. **Extent.**—The extent of the use during the prescriptive period limits the right.[12] Citing other authorities it is said:[13] "The principle declared by these authorities is that the rights of a party who has acquired a prescriptive title, and the rights of one against whom said title is acquired, are mutual, and each is entitled to demand that the prescriptive right be exercised in the same manner that it was exercised while it was being acquired." Adverse use for watering of stock alone could gain a right only to the extent of the use, and it would not confer any right to the additional use of water for the irrigation of land.[14]

Where plaintiff constructed an irrigation ditch across defendants' land, plaintiff could acquire a prescriptive right to use and maintain the ditch for the specific purpose of conveying a given quantity of water while defendants at the same time were using a portion of the same ditch to convey a separate distinct quantity of water, plaintiff's prescriptive right being limited to his use as measured by the quantity of *his* water carried through the ditch.[15] Consequently the prescriptive right may be for only a limited amount of water in a ditch,[16] and the person against whom it is acquired may use the property himself in any manner not inconsistent with the right thus limited.[17]

Not only is the right limited by the use, but conversely the right is coextensive with the use during the prescriptive period and cannot thereafter be restricted by the former owner, as, for example,

[11] Alhambra etc. Water Co. v. Richardson, 72 Cal. 598, 608, 14 Pac. 379.

[12] Burris v. People's Ditch Co., 104 Cal. 248, 37 Pac. 922; Hall v. Carter, 33 Tex. Civ. App. 230, 77 S. W. 19; North Fork Co. v. Edwards, 121 Cal. 662, 54 Pac. 69; Smith v. Hampshire, 4 Cal. App. 8, 87 Pac. 224; Knight v. Cohen, 7 Cal. App. 43, 93 Pac. 396; Chessman v. Hale, 31 Mont. 577, 79 Pac. 256, 68 L. R. A. 410, 13 Ann. Cas. 1038; Norman v. Corbley, 32 Mont. 195, 79 Pac. 1059; Smith v. Logan, 18 Nev. 149, 1 Pac. 678; Boynton v. Longley, 19 Nev. 69, 3 Am. St. Rep. 781, 6 Pac. 437; Church v. Stillwell, 12 Colo. App. 43, 54 Pac. 395; Mason v. Yearwood (Wash.), 108 Pac. 608; White v. White (1906), App. Cas. 72 (Eng.).

[13] Wutchumna etc. Co. v. Ragle, 148 Cal. 759, 84 Pac. 165. See, also, Logan v. Guichard (Cal. 1911), 114 Pac. 989.

[14] Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. 338; Same v. Same, 158 Cal. 206, 110 Pac. 927.

[15] Smith v. Hampshire, 4 Cal. App. 8, 87 Pac. 224.

[16] Bashore v. Mooney, 4 Cal. App. 276, 87 Pac. 553.

[17] Hoyt v. Hart, 149 Cal. 722, 87 Pac. 569. See, also, Oliver v. Burnett, 10 Cal. App. 403, 102 Pac. 223; Stock v. City of Hillsdale (1909), 155 Mich. 375, 119 N. W. 438; Union Min. Co.

a right acquired by prescription cannot be restricted by requiring notice to be given in advance when use is made, where such notice was not given during the prescriptive period.[18]

Adverse use of land does not carry title to a water-right appurtenant thereto if there was no specific use made of the water.[19]

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§ 582. **Essentials.**—The following are the requisites for the loss and acquisition of a right by adverse use or prescription, viz.: The use must be continuous for the statutory period, exclusive (i. e., uninterrupted; i. e., peaceable), open (i. e., notorious), under claim of right (i. e., color of title), hostile, and an invasion of the other's right which he has a chance to prevent, and taxes must be paid. We proceed to consider each of these separately.[20]

v. Dangberg, 81 Fed. 73. But see Whitehair v. Brown (1909), 80 Kan. 297, 102 Pac. 783.

"Title acquired by the adverse possession and user could only be commensurate and coextensive with the use to which the land was being subjected. The question as to the amount of ground necessary for the use of the ditch and right of way would be one of fact to be determined on the trial of the case, and could not be measured by the calls of the deed. . . . . In other words, the amount of land necessary for the ditch and right of way would have to be determined upon the proofs rather than upon the calls of the deed. It would extend only to the amount adversely used and occupied." Swank v. Sweetwater Irr. Co., 15 Idaho, 353, 98 Pac. 297.

18 Wutchumna etc. Co. v. Ragle, 148 Cal. 759, 84 Pac. 162. If claimant used all the flow there was, his prescriptive right extends to the whole flow, although in dry seasons the flow came to less than the amount claimed. Perry v. Calkins (Cal. 1911), 113 Pac. 136. See, however, Logan v. Guichard (Cal. 1911), 114 Pac. 989.

19 Alta etc. Co. v. Hancock, 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. 645. See, also, 93 Am. St. Rep. 719, note.

20 For a general statement of the requirements, see Unger v. Mooney, 63 Cal. 595, 49 Am. Rep. 100 (a leading case); Bashore v. Mooney, 4 Cal. App. 276, 87 Pac. 555; Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. 1113; Silva v. Hawn, 10 Cal. App. 544, 102 Pac. 952, and the note in 93 Am. St. Rep. 711.

"To have been adverse it must have been asserted under claim of title with the knowledge and acquiescence of the person having the prior right, and must have been uninterrupted. In order to constitute a right by prescription, there must have been such an invasion of the rights of the party against whom it is claimed, that he would have had ground of action against the intruder. To be adverse, it must be accompanied by all the elements required to make out an adverse possession; the possession must be by actual occupation, open, notorious, and not clandestine; it must be hostile to the other's title; it must be held under claim of title, exclusive of any other right, as one's own; it must be continuous and uninterrupted for the period of five years." Alta L. & W. Co. v. Hancock, 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. 645.

For recent examples where prescriptive rights were upheld, see Silva v. Hawn, 10 Cal. App. 544, 102 Pac. 952; Evans v. Lakeside D. Co., 13 Cal. App. 119, 108 Pac. 1027; Tosini v. Cascade etc. Co. (1909), 22 S. D. 337, 117 N. W. 1037; Davis v. Angelo, 8 Cal. App. 305, 96 Pac. 909; Davis v. Chamberlain, 51 Or. 304, 98 Pac. 154; Mason v. Yearwood (Wash.), 108 Pac. 608; Malmstrom v. People's D. Co. (Nev.), 107 Pac. 98.

Where persons whose names appeared on a map were owners of the

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§ 583. Continuous.—The use must be continuous for the period of the statute of limitations governing actions for the recovery of real property.[21] This period is five years in California,[22] which has been thought unfortunate as an unusually short period, but has been copied frequently in the West.[23] The statutory period is three years in Arizona;[24] five years in California,[25] Colorado,[1] Idaho,[2] Nevada;[3] seven years in Utah;[4] ten years in Nebraska,[5] Montana,[6] North Dakota,[7] Oregon,[8] Texas,[9] and Washington;[10] fifteen years in Kansas;[11] twenty years in South Dakota.[12]

It is sufficiently continuous if the adverse claimant used the water regularly as his needs required, though this did not necessitate a steady flow.[13] In one case,[14] it was held that where

various tracts of land marked with their respective names, and for over ten years they and their predecessors in interest had diverted and used through a certain ditch all the surface flow of the stream continuously and uninterruptedly and under claim of title as against all owners of land below the ditch, which ditch carried practically all the water of the stream, the former acquired a prescriptive right against the lower owners. Arroyo D. Co. v. Baldwin (1909), 155 Cal. 280, 100 Pac. 874.

Artificial contrivances are not necessary; use through existing or natural conduits may be adverse. Evans v. Lakeside D. Co., 13 Cal. App. 119, 108 Pac. 1027.

[21] Cal. Code Civ. Proc., 325; Mason v. Yearwood (Wash.), 108 Pac. 608; State v. Quantic, 37 Mont. 32, 94 Pac. 491.

[22] Cal. Code Civ. Proc., sec. 318.

[23] Pomeroy on Riparian Rights, secs. 137, 151.

[24] *Semble*, Rev. Stats. 1901, sec. 2935. Ten years in some cases.

[25] Code Civ. Proc., 318; Alta etc. Co. v. Hancock, 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. 645; Gallagher v. Water Co., 101 Cal. 242, 35 Pac. 770; Rice v. Meiners, 136 Cal. 292, 68 Pac. 817; Gutierrez v. Wege, 145 Cal. 730, 79 Pac. 449; Silva v. Hawn, 10 Cal. App. 544, 102 Pac. 952. Ten years against the State. Code Civ. Proc. 315.

[1] M. A. S., sec. 2923; Laws 1874, p. 177.

[2] Gen. Stats. 1887, sec. 4043; Hall v. Blackman, 8 Idaho, 272, 68 Pac. 19; Swank v. Sweetwater Co., 15 Idaho, 353, 98 Pac. 297.

[3] Boynton v. Longley, 19 Nev. 69, 3 Am. St. Rep. 781, 6 Pac. 437.

[4] Center etc. Co. v. Lindsay, 21 Utah, 192, 60 Pac. 559.

Compare, also, Lara v. Sandell, 52 Wash. 53, 100 Pac. 166.

[5] Crawford etc. Co. v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647, 93 N. W. 781, 60 L. R. A. 889.

[6] Smith v. Duff (1909), 39 Mont. 374, 133 Am. St. Rep. 582, 102 Pac. 981. See Talbott v. Butte etc. Co., 29 Mont. 17, 73 Pac. 1111, formerly five years, *semble*.

[7] Rev. Codes, 1905, sec. 4928.

[8] Ison v. Sturgill (Or.), 109 Pac. 579. Formerly twenty years (*semble*), Dodge v. Marden, 7 Or. 456, 1 Morr. Min. Rep. 63.

[9] Haas v. Choussard, 17 Tex. 588; Evans v. Scott, 37 Tex. Civ. App. 373, 83 S. W. 874.

[10] Benton v. Johncox, 17 Wash. 277, 61 Am. St. Rep. 912, 49 Pac. 496, 39 L. R. A. 107. Seven years (*semble*), Lara v. Sandell, 52 Wash. 53, 100 Pac. 166.

[11] Gen. Stats. 1905, sec. 4883.

[12] Rev. Codes 1903, Civ. Code, sec. 43.

[13] Hesperia etc. Co. v. Rogers, 83 Cal. 10, 17 Am. St. Rep. 209, 23 Pac. 196. See 93 Am. St. Rep. 717, note; Collins v. Gray, 3 Cal. App. 723, 86 Pac. 983; McDougal v. Lame, 39 Or. 212, 64 Pac. 864; Smith v. Logan, 18 Nev. 149, 1 Pac. 678; Strong v. Baldwin (1908), 154 Cal. 150, 129 Am. St. Rep. 149, 97 Pac. 178.

[14] McDougal v. Lame, just cited.

plaintiffs claimed an easement for mining purposes in the water of a stream which contained water only during the winter season, and plaintiffs used it whenever available, the fact that they did not use the water the entire year did not prevent their adverse use from being continuous. In the leading case of Hesperia etc. Co. v. Rogers,[15] Mr. Justice Thornton, commenting upon this principle, says: "The correct rule as to continuity of user, to give a presumptive right to an easement, and what shall constitute such continuity, can be stated only with reference to the nature and character of the right claimed. The right is not abandoned to the use of a ditch to convey water for purposes of irrigation, because water does not flow in it every day in the year. The party claimant does not need the ditch every day in the year, and the law does not require him, to constitute continuity of use, to use the water when he does not need it. If he has used the ditch at such times as he needed it, it is regarded by the law as a continuous use. If a right of way over another's land has been used for more than five years, it is not necessary, to make good such use, that the claimant has used it every day. He uses it every day, or once in every week, or twice a month, as his needs require. He is not required to go over it when he does not need it, to make his use of the way continuous. The claimant is required to make such reasonable use of the way as his needs require. So it is with the ditch. If, whenever the claimant needs it from time to time, he makes use of it, this is a continuous use."[16]

But, where the periodical character of the use arose not from claimant's own free will, but because of annual interruption by the owner, there is no adverse use.[17]

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§ 584. **Exclusive; Uninterrupted.**—The terms "exclusive" and "uninterrupted" probably represent the same thing in this connection; namely, that to the extent of the right claimed,[18] the

15 83 Cal. 10, 23 Pac. 196.

16 A more recent case says: "There is a finding, that for more than five years plaintiff and others used the same as often as required by them for irrigating purposes. This is a sufficient finding as to continuous use, having the character of use in view." Collins v. Gray, 3 Cal. App. 723, 86 Pac. 983.

An adverse user of an irrigation ditch during the cropping season only, constitutes a continuous adverse user. Silva v. Hawn, 10 Cal. App. 544, 102 Pac. 952.

17 Bree v. Wheeler, 4 Cal. App. 109, 87 Pac. 255.

18 See *supra*, sec. 459, as to use of ditch jointly with owner.

claimant must not have shared the use with the true owner, nor suffered any act of dominion by him, such as an interruption. The use must be uninterrupted.[19] Mere verbal objection is not an interruption; it must be some act actually causing a stoppage in the adverse use for a reasonable time,[20] though it has been held that use under continual dispute is not adverse.[21]

The burden of showing that the use was uninterrupted is on the adverse claimant.[22] Turning water out of defendant's (claimant's) ditch is sufficient interruption, though he turned it back again when plaintiff left.[23] An annual interruption prevents adverse use.[24] Secret interruption by stealth does not stop the running of adverse use.[25]

It has been held that the word "uninterrupted" comprehends "continuous,"[1] and that "uninterrupted" is synonymous with "peaceable" so far as necessary in pleading prescriptive title.[2]

A suit by a third person against the adverse claimant does not

[19] American Co. v. Bradford, 27 Cal. 360, 15 Morr. Min. Rep. 190; Davis v. Gale, 32 Cal. 36, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Cave v. Crafts, 53 Cal. 135; Bree v. Wheeler, 129 Cal. 145, 61 Pac. 782; Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, at 597, 77 Pac. 1113; Watts v. Spencer, 51 Or. 262, 94 Pac. 39; Union Mining Co. v. Dangberg, 81 Fed. 173, saying that an interruption, "however slight," prevents prescription.

[20] Cox v. Clough, 70 Cal. 345, 11 Pac. 732; Higuerra v. Del Ponte (Cal. App.), 88 Pac. 808; Oregon etc. Co. v. Allen etc. Co., 41 Or. 209, 93 Am. St. Rep. 701, 69 Pac. 455. It was not necessary in order to make plaintiff's adverse use of an irrigation ditch across defendant's land exclusive, that all other persons were excluded from using the ditch, so long as plaintiff's use thereof was not disturbed. Silva v. Hawn, 10 Cal. App. 544, 102 Pac. 952. See Perry v. Calkins (Cal. 1911), 113 Pac. 136.

[21] Faull v. Cooke, 19 Or. 455, 20 Am. St. Rep. 836, 26 Pac. 662.

Where the owner protested whenever claimant made his use and always sought to prevent him, no prescriptive right arises. Union Min. Co. v. Dangberg, 81 Fed. 73.

[22] Union Mining Co. v. Dangberg, 81 Fed. 73.

[23] Authors v. Bryant, 22 Nev. 242, 38 Pac. 439. See, also, Wasatch etc. Co. v. Fulton, 23 Utah, 466, 65 Pac. 205.

[24] Bree v. Wheeler, 4 Cal. App. 109, 87 Pac. 255.

[25] Brattain v. Conn, 50 Or. 156, 91 Pac. 458.

[1] Collins v. Gray, 3 Cal. App. 723, 86 Pac. 983. But see *contra*, Alta Co. v. Hancock, 85 Cal. 227, 20 Am. St. Rep. 217, 24 Pac. 645.

[2] Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. 1113, commenting on Cave v. Crafts, 53 Cal. 135, and saying: "It is true that in Cave v. Crafts, 53 Cal. 135, it is said that the adverse use must be peaceable. But that means no more, as the opinion itself explains, quoting Wood on Nuisances, than that it must be uninterrupted. Says Wood: 'The use must also be open and as of right, and also peaceable, for if there is any act done by other owners that operates as an interruption, however slight, it prevents the acquisition of the right by such use.' If the possession has been uninterrupted, of necessity it has been peaceable. If it had been interrupted, of necessity it has not been peaceable. The words are therefore interchangeable and synonymous in the pleading of prescriptive title."

affect or interrupt his adverse use as against a stranger to such suit.[3]

(3d ed.)

§ 585. **Open; Notorious.**—These terms, "open" and "notorious," probably represent the same thing in this connection.[4] The use must be open and "not clam," or clandestine, hidden or concealed.[5] This will hence be an important obstacle to claims to percolating water by adverse use.

Since the rules of adverse use are punitive, to induce watchfulness, the better view seems to be that it is sufficient if the adverse use was open and without attempt at concealment,[6] but a further restriction is sometimes held, requiring notice of the use to be brought home to the owner.[7] Knowledge by the owner of wrongful use of pipes underground must be brought home to him.[8] Between tenants in common, notice is held necessary.[9] Notice to an officer of a corporation is notice to the corporation in this respect.[10] It has been held that no adverse user can be initiated until the owners of the superior right are deprived of the benefit of its use in such a substantial manner as to notify them that their rights are being invaded.[11]

(3d ed.)

§ 586. **Claim of Right; Color of Title.**—The occupation must be under a claim of right by the adverse claimant, or, as it is

[3] Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. 1113.

[4] Smith v. Duff (1909), 39 Mont. 374, 133 Am. St. Rep. 582, 102 Pac. 981.

[5] Abbott v. Pond, 142 Cal. 393, 76 Pac. 60; Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, at 597, 77 Pac. 1113; Anaheim W. Co. v. Ashcroft, 153 Cal. 152, 94 Pac. 613 (use by a pump); Cal. Code Civ. Proc., secs. 322, 324; Hume v. Rogue Riv. Co., 51 Or. 238, 131 Am. St. Rep. 732, 83 Pac. 391, 92 Pac. 1072, 96 Pac. 865; Curtis v. La Grande Co., 20 Or. 34, 23 Pac. 808, 25 Pac. 378, 10 L. R. A. 484.

[6] Gurnsey v. Antelope etc. Co., 6 Cal. App. 387, 92 Pac. 326. (See 93 Am. St. Rep. 719, note.) Evans v. Lakeside D. Co., 13 Cal. App. 119, 108 Pac. 1027. "When the use is not secret or clandestine, but open, visible and notorious, the presumption of knowledge follows." Silva v. Hawn, 10 Cal. App. 544, 102 Pac. 955.

[7] Churchill v. Louie, 135 Cal. 608, 67 Pac. 1052; Britt v. Reed, 42 Or. 76, 70 Pac. 1029; Clark v. Ashley, 34 Colo. 285, 82 Pac. 588; Swank v. Sweetwater Co., 15 Idaho, 353, 98 Pac. 297; Weidensteiner v. Mally (1909), 55 Wash. 79, 104 Pac. 143.

[8] Gray v. Cambridge, 189 Mass. 405, 76 N. E. 195, 2 L. R. A., N. S., 977.

[9] Smith v. North etc. Co., 16 Utah, 194, 52 Pac. 283; Beers v. Sharpe, 44 Or. 386, 75 Pac. 717.

[10] Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. 1113.

[11] Wimer v. Simmons, 27 Or. 1, 50 Am. St. Rep. 685, 39 Pac. 6; North Powder Co. v. Coughanour, 34 Or. 9, 54 Pac. 223; Bowman v. Bowman, 35 Or. 279, 57 Pac. 546; Boyce v. Cupper, 37 Or. 256, 61 Pac. 642; Watts v. Spencer, 51 Or. 262, 94 Pac. 39.

sometimes put, under color of title.[12] A patent from the government to land through which water flows or percolates does not give color of title to the water under the Colorado doctrine of the effect of land patents on water-rights.[13] Claim of right is negatived by proof of an offer to purchase or rent.[14] In Oregon on a question of adverse use it has been held that it will be presumed that the use was under claim of right after death of the person initiating the use.[15] A use under a void deed as though the deed were good is adverse to the grantor, though not necessarily adverse to the right of strangers to the deed,[16] because it is a claim against the grantor and those in privity with him only. The claim is sufficient if by visible acts, and assertions by word of mouth are unnecessary.[17]

To give color of title, the adverse claimant may have begun his use in any character whatsoever, but if he began it in the character of an appropriator, pretending to have a valid appropriation, he must have made his adverse use a use for a beneficial purpose. Since a right of appropriation cannot be held without beneficial use, one pretending to be an appropriator has no color of title without beneficial use. It is consequently held that the adverse use must be for a beneficial purpose;[18] though the beneficial use need not be made immediately, a reasonable time being allowed, as in making the appropriation.[19] Rental and sale is a beneficial use.[20]

See Davis v. Chamberlain, 51 Or. 304, 98 Pac. 154; Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

12 Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. 1113; Winter v. Winter, 8 Nev. 129; Brossard v. Morgan, 7 Idaho, 215, 61 Pac. 1031; Center Creek etc. Co. v. Lindsay, 21 Utah, 192, 60 Pac. 559; American etc. Co. v. Bradford, 27 Cal. 360, 15 Morr. Min. Rep. 190; Davies v. Angel, 8 Cal. App. 305, 96 Pac. 909.

13 Clark v. Ashley, 34 Colo. 285, 82 Pac. 588.

14 Jensen v. Hunter (Cal.), 41 Pac. 17. But see Logan v. Guichard (Cal. 1911), 114 Pac. 989.

15 Bauers v. Bull, 46 Or. 60, 78 Pac. 757.

16 Rose v. Mesmer, 142 Cal. 322, 75 Pac. 905; Cal. Code Civ. Proc., secs. 322, 323, but see Knight v. Cohen, 7 Cal. App. 43, 93 Pac. 396. See Briggs v. Avary, 46 Tex. Civ. App. 488, 106 S. W. 904.

17 Gurnsey v. Antelope etc. Co., 6 Cal. App. 387, 92 Pac. 326; Knight v. Cohen, 6 Cal. App. 43, 93 Pac. 396.

18 Alta etc. Co. v. Hancock, 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. 645; Senior v. Anderson, 130 Cal. 290, at 297, 62 Pac. 563; Lavery v. Arnold, 36 Or. 84, 57 Pac. 907, 58 Pac. 524; Oregon etc. Co. v. Allen, 41 Or. 209, 69 Pac. 455, see 93 Am. St. Rep. 701, note.

19 Oregon etc. Co. v. Allen etc. Co., 41 Or. 209, 93 Am. St. Rep. 701, 69 Pac. 455.

20 Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. 1113. As to what is beneficial use, see *supra*, secs. 378, 481.

While the above decisions requiring beneficial use on the part of the adverse claimant used general language applying to all, yet the rule would seem not to apply to an adverse claimant not pretending to be an appropriator, and is hence doubted as applying to adverse claimants in other character.[21] For example, a riparian proprietor (in jurisdiction recognizing riparian rights) need not make beneficial use of the water to give color of title, and there would be no reason why one claiming adversely in that character need use the water beneficially.[22]

An adverse claimant in the character of an appropriator has, at the same time, color of title without posting a notice of appropriation, since his actual diversion is sufficient color of title as appropriator by actual diversion.[23] Hence, posting a notice, while valuable evidence, is not necessary to support a right by adverse use.[24] The place of use is also immaterial.[25]

Satisfactory proof of a continuous, open, notorious and uninterrupted use of the waters for the statutory period, and of such a character as to unquestionably indicate that the use was being exercised in hostility to the right of any person to interfere with its exercise is sufficient proof that they claimed a right to use it.[1]

(3d ed.)

§ 587. Hostile to Owner; Permission.—The use must be hostile to the owner;[2] hence permissive use is not adverse. If there is permission, the use, however long continued, cannot ripen into a right by prescription.[3]

21 93 Am. St. Rep. 729, note.

22 A superior court decision in California somewhat to this effect was rendered by Judge J. M. Seawell, sitting in Madera County, in the case of California Pastoral Co. v. Madera Canal Co., 1906.

23 *Supra*, sec. 364.

24 Alta etc. Co. v. Hancock, 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. 645; Frederick v. Dickey, 91 Cal. 360, 27 Pac. 742.

25 Southern Cal. etc. Co. v. Wilshire, 144 Cal. 68, 77 Pac. 767; Meng v. Coffey, 67 Neb. 500, 108 Am. St. Rep. 697, 93 N. W. 715, 60 L. R. A. 910.

1 Anaheim W. Co. v. Ashcroft (1908), 153 Cal. 152, 94 Pac. 613; Evans v. Lakeside D. Co., 13 Cal. App. 119, 108 Pac. 1027.

2 Hayes v. Martin, 45 Cal. 563; McManus v. O'Sullivan, 48 Cal. 7; Francoeur v. Newhouse, 43 Fed. 238; Rhoades v. Barnes, 54 Wash. 145, 102 Pac. 884.

3 Ball v. Kehl, 95 Cal. 606, 30 Pac. 780; Jensen v. Hunter (Cal.), 41 Pac. 17; Oliver v. Burnett (1909), 10 Cal. App. 403, 102 Pac. 223; Davis v. Martin, 157 Cal. 657, 108 Pac. 866 (fifty years); Jobling v. Tuttle, 75 Kan. 351, 89 Pac. 699, 9 L. R. A., N. S., 960; Yeager v. Woodruff, 17 Utah, 361, 53 Pac. 1045; Hall v. Blackman, 8 Idaho, 272, 68 Pac. 19; Anderson v. Bassman, 140 Fed. 25; Knight v. Cohen, 7 Cal. App. 43, 93 Pac. 396; Watts v. Spencer, 51 Or. 262, 94 Pac. 39; Metcalfe v. Faucher (Tex. Civ. App.), 99 S. W. 1038; Rhoades v. Barnes, *supra;* Weiden-

Who has the burden of proof where permission is set up? Upon the ultimate issue of adverse use the adverse claimant has the burden of proof;[4] but it is held that use otherwise falling within the requirements will make a *prima facie* title by adverse use and will raise a presumption that the use was not permissive; thereby putting upon the party asserting that there was permission, the burden of proving it. It is said in one case:[5] "Where an open and uninterrupted use of an easement for a sufficient length of time to create the presumption of a grant is shown, if the other party relies on the fact that these acts or any part of them were permissive, it is incumbent on such party, by sufficient proof, to rebut such presumption of a nonappearing grant; otherwise the presumption stands as sufficient proof, and establishes the right."[6]

The case quoted in the foregoing note would, however, also apply the rule to any element in opposition to the adverse right, thus putting upon owners the duty of disproving adverse claims instead of requiring the trespasser to "make good." It has been said that a man's title should count for something in controversies of this character.[7]

(3d ed.)

§ 588. Invasion of Right.—The use must "substantially interfere" with the property of the owner;[8] there must be an actual invasion of his property.[9] There must have been such a use of the water, and such damage, as would raise a presumption that

steiner v. Mally (1909), 55 Wash. 79, 104 Pac. 143, citing this section (2d ed., sec. 248).

[4] *Supra*, sec. 579.

[5] Fleming v. Howard, 150 Cal. 28, 87 Pac. 908.

[6] Accord, Gurnsey v. Antelope Co., 6 Cal. App. 387, 92 Pac. 326; Knight v. Cohen, 7 Cal. App. 43, 93 Pac. 396.

"While an adverse right cannot grow out of mere permissive enjoyment, the burden of proving possession thus claimed to have been held by such permission or subserviency is cast upon the party attempting to defeat such claim." Gardner v. Wright, 49 Or. 609, 91 Pac. 286, citing Coventon v. Seufert, 23 Or. 548, 32 Pac. 508; Rowland v. Williams, 23 Or. 515, 32 Pac. 402; Bauers v. Bull, 46 Or. 60, 78 Pac. 757; Horbach v. Boyd, 64 Neb. 129, 89 N. W. 644.

[7] Jensen v. Hunter (Cal.), 41 Pac. 17. Not officially reported.

[8] Gardner v. Wright, 49 Or. 609, 91 Pac. 286.

[9] American etc. Co. v. Bradford, 27 Cal. 360, 15 Morr. Min. Rep. 190; Oneto v. Restano, 78 Cal. 374, 20 Pac. 743; Paige v. Rocky Ford etc. Co., 83 Cal. 84, 21 Pac. 1102, 23 Pac. 875; Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748; Perry v. Calkins (Cal. 1911), 113 Pac. 136; Rhoades v. Barnes (1909), 54 Wash. 145, 102 Pac. 884; Ison v. Sturgill (Or.), 109 Pac. 579; Carson v. Hayes, 39 Or. 97; 65 Pac. 814; Wimer v. Simmons, 27 Or. 18, 50 Am. St. Rep. 685, 39 Pac. 6; Huston v. Bybee, 17 Or. 140, 20 Pac. 51, 2 L. R. A. 568.

complainant would not have submitted to it unless the respondents had acquired the right to so use it.[10] The burden is on the adverse claimant to show such invasion.[11]

There are numerous cases holding that this does not mean that actual damage as measured in money need be occasioned by the adverse claimant, however, since a right of property is invaded by any acts inconsistent with it (*injuria sine damno*), and the use may be adverse, irrespective of the amount of damage, however small that may be ("nominal damage"); even if there is no actual money damage at all.[12] In this connection, it is necessary, however, to refer to other sections where the application of this doctrine is limited considerably by the modern tendency of the law. The cases just cited considered the appropriation primarily measured by capacity of ditch, and not by beneficial use short of abandonment. By statute this is now done away with after a fixed period of nonuse, and even within the period injunctions are largely refused unless the plaintiff can show actual damage to his use at the time of suit. The law upon this matter is in a transitionary state, and presents some confusion.[13] The usual statement in the decisions to-day is that no prescription can arise *under the system of appropriation* without damage to *actual use,* nor if water is taken when the owner has no need for it,[14] because under such circumstances the water is

[10] Union Mining Co. v. Dangberg, 81 Fed. 73, citing Dick v. Bird, 14 Nev. 161; Dick v. Caldwell, 14 Nev. 167; Boynton v. Longley, 19 Nev. 69, 76, 3 Am. St. Rep. 781, 6 Pac. 437; Water Co. v. Crary, 25 Cal. 504, 85 Am. Dec. 145; Grigsby v. Water Co., 40 Cal. 396, 406; Anaheim Water Co. v. Semi-Tropic Water Co., 64 Cal. 185, 30 Pac. 623; Alta etc. Water Co. v. Hancock, 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. 645; Last Chance etc. Ditch Co. v. Heilbron, 86 Cal. 1, 12, 26 Pac. 523; Black's Pomeroy on Water Rights, sec. 132; Kinney on Irrigation, secs. 293, 294, 297.

[11] Ison v. Sturgill (Or.), 109 Pac. 579.

[12] Moore v. Clear etc. Works, 68 Cal. 146, 8 Pac. 816; Stanford v. Felt, 71 Cal. 249, 16 Pac. 900; Heilbron v. Fowler etc. Canal Co., 75 Cal. 426, 7 Am. St. Rep. 183, 17 Pac. 535; Conkling v. Pacific etc. Co., 87 Cal. 296, 25 Pac. 399; Walker v. Emerson, 89 Cal. 456, 26 Pac. 968; Spargur v. Hurd, 90 Cal. 221, 27 Pac. 198; Mott v. Ewing, 90 Cal. 231, 27 Pac. 194. See *infra,* sec. 642. Compare cases cited *infra,* sec. 815 et seq., regarding riparian rights.

[13] See cross-references, *supra,* sec. 139.

[14] E. g., Smith v. Duff (1909), 39 Mont. 374, 133 Am. St. Rep. 582, 102 Pac. 981; Ison v. Sturgill (Or.), 109 Pac. 579; Miller v. Wheeler (1909), 54 Wash. 429, 103 Pac. 641, 23 L. R. A., N. S., 1065; Morris v. Bean (Mont.), 146 Fed. 433; affirmed in Bean v. Morris, 159 Fed. 651, 86 C. C. A. 519; Jobling v. Tuttle, 75 Kan. 351, 89 Pac. 699, 9 L. R. A., N. S., 960; Egan v. Estrada, 6 Ariz. 248, 56 Pac. 721; Meng v. Coffey, 67 Neb. 500, 108 Am. St. Rep. 697, 93 N. W. 713, 60 L. R. A. 910; Watts v. Spencer, 51 Or. 262, 94 Pac. 39; Anaheim W. Co. v. Semi-Tropic Co., 64 Cal. 185, 192, 30 Pac. 623; Last

open to appropriation, and prescription is unnecessary to give a right.[15]

Between tenants in common, before possession of one, or a sale by him, becomes adverse to the others, there must be an actual ouster and notice or knowledge of the adverse intention.[16]

There can be no adverse use by lower claimants against those above, since a use below can in no way interfere with the flow above (omitting cases of "backing" the water and flooding); it is no possible invasion of the right of the upper owner. Lower use is not adverse.[17] Nor is the use of a surplus above the appropriator adverse to him, since it leaves the amount to which he is entitled uninvaded.[18] No right by adverse use can hence result from use below, or from use of surplus above.[19]

There can be no adverse use (between appropriators) for the same reason, where during the prescriptive period, there has been water enough for all users.[20] (*Quaere*, whether this applies to adverse use against a riparian proprietor, the invasion of whose right does not depend upon the fact that he has enough for his present use.) "A mere scrambling possession of the water or the obtaining of it by force or fraud[21] gives no prescriptive right; nor can this right be acquired if, during the time in which such right is claimed to have accrued, there has been an abundant supply of water in the stream or river for other claimants."[22] In

Chance Co. v. Heilbron, 86 Cal. 20, 26 Pac. 523; Featherman v. Hennessey (Mont. 1911), 113 Pac. 751.

15 *Supra*, sec. 481, beneficial use.

16 Smith v. North Canyon etc. Co., 16 Utah, 194, 52 Pac. 283; Beers v. Sharpe, 44 Or. 386, 75 Pac. 717; Oliver v. Burnett (1909), 10 Cal. App. 403, 102 Pac. 223.

17 Hargrave v. Cook, 108 Cal. 72, 41 Pac. 18, 30 L. R. A. 390; Bathgate v. Irvine, 126 Cal. 135, 77 Am. St. Rep. 158, 58 Pac. 442; Cave v. Tyler, 133 Cal. 566, 65 Pac. 1089; Davis v. Martin, 157 Cal. 657, 108 Pac. 866; Perry v. Calkins (Cal.), 113 Pac. 136; Harrington v. Demarris, 46 Or. 111, 77 Pac. 605, 82 Pac. 14, 1 L. R. A., N. S., 756; North Powder Co. v. Coughanour, 34 Or. 9, 54 Pac. 223; Bowman v. Bowman, 35 Or. 279, 57 Pac. 546; Beers v. Sharpe, 44 Or. 386, 75 Pac. 719; Wimer v. Simmons, 27 Or. 1, 50 Am. St. Rep. 685, 39 Pac. 6; Hallett v. Davis (1909), 54 Wash. 326, 103 Pac. 423.

18 Fifield v. Spring Valley etc. Works, 130 Cal. 552, 62 Pac. 1054; Faulkner v. Rondoni, 104 Cal. 140, 37 Pac. 883.

19 See, also, 93 Am. St. Rep. 717, note; Talbott v. Butte etc. Co., 29 Mont. 17, 73 Pac. 1111; Norman v. Corbley, 32 Mont. 195, 79 Pac. 1059.

20 Smith v. Duff (1909), 39 Mont. 374, 133 Am. St. Rep. 582, 102 Pac. 981; Miller v. Wheeler (1909), 54 Wash. 429, 103 Pac. 641; Jobling v. Tuttle, 75 Kan. 351, 89 Pac. 699, 9 L. R. A., N. S., 960; Egan v. Estrada, 6 Ariz. 248, 56 Pac. 721; Meng v. Coffey, 67 Neb. 500, 108 Am. St. Rep. 697, 93 N. W. 713, 60 L. R. A. 910; Watts v. Spencer, 51 Or. 262, 94 Pac. 39; Anaheim W. Co. v. Semi-Tropic Co., 64 Cal. 185, 192, 30 Pac. 623; Last Chance Co. v. Heilbron, 86 Cal. 20, 26 Pac. 523.

21 *Sed qu.*

22 Union etc. Co. v. Dangberg, 81 Fed. 73.

Morris v. Bean [23] it is said that the aid of the statute of limitations has occasionally been invoked with success, but not in cases of a scrambling possession, and the burden is upon the adverse claimant to bring himself within the statute, and the proof must be clear before a prescriptive right will be enforced.

To constitute adverse use by a tenant against his landlord there must first be an open repudiation of the tenancy by the tenant, for otherwise he will be estopped to deny his landlord's title, and his holding will not be adverse until such open repudiation of the lease has been made.[24]

(3d ed.)

§ 589. **Chance to Prevent.**—There must be a chance for the true owner to prevent the use by the claimant, either by physical force or legal proceedings.[25] "In order to obtain a right by prescription it is necessary that during the prescriptive period an action could have been maintained by the party against whom the claim is made."[1] Hence, another reason why there can be no right by adverse use from use below, or of the surplus above, the appropriator.

As there was no right of action for loss of percolating water under the old rule, no right to it could be acquired by adverse use, under the old rule.[2] No prescriptive right could be had, since no action would lie against the adverse claimant to recover the water during the prescriptive period.[3] Under the new rule giving a right of action in some cases, a prescriptive right may arise.[4]

23 (Mont.), 146 Fed. 433.

24 "When a tenancy is once shown to exist, in order to set the statute of limitations running in favor of the tenant desiring to avail himself of it, to acquire title by adverse possession he must openly and explicitly disclaim and disavow any and all holding under his former landlord; and, further, he must unreservedly and steadily assert that he himself is the owner of the true title, all of which must be brought home to the knowledge of the rightful owner." Coquelle etc. Co. v. Johnson, 52 Or. 549, 132 Am. St. Rep. 716, 98 Pac. 132, citing Nessley v. Ladd, 29 Or. 354, 45 Pac. 904. Compare Swift v. Goodrich, 70 Cal. 103, 1 Pac. 561.

25 Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299; Montecito etc. v. Santa Barbara, 144 Cal. 578, at 597, 77 Pac. 1113; but see Alhambra etc. Water Co. v. Richardson, 72 Cal. 598, 14 Pac. 379; Fogarty v. Fogarty, 129 Cal. 46, 61 Pac. 570.

1 Chessman v. Hale, 31 Mont. 577, 79 Pac. 256, 68 L. R. A. 410, 3 Ann. Cas. 1038; accord, Perry v. Calkins (Cal. 1911), 113 Pac. 136; Smith v. Duff (1909), 39 Mont. 374, 133 Am. St. Rep. 582, 102 Pac. 981; Davis v. Chamberlain, 51 Or. 304, 98 Pac. 154; North Powder Co. v. Coughanour, 34 Or. 9, 54 Pac. 223; Wimer v. Simmons, 27 Or. 1, 50 Am. St. Rep. 685, 39 Pac. 6; Boyce v. Cupper, 37 Or. 256, 61 Pac. 642; Anderson v. Bassman (C. C.), 140 Fed. 10.

2 Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299.

3 Crescent etc. Co. v. Silver etc. Co., 17 Utah, 444, 70 Am. St. Rep. 810, 54 Pac. 244.

4 *Infra*, sec. 1170.

(3d ed.)

§ 590. **Payment of Taxes.**—Statutes usually require the claimant to real estate by adverse use to have paid the taxes thereon during the prescriptive period.[5] This applies also to water-rights, as they are real estate.[6] In construing this rule, the adverse claimant is favored. If no taxes were assessed, the rule is inoperative.[7] The burden of proof that taxes were assessed, and also that they were not paid, is not on the adverse claimant, but on the owner.[8] If the claimant used the water upon other land owned by him, and paid the taxes assessed upon that land generally, that fulfills the requisite, though there was no separate or specific payment of taxes for the water, there having been no separate assessment thereof.[9] Where an irrigation ditch across defendant's land which plaintiff claimed the use of by adverse user was not assessed apart from the land, or at all, payment of taxes by plaintiff was not necessary to establish adverse user; and since an easement need not be assessed apart from the land, the burden was on defendant to show that the ditch was so assessed if he claimed that payment of taxes by plaintiff was necessary to establish adverse user.[10] If the owner pays the taxes on the last year of the prescriptive period, this stops the running of prescription, although the trespasser paid during the other four years, and the assessment was made in the fifth year also.[11] If the owner pays first, a duplicate payment by the trespasser is of no avail to the latter.[12]

The requirement that taxes be paid is purely statutory, and does not exist at common law.[13]

5 E. g., Cal. Code Civ. Proc., sec. 325; Colo. M. A. S., sec. 2923; Ariz. Rev. Stats. 1901, sec. 2935 et seq.; Idaho Rev. Stats. 1887, sec. 4043.

6 Frederick v. Dickey, 91 Cal. 358, 27 Pac. 742; Swank v. Sweetwater Irr. Co., 15 Idaho, 353, 98 Pac. 297.

7 Heilbron v. Last Chance Water etc. Co., 75 Cal. 117, 17 Pac. 65; Oneto v. Restano, 78 Cal. 374, 20 Pac. 743; Hesperia etc. Co. v. Rogers, 83 Cal. 10, 17 Am. St. Rep. 202, 23 Pac. 196.

8 *Ibid.*

9 Coonradt v. Hill, 79 Cal. 587, 21 Pac. 1099.

10 Silva v. Hawn, 10 Cal. App. 544, 102 Pac. 952.

11 Glowner v. Alvarez, 10 Cal. App. 194, 101 Pac. 432.

12 Cavanaugh v. Jackson, 99 Cal. 672, at 675, 676, 34 Pac. 509.

13 "It appears that this ditch has never been assessed separately from the land, but that the Puente Rancho was always assessed wholly to Baldwin and that he paid the taxes thereon. It is urged, in view of these circumstances, that under section 325, Code of Civil Procedure, title by prescription could not have been acquired by plaintiffs and cross-defendants. A sufficient answer to this claim is that their title by prescription was complete prior to the amendment of section 325, Code of Civil Procedure, making the payment of taxes an element of adverse possession, which amendment was enacted in 1878, and that such amendment therefore has no application." Strong v. Baldwin, 154 Cal. 150, 129 Am. St. Rep. 149, 97 Pac. 178, citing Lucas v. Provines, 130 Cal. 270, 62 Pac. 509.

(3d ed.)

§ 591. **Against the United States or the State.**—There can be no adverse use against the United States, and hence if the title to the water or land involved was in the government any part of the five years, no prescriptive right can arise.[14] And, also, consequently, the acquisition of a right by appropriation and one by adverse use stand on entirely different footings.[15] This, however, has reference only to the point of diversion or to the land through which the stream or ditch runs, and has no reference to the place of the adverse use. Title to the place of use is immaterial, and the use may be made upon public land and nevertheless be adverse to private rights in the water.[16]

Against the State prescription is usually allowed by statute, but under a longer time than against a private party. As against the State of California, prescriptions may be acquired by ten years' adverse use.[17]

(3d ed.)

§ 592. **Conclusion.**—In one case it is said that a man's title should count for something in controversies of this character;[18] and in another, "From these observations it will be seen that it is difficult to obtain a prescriptive right to the use of water under our law as it now stands." This remark was made by the Idaho court,[19] after setting forth requirements similar to those given above; and the result in the many cases where a right by adverse use was contended for substantiates this conclusion.

Reference should also be made to the sections upon prescription under the law of riparian rights and the law of percolating water.[20]

D. ESTOPPEL.

(3d ed.)

§ 593. **Elements of Estoppel in Pais.**—The elements requisite for estoppel are substantially those necessary to found an action

[14] Mathews v. Ferrea, 45 Cal. 51; Wilkins v. McCue, 46 Cal. 656; Jatunn v. Smith, 95 Cal. 154, 30 Pac. 200; Smith v. Hawkins, 110 Cal. 122, 42 Pac. 453; Vansickle v. Haines, 7 Nev. 249; Wattier v. Miller, 11 Or. 329, 8 Pac. 354; Union Min. Co. v. Ferris, 2 Saw. 179, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90.

[15] *Supra*, sec. 579.

[16] Southern Cal. etc. Co. v. Wilshire, 144 Cal. 68, 77 Pac. 767; Meng v. Coffey, 67 Neb. 500, 108 Am. St. Rep. 697, 93 N. W. 715, 60 L. R. A. 910.

[17] Code Civ. Proc., 315; Civ. Code, sec. 1007.

[18] Jensen v. Hunter (Cal.), 41 Pac. 17.

[19] Hall v. Blackman, 8 Idaho, 272, 68 Pac. 19.

[20] *Infra*, secs. 863, 1170.

for deceit, with the exception of the element of knowledge of falsity. In deceit there must be some statement, or conduct implying a statement, which is untrue, intending the other party to act and he does act thereon, damage, and knowledge by the party making the statement that it is untrue. The omission of the last element from estoppel is the only substantial difference. This is substantially set forth in the following passage from Lux v. Haggin:[21] "There are estoppels *in pais*, as where a defendant is induced to act by the declarations or conduct of a plaintiff, which are a defense both at law and equity. Here we cannot discover the elements of such an estoppel. The defendant has acted with full knowledge of all the facts, and, as must be presumed, with full knowledge of the law controlling the rights of the parties. To constitute the estoppel the party claiming the benefit of it must be destitute of knowledge of his own legal rights, and of the means of acquiring such knowledge. To constitute such an estoppel it must also be shown that the person sought to be estopped has made an admission or done an act with the intention of influencing the conduct of another, or that he had reason to believe would influence his conduct, inconsistent with the evidence he proposes to give, or the title he proposes to set up; that the other party has acted upon, or been influenced by, such act or declaration; that the party so influenced will be prejudiced by allowing the truth of the admission to be disproved. In the case before us the fact relied on as proving the estoppel is that plaintiff had knowledge of the expensive canals and other works of defendant while they were in progress, and did not object to them. The bare fact that ditches, etc., were constructed with the knowledge of the plaintiffs, though at great expense, without objection by plaintiffs is not sufficient to constitute (such) an estoppel."[22]

21 69 Cal. 255, 10 Pac. 674.

22 In Biddle Boggs v. Merced Min. Co., 14 Cal. 279, 10 Morr. Min. Rep. 334, a leading case upon the subject of estoppel, Judge Field said: "It is undoubtedly true that a party will, in many instances, be concluded by his declarations or conduct, which have influenced the conduct of another to his injury. The party is said in such cases to be estopped from denying the truth of his admissions. But to the application of this principle with respect to the title of property it must appear: *First*, that the party making the admission by his declarations or conduct was apprised of the true state of his own title; *second*, that he made the admission with the express intention to deceive, or with such careless and culpable negligence as to amount to culpable fraud; *third*, that the other party was not only destitute of all knowledge of the true state of the

The fact that a subsequent appropriator employed the prior appropriator (plaintiff) in the construction of its works does not alone raise an estoppel against plaintiff,[23] though it is otherwise where plaintiff gave his actual consent to the works.[24] In one case[25] it was said: "The evidence shows that the plaintiff was employed by the defendant about its mill; that he knew it was being constructed to reduce ores and made no objection to the erection thereof. Such tacit acquiescence, however, is not sufficient to create an equitable estoppel. To produce such an impediment, the evidence must conclusively show that money has been expended or labor performed in making permanent and valuable improvements upon real property pursuant to an agreement of the parties, in relation to the exercise of some right over an easement in the lands of another, or some joint participation of the parties in the enterprise from which a license to do the particular act relied upon may reasonably be inferred."

Where a water company served written notice of its claim, this prevents any estoppel in favor of the persons so served by reason of any subsequent expenditures by them.[1]

The question is often confused with considerations of laches and acquiescence as barring an injunction—an entirely different matter.[2]

(3d ed.)

§ 594. **Estoppel by Silence.**—A person entitled to the use of water is not deprived thereof by estoppel on merely seeing another constructing a ditch or other works and making no objection thereto until the diversion is completed. Merely standing by while a wrongdoer incurs expense with a view to consummate his plans creates no estoppel.[3] The principle is the same as that set

title, but of the means of acquiring such knowledge; and *fourth*, that he relied directly upon such admission, and will be injured by allowing its truth to be disproved. These qualifications in the application of the doctrine will be found fully sustained by the authorities. There must be some degree of turpitude in the conduct of a party before a court of equity will estop him from the assertion of his title—the effect of the estoppel being to forfeit his property and transfer it to another."

[23] Brown v. Gold Coin Min. Co., 48 Or. 277, 86 Pac. 363.

[24] Churchill v. Baumann, 104 Cal. 369, 36 Pac. 93, 38 Pac. 43. See Cal. Civ. Code, sec. 3516.

[25] Brown v. Gold Coin Min. Co., *supra*.

[1] Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. 338; Same v. Same, 158 Cal. 206, 110 Pac. 927; Burr v. Maclay R. Co., 154 Cal. 428, 98 Pac. 260.

[2] *Infra*, secs. 644 et seq., 651.

[3] Davis v. Martin, 157 Cal. 657, 108 Pac. 866; Anaheim Co. v. Semi-Tropic Co., 64 Cal. 185, 194, 30 Pac. 623; Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Hargrave v. Cook, 108 Cal.

forth in regard to the use of waste water coming from a ditch, and the authorities there cited are also in point.[4] Lower or upper rights in the natural stream may arise by appropriation; or upper rights by adverse use; but standing by while others use the water, having neither such right, does not alone work an estoppel in their favor. If one has no right by appropriation or adverse use, the mere silence of others gives him none by estoppel.

Estoppels may arise where the necessary facts are present. But the claim is usually based on silence, standing by, and similar omission to act while another is incurring expense in arranging hostile plans. "It is safe to say that few cases of this character have been tried where the defense of estoppel has not been interposed with result uniformly unsuccessful. The estoppel argued for here is that the parties now seeking to assert their rights ought not to be allowed to do so, because they knew that the defendants were building up their improvements, and relying upon the use of the water to maintain them. An all-sufficient answer to this is that the defendants knew also that the complainant and intervener were relying upon the same water to maintain their improvements already made, and to carry on their farming operations already begun. Under this view of it the one side is as much estopped as the other."[5]

The fact that one who had filed a homestead entry on land made no objection to the construction of a ditch thereon by an irrigation company until after he had obtained his patent did not estop him from asserting that his patent was not subject to the com-

72, 41 Pac. 18, 30 L. R. A. 390; Bathgate v. Irvine, 126 Cal. 136, 77 Am. St. Rep. 158, 58 Pac. 442; Miller & Lux v. Madera etc. Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A., N. S., 391; Farmers' Co. v. Pawnee Co., 47 Colo. 239, 107 Pac. 286; Snyder v. Colo. etc. Co. (Colo.), 181 Fed. 62; Hill v. Standard Min. Co., 12 Idaho, 223, 85 Pac. 912; Walker v. Elmore County, 16 Idaho, 696, 102 Pac. 389; Rasmussen v. Blust, 83 Neb. 678, 120 N. W. 184; Trambley v. Luterman, 6 N. M. 26, 27 Pac. 312; Garrett v. Bishop, 27 Or. 349, 41 Pac. 10; Smyth v. Neal, 31 Or. 105, 49 Pac. 850; North Powder Co. v. Coughanour, 34 Or. 9, 54 Pac. 223; Lavery v. Arnold, 36 Or. 84, 57 Pac. 906, 58 Pac. 524; Hallock v. Suitor, 37 Or. 9, 60 Pac. 384; Ewing v. Rhea, 37 Or. 583, 82 Am. St. Rep. 783, 62 Pac. 790, 52 L. R. A. 140; Carson v. Hayes, 39 Or. 97, 65 Pac. 814; McPhee v. Kelsey, 44 Or. 193, 74 Pac. 401, 75 Pac. 713; Bolter v. Garrett, 44 Or. 304, 75 Pac. 143; Brown v. Gold Coin Min. Co., 47 Or. 277, 86 Pac. 363; Flinn v. Vaughn (Or.), 106 Pac. 642; Orient etc. Co. v. Freckleton etc. Co., 27 Utah, 125, 74 Pac. 652; Durga v. Lincoln etc. Co., 47 Wash. 477, 92 Pac. 343; Rhodes v. Barnes, 54 Wash. 145, 102 Pac. 884; McKinney v. Big Horn Co. (Wyo., 1909), 167 Fed. 770, 93 C. C. A. 258; City of Patterson v. East Jersey W. Co., 74 N. J. Eq. 49, 70 Atl. 472; McCann v. Wallace, 117 Fed. 936. See 93 Am. St. Rep. 71, note.

[4] *Supra*, sec. 56 et seq.

[5] Morris v. Bean, 146 Fed. 434.

pany's rights, in view of the statute providing that all conveyances of any interest in, and contracts creating any encumbrances on real estate, shall be by deed.[6]

An Oregon case (and there are many such decisions in this State already cited) says:[7] "It is said that plaintiffs made no objections to the expenditures of large sums of money by the defendants in opening up and developing their mines in the construction of hydraulic works and reservoirs for the operation thereof. But the mere silence of the plaintiffs is not sufficient to estop them from now asserting their rights because of such expenditures by the defendant. They were not acting under any license or agreement with the plaintiffs, but upon their own responsibility; and the plaintiffs had a right to assume that they did not intend, by their operation of their mine, to interfere with any of their rights." A leading California case,[8] referring to an instruction "That if those from and through whom the plaintiffs claim had the prior right to the waters, and they stood by and saw those from whom the defendant derives his title to the ditch, and the right to the waters of the creek, appropriate the water of the creek, at great expenditure of money and labor, under the mistaken idea that the defendant's vendors were obtaining the first appropriation, and did not inform them of the mistake they, plaintiff's vendors, and the plaintiffs who claim under them, are estopped from setting up their prior right at this time," says: "In the light of the subsequent decisions, it can scarcely be claimed that the facts recited in the instruction constituted an equitable estoppel which could be relied on as a defense at law. It may be that the defendant had the better right. In fact, the defendant's grantors seem to have appropriated the water before the plaintiff's grantors even 'located' the mining claim. It does not appear that the plaintiff's predecessors ever took actual possession of the mining claim; and even if the location of the claim preceded the defendant's appropriation, it does not appear that the manner of the location was such as that defendant's grantors were bound to take notice of it. But, whatever the facts, we cannot assent to the proposition—apparently recognized by the court—that the mere silence of plaintiff's

[6] Atkinson v. Washington Irr. Co., 44 Wash. 75, 120 Am. St. Rep. 978, 86 Pac. 1123.

[7] Carson v. Hayes, 39 Or. 97, 65 Pac. 814, 817.

[8] Lux v. Haggin, 69 Cal. 255, at 278, 10 Pac. 674.

grantors, disconnected from other circumstances in evidence, created an estoppel at law."

In a more recent case[9] the facts were stated, such as that while defendants were sinking wells, erecting pumps, and laying pipes, plaintiff had no information from them or from other source, as to the amount of water to be pumped, and so did not serve any notice that defendants incurred expense at their own peril, and similar facts; and after stating these facts, Mr. Justice Shaw said: "The facts stated are not sufficient to create estoppels against the plaintiffs. It does not appear that either Verdugo or Ross was induced to put down his well by any act, word or tacit encouragement of the plaintiffs, or either of them, or relied upon their silence as evidence of his own right, or of their consent. Nor does it appear that plaintiffs intended that either should act in reliance upon their silence, or expected that either would do so. It is not shown that plaintiffs were under any duty toward either to disclose any claim they might have to the water, nor that said defendants did not know, at least as well as the plaintiffs knew, that the pumping of the respective wells would decrease the west side stream, and the underflow at the dam. The party estopped must always intend, or at least must be so situated that he should be held to have expected, that the other party shall act, and the other party must, by the words, conduct or silence of the first party, be induced or led to do what he would not otherwise do.[10] The mere fact that the defendants expended money in sinking the wells and putting in the pumps each upon his own land, with the knowledge of the plaintiffs and without objection by them, creates no estoppel.[11] A mere passive acquiescence where one is under no duty to speak does not raise an estoppel."[12]

(3d ed.)

§ 595. **Same.**—The usual case where estoppel *in pais* comes into play in the law of waters is in the matter of executed parol licenses. There the party estopped has done an affirmative act, the

9 Verdugo Canyon W. Co. v. Verdugo (1908), 152 Cal. 655, 93 Pac. 1021.

10 Citing Carpy v. Dowdell, 115 Cal. 677, 47 Pac. 695; Swain v. Seamans, 9 Wall. 274, 19 L. Ed. 560; Dickerson v. Colegrove, 100 U. S. 580, 25 L. Ed. 618.

11 Citing Kelly v. Taylor, 23 Cal. 15, 5 Morr. Min. Rep. 598; Maye v. Yappan, 23 Cal. 308, 10 Morr. Min. Rep. 101; Stockman v. Riverside L. & I. Co., 64 Cal. 59, 28 Pac. 116; Leonard v. Flynn, 89 Cal. 542, 23 Am. St. Rep. 500, 26 Pac. 1097.

12 Citing Lux v. Haggin, 69 Cal. 270, 10 Pac. 674; Rochdale Co. v. King, 2 Sim., N. S., 89.

giving of a license, with intent that it be acted upon; as considered in another place.[13] Perhaps such cases are not theoretical estoppels, though very similar.

Our discussion here has been confined to estoppels *in pais*. Regarding estoppel by deed and estoppel by judgment, reference is made elsewhere.[14]

Reference is also made to other places where delay, incurring of expense, and public interest, influence the remedy obtainable without questioning the rule of the present sections that they in no way affect the right.[15]

[13] *Supra*, sec. 556.
[14] *Supra*, secs. 541, 544; *infra*, 651.
[15] *Infra*, secs. 616, 644 et seq., 650, secs. 1232, 1233.

§§ *596–603. (Blank numbers.)*

CHAPTER 26.

LOSS OF RIGHT (CONTINUED)—EMINENT DOMAIN.

§ 604. Necessity for public use.
§ 605. Requirement of hearing and compensation.
§ 606. What is a public use.
§ 607. Private enterprise as public use.
§ 608. Clark v. Nash.
§ 609. Same—State statutes and decisions.
§ 610. In California.
§ 611. Statement of the rule of Clark v. Nash.
§ 612. Practical results.
§ 613. Conditions imposed.
§ 614. The French Irrigation System.
§ 615. Procedure and miscellaneous.
§ 616. A question of procedure.
§ 617. Same.
§ 618. Same.
§§ 619–623. (Blank numbers.)

(3d ed.)

§ 604. Necessity for Public Use.—The State cannot take property from one man and present it to another merely because it prefers the other to have it (as the kings of Europe used to do), even if the latter is willing to pay for it. In all the States there are constitutional provisions declaring that private property cannot be taken from its owner without due process of law, which inhibits taking a man's property from him for uses that are in no way public uses. The constitution of the United States so provides, as concerns Congress, in Amendment V [1]—"No person shall be . . . . nor be deprived of life, liberty or property without due process of law," and likewise so provides as concerns States, in Amendment XIV—"Nor shall any State deprive any person of life, liberty or property, without due process of law." For a State to authorize the taking of private property from its owner for purposes in no way public would be unconstitutional in any State. "This is necessarily so, because private property without the owner's consent cannot be taken for the private use of another without violating the fourteenth amendment of the constitu-

[1] This amendment applies only to acts of Congress. Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 17 Sup. Ct. Rep. 56, 41 L. Ed. 369.

tion of the United States."[2] But this great principle is usually reinforced by the constitutions of the various States themselves. For example, the California constitution provides:[3] "No person shall be . . . .; nor be deprived of life, liberty or property without due process of law." These are the guaranties of the system of private ownership of property and of the security of the individual against oppression by public officers, under which we live, and which even the new States of Arizona,[4] New Mexico[5] and Oklahoma[6] have included in their constitutions.

(3d ed.)

§ 605. Requirement of Hearing and Compensation.—Even when taken for public use, constitutions so firmly protect private property that they prohibit its being taken away from its owner without a due hearing and just compensation. As to Congress the Federal constitution so provides in article V—"Nor shall private property be taken for public use, without just compensation."[7]

The California constitution provides (in article 1, section 14): "Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court, for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law."

In Colorado the constitution declares:[8] "That private property shall not be taken or damaged, for public or private use, without just compensation. Such compensation shall be ascertained

[2] Helena etc. Co. v. Spratt, 35 Mont. 108, 88 Pac. 773, 8 L. R. A., N. S., 567, 10 Ann. Cas. 1055, citing Missouri Pacific R. Co. v. Nebraska, 164 U. S. 403, 17 Sup. Ct. Rep. 130, 41 L. Ed. 489; Fallbrook Irr. Dist. v. Bradley, 164 U. S. 158, 17 Sup. Ct. Rep. 56, 41 L. Ed. 369; Matter of Tuthill, 163 N. Y. 133, 79 Am. St. Rep. 574, 57 N. E. 303, 49 L. R. A. 781.

[3] Art. 1, sec. 13.

[4] Ariz. Const., art. 2, sec. 4.

[5] N. M. Const., art. 2, sec. 18.

[6] Okl. Const., art. 2, sec. 7.

[7] This amendment applies only to acts of Congress. Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 17 Sup. Ct. Rep. 56, 41 L. Ed. 369.

[8] Const., art. 2, sec. 15.

by a board of commissioners, of not less than three freeholders, or by jury, when required by the owner of the property," etc.[9]

(3d ed.)

§ 606. **What is a Public Use.**—While the law of eminent domain applies only to takings for a public use, there are two lines of decisions upon what is a public use. The older one is that a public use of water must be for the use of the general public, the taking being by its official representatives or someone standing in the position of a public agent, and not for particular individuals or estates. Such seems to be the rule in California.[10] Consequently, in California, water cannot thus be taken to run a group of mines, as it is merely private enterprise.[11] For irrigation, under this view, water must be condemned, if at all, only by corporations or others who will (and after taking it must)[12] supply it to the public in general, and not merely for their own use. Such corporations, then, stand in the position of an agent of the public.[13] Lux v. Haggin says: "It must always be borne in mind that under the codes no man, or set of men, can take another's property for his own *exclusive* use. Whoever attempts to condemn the private right must be prepared to furnish (to the extent of the water he consumes and pays for) every individual of the community or communities, farming neighborhood or farming neighborhoods, to which he conducts it, the consumers being required to pay reasonable rates, and being subjected to reasonable regulations."

[9] Some other examples are, *inter alia:* "Private property may be taken for public use, but not until a just compensation, to be ascertained in a manner prescribed by law, shall be paid therefor." Idaho Const., art. 1, sec. 14. See Ariz. Const., art. 2, sec. 17; N. M. Const., art. 2, sec. 20; Okl. Const., art. 2, sec. 24; Utah Const., art. 1, sec. 22.

In the civil law the principle also exists, though not having the binding force of a constitution: "No one can be despoiled of his property, nor of his rights, not even on account of public utility, without first having given to him proper indemnity." Eschriche Aguas, sec. 2.

[10] Hildreth v. Montecito etc. Co., 139 Cal. 22, 72 Pac. 395; Merrill v. Southside Irr. Co., 112 Cal. 426, 44 Pac. 720; Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585; Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. 404.

[11] Consolidated etc. Co. v. Central etc. Ry., 51 Cal. 269, 5 Morr. Min. Rep. 438; Cummings v. Peters, 56 Cal. 593; Lorenz v. Jacob, 63 Cal. 73; Dower v. Richards, 73 Cal. 480, 15 Pac. 105; Amador etc. Co. v. De Witt, 73 Cal. 485, 15 Pac. 74; County of Sutter v. Nichol (1908), 152 Cal. 688, 93 Pac. 872, 15 L. R. A., N. S., 616, 14 Ann. Cas. 900.

[12] *Infra*, sec. 1280.

[13] State ex rel. Wilson v. Superior Court, 47 Wash. 397, 92 Pac. 271; Colorado etc. Co. v. McFarland et al. (Tex. Civ. App.), 94 S. W. 400; Borden v. Tres Palacios etc. Co., 98 Tex. 494, 107 Am. St. Rep. 640, 86 S. W. 11; Lux v. Haggin, 69 Cal. 255, 10 Pac. 674.

The California constitution provides that sale, rental, or distribution of water is a public use.[14]

The California legislature has provided[15] for various cases of eminent domain proceedings, among them the following: "Canals, ditches, dams, pondings, flumes, aqueducts and pipes, for irrigation, public transportation, supplying mines and farming neighborhoods with water, and draining and reclaiming lands," etc. The court has upheld the taking by irrigation districts[16] and by irrigation companies, under the provision allowing the taking for "farming neighborhoods."[17] What constitutes a farming neighborhood was considered in Lux v. Haggin, saying: "The words 'farming neighborhoods' are somewhat indefinite; the idea sought to be conveyed by them is more readily conceived than put into accurate language. Of course 'farming neighborhood' implies more than one farm; but it would be difficult to say that any certain number is essential to constitute such a neighborhood. The vicinage may be nearer or more distant, reference being had to the populousness or sparseness of population of the surrounding country; but the farmers must be so near to each other—relatively to the surrounding settlers—as to make what in popular parlance is known as a 'farming neighborhood.' A very exact definition of the word is not, however, of paramount importance. The main purpose of the statutes is to provide a mode by which the State, or its agent, may conduct water to arable lands where irrigation is a necessity, on payment of due compensation to those from whom the water is diverted. The same agent of the State may take water to more than one farming neighborhood." In 1911 a statute in general terms declares irrigation to be a public use.[17a]

The taking for a public water supply in California[18] was upheld.[19]

[14] Art. 14, sec. 1. See *infra*, sec. 1264.

[15] Cal. Code Civ. Proc., sec. 1238. Copied substantially in several other States; e. g., Idaho Rev. Stats. 1887, sec. 5210, subd. 3, as amended in Laws 1903, p. 204; Idaho Const., art. 1, sec. 14.

[16] See the chapter on "Irrigation Districts," *infra*, c. 58.

[17] Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; and in Aliso etc. Co. v. Baker, 95 Cal. 268, 30 Pac. 537; Lindsay etc. Co. v. Mehrtens, 97 Cal. 670, 32 Pac. 802; Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 17 Sup. Ct. Rep. 56, 41 L. Ed. 369.

[17a] Stats. 1911, c. 719.

[18] Under Code of Civil Procedure, sec. 1238.

[19] St. Helena etc. Co. v. Forbes, 62 Cal. 182, 45 Am. Rep. 659; McCrary v. Baudry, 67 Cal. 120, 7 Pac. 264; Santa Cruz v. Enright, 95 Cal. 105, 30 Pac. 197. See Cal. Const., art. 14, sec. 1.

On the other hand, mining is not, in California, a public use, and the above statute authorizing water to be taken to run a group of mines is to this extent unconstitutional.[20] The difference between mining and irrigation in this respect emphasizes the fact, shown throughout this whole subject, that mining is no longer the paramount industry in California.

Where general public supply was intended, the following, for example, have been held public uses, for which the power of eminent domain may be exercised: Irrigation canals;[21] electric light, heat or power plant;[22] courthouses, jails, schoolhouses, city halls, public markets, almshouses, public parks, boulevards, commons or pleasure grounds, and places of historic interest, a convention hall.[23] But water supply to sawmills to generate steam in boilers for manufacturing is held not a public use;[24] and *quaere* whether a municipality can condemn water-rights on a stream for the purpose of polluting it with sewage.[25]

What is a public use is always ultimately a judicial question; but a legislative declaration that a certain use is public is presumed to be correct, and will not be overturned unless it clearly appears to be without reasonable foundation.[1] Where the intended use is for the government, the presumption that it is a public use is stronger than when the proposed supply to or service of the public is to be made by a private corporation under delegated right of eminent domain.[2]

20 Cases cited *supra*.

21 Portneuf Irr. Co. v. Budge (1909), 16 Idaho, 116, 100 Pac. 1046.

22 Tuolumne etc. Co. v. Frederick, 13 Cal. App. 498, 110 Pac. 134; Northern Cal. etc. Co. v. Stacher, 13 Cal. App. 404, 109 Pac. 896; Walker v. Shasta Power Co. (Cal.), 160 Fed. 859, 87 C. C. A. 660; Sternberger v. Seaton etc. Co., 45 Colo. 401, 102 Pac. 168; Hollister v. State, 9 Idaho, 8, 71 Pac. 541. See, also, 21 L. R. A., 410, note; Or. Laws 1911, c. 265, p. 456; United States Geological Survey, Water Supply Paper No. 238. But see *contra*, Minnesota Co. v. Kaochiching Co., 97 Minn. 444, 107 N. W. 410, 5 L. R. A., N. S., 638, 7 Ann. Cas. 1182. See, also, *infra*, sec. 609, note 21.

23 State ex rel. Manhattan etc. Co. v. Barnes, 22 Okl. 191, 97 Pac. 1000, reviewing authorities.

24 State ex rel. Shropshire v. Superior Court (1909), 51 Wash. 386, 99 Pac. 3.

25 Village of Twin Falls v. Stubbs, 15 Idaho, 68, 96 Pac. 195.

1 Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Paxton etc. Co. v. Farmers' etc. Co., 45 Neb. 884, 50 Am. St. Rep. 585, 64 N. W. 343, 29 L. R. A. 853; State ex rel. Manhattan etc. Co. v. Barnes, 22 Okl. 191, 97 Pac. 1000 (citing 2 Dillon on Mun. Corp., 703; Cooley on Const. Lim., 7th ed., p. 777; Logan v. Stogsdale, 123 Ind. 372, 24 N. E. 135, 8 L. R. A. 58; United States v. Gettysburg Co., 160 U. S. 668, 16 Sup. Ct. Rep. 427, 40 L. Ed. 576; Tuttle v. Moore, 3 Ind. Ter. 712, 64 S. W. 585).

2 United States v. Gettysburg Co., 160 U. S. 668, 16 Sup. Ct. Rep. 427, 40 L. Ed. 576; State ex rel. Manhattan etc. Co. v. Barnes, 22 Okl. 191, 97 Pac. 1000.

Cases holding that, to constitute a public use, the use must be for, or available to, the general public, and that all the public, or a class thereof, must have a right to share directly in the use, are given herewith.[3]

This is again considered in connection with the distribution of water to public uses.[4]

'(3d ed.)

§ 607. Private Enterprise as Public Use.—On the other hand, there is the second view, that the right to actual use by the public or a class thereof is not necessary, but that the promotion of a great industry, such as mining in some States, irrigation in others, may, under peculiar local conditions, be of sufficient interest to the public at large to constitute the taking of another man's property by a private person for his individual enterprise alone, a public use. Public use is considered more from the view of "public-spirited private use" than of actual use by the public. The leading case in support of this doctrine is the recent decision of the supreme court of the United States in Clark v. Nash,[5] affirming the Utah case of Nash v. Clark.[6] The supreme court of Utah said: "One class of authorities, in a general way, holds that by public use is meant a use by the public or its agencies—that is, the public must have the right to the actual use in some way of the property appropriated; whereas the other line of decisions holds that it is a public use within the meaning of the law when the taking is for a use that will promote the public

[3] As cited in Helena etc. Co. v. Spratt, 35 Mont. 108, 88 Pac. 775, 8 L. R. A., N. S., 567, viz.: Borden v. Trespalacios Rice etc. Co. (Tex. Civ. App.), 82 S. W. 461; Pittsburg etc. R. Co. v. Benwood Iron Works, 31 W. Va. 710, 8 S. E. 453, 2 L. R. A. 680; Varner v. Martin, 21 W. Va. 534; Fallsburg Power Mfg. Co. v. Alexander, 101 Va. 98, 99 Am. St. Rep. 855, 43 S. E. 194, 61 L. R. A. 129; In re Barre Water Co., 72 Vt. 413, 48 Atl. 653; Avery v. Vermont Electric Co., 75 Vt. 235, 98 Am. St. Rep. 818, 54 Atl. 179, 59 L. R. A. 817; Berrien Springs Water Co. v. Berrien Circuit Judge, 133 Mich. 48, 103 Am. St. Rep. 438, 94 N. W. 379; Brown v. Gerald, 100 Me. 351, 109 Am. St. Rep. 526, 61 Atl. 785, 70 L. R. A. 472; State ex rel. Tacoma etc. Co. v. White River Power Co., 39 Wash. 648, 82 Pac. 150, 2 L. R. A., N. S., 842, 4 Ann. Cas. 987; State v. Superior Court, 42 Wash. 660, 85 Pac. 666.

See, also, State ex rel. Wilson v. Superior Court, 47 Wash. 397, 92 Pac. 271; Hildreth v. Montecito W. Co., 139 Cal. 22, 72 Pac. 395; Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. 404; Price v. Riverside etc. Co., 56 Cal. 431; McCrary v. Beaudry, 67 Cal. 120, 7 Pac. 264; Crow v. San Joaquin W. Co., 130 Cal. 309, 62 Pac. 562, 1058.

[4] *Infra*, sec. 1260 et seq.

[5] 198 U. S. 361, 25 Sup. Ct. Rep. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1171.

[6] 27 Utah, 158, 101 Am. St. Rep. 953, 75 Pac. 371, 1 L. R. A., N. S., 208.

interest, and which use tends to develop the natural resources of the commonwealth." And held that a Utah statute [7] providing for the enlargement by condemnation of another's ditch to convey water to your land for irrigation is constitutional.[8] This was affirmed by the supreme court of the United States in Clark v. Nash,[9] as follows:

(3d ed.)

§ 608. **Clark v. Nash.**[10]—In the course of the statement of the case by Mr. Justice Peckham, it is said: "This action was brought by the defendant in error, Nash, to condemn a right of way, so called, by enlarging a ditch for the conveying of water across the land of plaintiffs in error, for the purpose of bringing water from Fort Canyon Creek, in the county and State of Utah, which is a stream of water flowing from the mountains near to the land of the defendant in error, and thus to irrigate his land. . . . . That the said waters of said Fort Canyon Creek cannot be brought upon the said plaintiff's said land by any other route except by and through the ditch of the defendants, owing to the canyon through which said ditch runs being such as to only be possible to build one ditch." Defendants refused to give permission. The ditch was to be widened only one foot and the whole damage would be forty dollars ($40). Mr. Justice Peckham delivered the opinion of the court, which follows in full:[11]

"The plaintiffs in error contend that the proposed use of the enlarged ditch across their land for the purpose of conveying water to the land of the defendant in error alone is not a public use, and that, therefore, the defendant in error has no constitutional or other right to condemn the land, or any portion of it, belonging to plaintiffs in error, for that purpose. They argue that, although the use of water in the State of Utah for the purposes of mining or irrigation or manufacturing may be a public

[7] Utah Rev. Stats., 1898, sec. 1278; Comp. Laws 1907, sec. 1288x22; Laws 1905, p. 160.

[8] Relying on Dayton Min. Co. v. Seawell, 11 Nev. 394, 5 Morr. Min. Rep. 424, holding similarly as to a right of way to haul material to one's mine; and citing Oury v. Goodwin, 3 Ariz. 255, 26 Pac. 376; De Graffenried v. Savage, 9 Colo. App. 131, 47 Pac. 902; Yunker v. Nichols, 1 Colo. 551, 8 Morr. Min. Rep. 64; Schilling v. Rominger, 4 Colo. 100; Ellinghouse v. Taylor, 19 Mont. 462, 48 Pac. 757; Fallbrook Irr. Co. v. Bradley, 164 U. S. 112, 17 Sup. Ct. Rep. 56, 41 L. Ed. 369.

[9] 198 U. S. 361, 25 Sup. Ct. Rep. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1171.

[10] 198 U. S. 361, 25 Sup. Ct. Rep. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1171.

[11] Clark v. Nash, 198 U. S. 361, 25 Sup. Ct. Rep. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1171.

use where the right to use it is common to the public, yet that no individual has the right to condemn the land for the purpose of conveying water in ditches across his neighbor's land, for the purpose of irrigating his own land alone, even where there is, as in this case, a State statute permitting it.

"In some States, probably in most of them, the proposition contended for by the plaintiffs in error would be sound. But whether a statute of a State permitting condemnation by an individual for the purpose of obtaining water for his land or for mining should be held to be a condemnation for a public use, and, therefore, a valid enactment, may depend upon a number of considerations relating to the situation of the State and its possibilities for land cultivation, or the successful prosecution of its mining or other industries. Where the use is asserted to be public, and the right of the individual to condemn land for the purpose of exercising such use is founded upon or is the result of some peculiar condition of the soil or climate, or other peculiarity of the State, where the right of condemnation is asserted under a State statute, we are always, where it can fairly be done, strongly inclined to hold with the State courts, when they uphold a State statute providing for such condemnation. The validity of such statutes may sometimes depend upon many different facts, the existence of which would make a public use, even by an individual, where, in the absence of such facts, the use would clearly be private. Those facts must be general, notorious, and acknowledged in the State, and the State courts may be assumed to be exceptionally familiar with them. They are not the subject of judicial investigation as to their existence, but the local courts know and appreciate them. They understand the situation which led to the demand for the enactment of the statute, and they also appreciate the results upon the growth and prosperity of the State which, in all probability, would flow from a denial of its validity. These are matters which might properly be held to have a material bearing upon the question whether the individual use proposed might not in fact be a public one. It is not alone the fact that the land is arid and that it will bear crops if irrigated, or that the water is necessary for the purpose of working a mine, that is material; other facts might exist which are also material—such as the particular manner in which the irrigation is carried on or proposed, or how the mining is to be done in a particular place where water is needed for that purpose. The general situa-

tion and amount of the arid land or of the mines themselves might also be material and what proportion of the water each owner should be entitled to; also the extent of the population living in the surrounding country, and whether each owner of land or mines could be, in fact, furnished with the necessary water in any other way than by the condemnation in his own behalf, and not by a company, for his use and that of others.

"These, and many other facts not necessary to be set forth in detail, but which can easily be imagined, might reasonably be regarded as material upon the question of public use, and whether the use by an individual could be so regarded. With all of these the local courts must be presumed to be more or less familiar. This court has stated that what is a public use may frequently and largely depend upon the facts surrounding the subject, and we have said that the people of a State, as also its courts, must, in the nature of things, be more familiar with such facts, and with the necessity and occasion for the irrigation of the lands, than can anyone be who is a stranger to the soil of the State, and that such knowledge and familiarity must have their due weight with the State courts.[12] It is true that in the *Fallbrook case* the question was whether the use of the water was a public use when a corporation sought to take land by condemnation under a State statute, for the purpose of making reservoirs and digging ditches to supply landowners with the water the company proposed to obtain and save for such purpose. This court held that such use was public. The case did not directly involve the right of a single individual to condemn land under a statute providing for that condemnation.

"We are, however, as we have said, disposed to agree with the Utah court with regard to the validity of the State statute which provides, under the circumstances stated in the act, for the condemnation of the land of one individual for the purpose of allowing another individual to obtain water from a stream in which he has an interest, to irrigate his land, which otherwise would remain absolutely valueless.

"But we do not desire to be understood by this decision as approving of the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the State. We

[12] Citing Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 159, 17 Sup. Ct. Rep. 56, 41 L. Ed. 369, 388.

similar to those cited, to mining, in Alaska, Nevada and Utah.[17] It has been applied to irrigation in Arizona, Colorado, Idaho, Montana, Nebraska, Texas, Utah, and Washington.[18] It has been applied in Idaho to taking land for a storage reservoir to float logs to a private sawmill;[19] in Montana,[20] to flooding lands to obtain water-power by an electric company supplying mines and smelters (as well as supplying water, for irrigation, by the same company). Condemnation for power plants has, in the West, usually been rested on this view, though, when the company is bound to supply all the public to the extent of its capacity, it would also be a public use under the narrower view.[21]

[17] *Alaska.*—Miocene D. Co. v. Jacobsen, 146 Fed. 680, 77 C. C. A. 106. But see Van Dyke v. Midnight Sun Co. (Alaska), 177 Fed. 90, 100 C. C. A. 503, saying in a mining case (*dictum*): "The diversion of the waters of Big Hurrah Creek by the plaintiff was not for any public use, but solely for its own purposes. If so, as a matter of course, the plaintiff had no right of condemnation."

Colorado.—See Snyder v. Colorado etc. Co. (C. C. A.), 181 Fed. 62 (*dictum* that right of way for a private mining ditch may be condemned).

Montana.—See Kipp v. Davis etc. Co. (Mont.), 110 Pac. 237.

Nevada.—Dayton Min. Co. v. Seawell, 11 Nev. 394, 5 Morr. Min. Rep. 424.

Utah.—Strickley v. Highland Boy Co., 200 U. S. 527, 26 Sup. Ct. Rep. 301, 50 L. Ed. 581, 4 Ann. Cas. 1174.

[18] *Arizona.*—Oury v. Goodwin, 3 Ariz. 255, 26 Pac. 376.

Colorado.—Kaschke v. Canfield, 46 Colo. 60, 102 Pac. 1061; Yunker v. Nichols, 1 Colo. 551, 8 Morr. Min. Rep. 64, *semble;* Schilling v. Rominger, 4 Colo. 100, *semble;* Schneider v. Schneider, 36 Colo. 518, 86 Pac. 347, *semble;* Tripp v. Overacker, 7 Colo. 73, 1 Pac. 695; Downing v. More, 12 Colo. 316, 20 Pac. 766; Sand Creek Co. v. Davis, 17 Colo. 326, 29 Pac. 742; Patterson v. Brown etc. Co., 3 Colo. App. 511, 34 Pac. 769.

See *supra,* sec. 223, appropriation on private land.

Idaho.—Portneuf Irr. Co. v. Budge, 16 Idaho, 116, 100 Pac. 1046 (*dictum* only).

Montana.—Ellinghouse v. Taylor, 19 Mont. 462, 48 Pac. 757. In Prentice v. McKay, 38 Mont. 114, 98 Pac. 1081, it is said (*dictum*), in a case where a right of way was sought for individual and not general supply: "Since the use of water is declared by the constitution of this state (article 3, section 15) to be a public use, the right to appropriate water on the land of another may be acquired by condemnation proceedings."

Nebraska.—*Semble,* Crawford etc. Co. v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647, 93 N. W. 781, 60 L. R. A. 889; Cline v. Stock, 71 Neb. 70, 102 N. W. 265; McCook Irr. Co. v. Crews, 70 Neb. 115, 102 N. W. 249. See Paxton Co. v. Farmers' Co., 45 Neb. 885, 50 Am. St. Rep. 585, 64 N. W. 343, 29 L. R. A. 853.

Texas.—Consider Mundy v. Hart (Tex. Civ. App.), 111 S. W. 236.

Utah.—Clark v. Nash, *supra.*

Washington.—State ex rel. Galbraith v. Superior Court (Wash.), 110 Pac. 429; Weed v. Goodwin, 36 Wash. 31, 78 Pac. 36. (But compare State ex rel. Wilson v. Superior Court, 47 Wash. 397, 92 Pac. 271.)

[19] Potlatch etc. Co. v. Peterson, 12 Idaho, 769, 118 Am. St. Rep. 233, 88 Pac. 426. *Contra,* see State ex rel. Wilson v. Superior Court, 47 Wash. 397, 92 Pac. 271.

[20] Helena Power Co. v. Spratt, 35 Mont. 108, 88 Pac. 773, 8 L. R. A., N. S., 567, 10 Ann. Cas. 1055.

[21] See Salt Lake City v. Salt Lake City W. & E. P. Co., 25 Utah, 441, 71 Pac. 1071; Hollister v. State, 9 Idaho, 651, 71 Pac. 339; Denver P. & I. Co. v. Denver & R. G. R. Co., 30 Colo. 204, 69 Pac. 568, 60 L. R. A. 383. See, also, *supra,* sec. 606, note 22.

In a recent Idaho case [22] it is said: "The decisions under many State constitutions, therefore, are of little value as precedents for cases arising under constitutions like that of Idaho, Colorado, and other Western States, which make the character of the use, whether strictly public or otherwise, the criterion of the right to exercise the power. There are two well-marked and conflicting lines of decisions by the courts in dealing with the constitutional rights to exercise the power of eminent domain. One class of those decisions is represented by Brown v. Gerald,[23] which draws a sharp distinction between 'public use' and 'public benefit' and guards the private rights of property against the assertion of the power of eminent domain for public benefits as distinguished from public use. The other line of decisions is represented by Nash v. Clark,[24] which case was taken by error to the supreme court of the United States.[25] . . . . The latter class of cases takes the view that the general welfare and benefit of the public should prevail over private property rights even though the use for which the power of eminent domain is asserted, is not, in a strict sense, a public use, and, as stated in the note to State ex rel. Tacoma I. Co. v. White River P. Co.,[1] 'the influence of peculiar local conditions and necessities in determining the choice between these two tendencies is plainly discernible.'" A recent Montana case,[2] relying on Clark v. Nash, says: "The courts of the Western States have, as a rule, adopted a liberal view of the term 'public use,' and in the main have largely followed the so-called 'Mill Cases' of New England."[3] And quoting another Montana case: "The public policy of the Territory and of the State of Montana has always been to encourage in every way the development of the minerals contained in the mountains; and the necessity for adding to its tilled acreage is manifest. This State is an arid country, and water is essential to the proper tillage of its scattered agricultural valleys. With all this in

22 Potlatch etc. Co. v. Peterson, 12 Idaho, 769, 118 Am. St. Rep. 233, 88 Pac. 426.

23 100 Me. 351, 109 Am. St. Rep. 526, 61 Atl. 785, 70 L. R. A. 472.

24 27 Utah, 158, 101 Am. St. Rep. 953, 75 Pac. 371, 1 L. R. A., N. S., 208, 1 Ann. Cas. 300.

25 Clark v. Nash, 198 U. S. 361, 25 Sup. Ct. Rep. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1174.

1 39 Wash. 648, 82 Pac. 150, 2 L. R. A., N. S., 842, 4 Ann. Cas. 987.

2 Helena etc. Co. v. Spratt, 35 Mont. 108, 88 Pac. 773, 8 L. R. A., N. S., 567, 10 Ann. Cas. 1055.

3 But as to the New England Mill acts see Blackstone Mfg. Co. v. Town of Blackstone, 200 Mass. 82, 85 N. E. 880, 18 L. R. A., N. S., 755, holding that these acts do *not* rest upon principles of eminent domain.

view, it was expressly declared in our State constitution that the use of water by private individuals for the purpose of irrigating their lands should be a public use." And concludes: "We are largely influenced in so holding by the two decisions of this court hereinbefore referred to, wherein we are already committed to the broad and, as it has sometimes been called, 'statesman-like' view of this question."

In the Nebraska cases the taking was by corporations proposing general supply and hence a public use within the narrower definition, but the decisions were placed on the broader ground.[4] "The development of a system of irrigation and the appropriation and application of the waters of the streams of the State for the purpose, is obviously a work of internal improvement." And again, referring to statutes, "Under these comprehensive provisions the legislature could have intended nothing less than that in the construction and operation of irrigation enterprises private property reasonably necessary for the conduct of the business could be taken and appropriated on due compensation by the exercise of the power and right of eminent domain."

A late case in Washington allowed a company, for its own land, to condemn a right of way for its ditch across private land. The company takes water from the Spokane River in Kootenai County, Idaho, five miles east of the Washington-Idaho line, and conveys it nineteen miles to its land holdings in Spokane County, Washington. The court held that the benefit to the public which supports the exercise of the power of eminent domain for purposes of this character is not necessarily the service the parties seeking to acquire such rights may be compelled to render to the public in connection therewith, but is the development of the resources of the State, and the increase of its wealth generally, by which its citizens incidentally reap a benefit. It was argued against the condemnor that its purpose was buying up lands in

[4] Crawford v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647, 93 N. W. 781, 60 L. R. A. 889.

Other decisions adopting this view of what constitutes a public use are given herewith. As cited in Helena etc. Co. v. Spratt, 35 Mont. 108, 88 Pac. 775, 8 L. R. A., N. S., 567, 10 Ann. Cas. 1055, viz.: Aldridge v. Tuscumbia etc. R. Co., 2 Stew. (Ala.) 199, 23 Am. Dec. 307; Todd v. Austin, 34 Conn. 78; Hand Gold Min. Co. v. Parker, 59 Ga. 419; Bradley v. New York etc. R. Co., 21 Conn. 294; Great Falls Mfg. Co. v. Fernald, 47 N. H. 456; Talbot v. Hudson, 16 Gray (Mass.), 417; Olmstead v. Camp, 33 Conn. 532, 89 Am. Dec. 221; Boston & Roxbury Mill Co. v. Newman, 12 Pick. (Mass.) 467, 23 Am. Dec. 622; Scudder v. Trenton Delaware Falls Co., 1 N. J. Eq. 694–728, 23 Am. Dec. 756.

large tracts in order to sell them in small holdings, but the court said: "It is utterly immaterial what the purpose of the company was in acquiring the lands or whether it proposes to farm the lands itself or proposes to sell them off in tracts of varying size to others. The fact remains that the company owns the water and owns the lands proposed to be irrigated, and that their irrigation will promote the public good by a means intended to be fostered by our constitution. Of course it acquired the lands with intent to profit by their use or sale. That is only exercising a right incident to all ownership as any private owner may exercise it." Instead of such a plan being invalid as "speculative," it would seem, on the contrary, that it constituted actual supply and distribution to the public who buys the parcels, so as to constitute actual public service, although the court, as already said, treated the case as one of private service.[5]

A late Utah case says the principle of Clark v. Nash applies to forcing a prior appropriator to change his apparatus and install appliances such as to permit a taking of surplus water by a later appropriator, provided the latter reimburses the cost of the change.[5a]

On the other hand, Clark v. Nash is held not to apply in Washington to takings for private manufacturing purposes,[6] nor in California, for *private* electric power.[7]

(3d ed.)

§ 610. In California.—While, as has been said, the actual decisions in California are against this rule, and require a taking by public officials or those in the position of public agents, supplying or serving the public or a class thereof, yet there is ground for considering it not concluded. In Lux v. Haggin[8] the court considered it an open question, though somewhat startling, saying: "Whether, in any supposable instance, the public has such interest in a use which can be directly enjoyed only by an individual for his profit, and without any concomitant duty from him to the public, as that the government may be justified in

[5] State ex rel. Galbraith v. Superior Court (Wash.), 110 Pac. 429.

[5a] Salt Lake City v. Gardner (Utah 1911), 114 Pac. 147. There does not seem to have been any statute so providing, however, in the case.

[6] State ex rel. Galbraith v. Superior Court (Wash.), 110 Pac. 429; citing State ex rel. Tacoma etc. Co. v. White River Co., 39 Wash. 648, 82 Pac. 150, 2 L. R. A., N. S., 842, 4 Ann. Cas. 987.

[7] Shasta Power Co. v. Walker, 149 Fed. 568; affirmed in Walker v. Shasta Power Co., 160 Fed. 856, 87 C. C. A. 660.

[8] 69 Cal. 255, 10 Pac. 674.

employing the eminent domain power for the use, as for a public use, is a question somewhat startling, but which is not involved in the decision of the present action. In case further legislation shall be deemed expedient for the distribution of waters to public uses, we leave its validity to be determined after its enactment, if its invalidity shall then be asserted." And elsewhere saying: "It may be that, under the physical conditions existing in some portions of the State, irrigation is not, theoretically, a 'natural want,' in the sense that living creatures cannot exist without it; but its importance as a means of producing food from the soil makes it less necessary, in a scarcely appreciable degree, from the use of water by drinking it. The government would seem to have not only a distant and consequential, but a direct, interest in the use; therefore a public use."

Moreover, in Fallbrook Irr. Dist. v. Bradley[9] the supreme court of the United States upheld the taking by California irrigation districts on this ground and not on the other restricted ground, saying: "On the other hand, in a State like California, which confessedly embraces millions of acres of arid lands, an act of the legislature providing for their irrigation might well be regarded as an act devoting the water to a public use, and therefore as a valid exercise of the legislative power. . . . . The fact that the use of the water is limited to the landowner is not, therefore, a fatal objection to this legislation." And in conclusion says: "We have no doubt that the irrigation of really arid lands is a public purpose, and the water thus used is put to a public use." Further, Clark v. Nash was relied on in the Federal court of the circuit in which California lies,[10] which held that under peculiar local conditions (in Alaska) private mining is a use for which a ditch right of way may be condemned.[11]

On the other hand, Clark v. Nash was said in one case[12] not to apply to use in California for power purposes, and it should be noted that the constitution only declares the use of water "for sale, rental or distribution" a public use.[13]

[9] 164 U. S. 117, 17 Sup. Ct. Rep. 56, 41 L. Ed. 369.

[10] Under Alaska Code, c. 22, sec. 204, 31 Stats. 522, which is worded very close to the provision of the California Code of Civil Procedure, section 1238, and probably copied therefrom.

[11] Miocene Ditch Co. v. Jacobsen, 146 Fed. 680, 77 C. C. A. 106.

[12] Shasta Power Co. v. Walker, 149 Fed. 568, affirmed in Walker v. Shasta Power Co., 160 Fed. 856, 87 C. C. A. 660.

[13] See *infra*, sec. 1264. See a *dictum* in Logan v. Guichard (Cal.,

(3d ed.)

§ 611. Statement of the Rule of Clark v. Nash.—This rule, that private enterprise may constitute a public use, cannot be accurately summed up in merely a few words; but from the above the following may be a serviceable summary: The situation of a State and the possibilities and necessities for the successful prosecution of various industries, and peculiar condition of soil or climate or other peculiarities, being general, notorious and acknowledged in the State so as to be judicially known and exceptionally familiar to the courts without investigation—such conditions justify a State court in upholding a statute authorizing the taking of another's private property by one individual for his own enterprise, where it believes, *by reason of the above*, that such a taking will, through its contribution to the growth and prosperity of the State, constitute a public benefit, and the supreme court of the United States will follow the decision of the State court in such a case.

The tendency will be great to say that the rule has by Clark v. Nash become established that private property may now be condemned for the private use of another; that condemnation is no longer restricted to public use, but that property may be condemned for a private use. That, however, is far from true. The theory is still that the taking is for a public use, and the private enterprise must be such as, because of pressing and universal necessity growing out of peculiar natural conditions in the State, is inferentially a use for the welfare of the public at large. Where there is no such pressing and universal necessity and no such peculiar natural conditions, the private enterprise will not, under Clark v. Nash, properly constitute a use for which condemnation will lie, as was said by way of *dictum* in Shasta Power Co. v. Walker.[14] There Clark v. Nash was held inapplicable to a case in California taking land for a water ditch for purposes of a light and power plant, if compulsory service to the general public is not to be a part of the proposed use, and private service, merely, is primarily intended.[15]

March 21, 1911), 114 Pac. 989, that one cannot comdemn a right of way for an irrigation ditch to one's private farm.

[14] 149 Fed. 568, affirmed in Walker v. Shasta Power Co., 160 Fed. 856, 87 C. C. A. 660.

[15] This was said by Judge Wolverton of the Oregon District, sitting in California in the absence of Judge Morrow.

As at length set forth in another place, it is only under statutes such as that upheld in Clark v. Nash that one may enter another's land to build a ditch or divert water without his consent for one's own private enterprise; in the absence of such statute, and notice to the landowner, a hearing, and payment to him of just compensation, no entry on private land will be lawful against the landowner.[16]

(3d ed.)

§ 612. **Practical Results.**—In practical results this system of acquiring rights on or over private land for private irrigation by taking another's property on notice, hearing and compensation, seems to the writer one of the most important developments in the water law. Some such matter has been urged from the earliest days in the West, and has hitherto given great difficulty. In early California a statute giving miners a right of entry on private land of agriculturists was held unconstitutional, even though amended to require the giving of a bond for damages;[17] and the California law has in all ways become settled against any interference by a water user, for merely his own private ends, with land or rights in private hands of another.[18] On the other hand, the early Colorado decisions allowed such entry for ditch-building even without compensation, and statutes to that effect have been passed in Colorado and other of the younger States.[19] As the courts of even these States are now against such entry under any circumstances short of the power of eminent domain,[20] the principle of Clark v. Nash becomes important as opening a practical way, by extending the right of eminent domain, to the solution of this difficulty which has existed throughout the history of the water law.

The principle is a considerable departure from the individualistic attitude of the common law, which holds an individual's

16 *Supra*, sec. 221 et seq.

17 *Supra*, sec. 85.

18 *Supra*, secs. 221, 259, 498 et seq., 502. See especially Boggs v. Merced Co., 14 Cal. 279, 10 Morr. Min. Rep. 334.

19 *Supra*, sec. 223 et seq.

As in the water law, it also took hold in the early Colorado mining law, a statute having enacted that one may, upon securing the owner against damage, "have the right to mine under any building or improvement," act of November 7, 1861, Hollister's Mines of Colorado, 303. It was also strongly urged as to mining in the early days in California, but just as in the California water law, so also in the California mining law, it never took hold, and was finally and once for all disposed of by Judge Field in Boggs v. Merced Co., 14 Cal., at 379, 10 Morr. Min. Rep. 334.

20 *Supra*, sec. 224.

property inviolate against any other single individual, and marks the tendency of the times to adopt more and more the communal attitude of the civil law as noted in the next section. Especially is this tendency strong in the law of waters, which is in its nature a thing intimately affecting many users from a common source, and in which the common law of riparian rights is itself a correlative (as opposed to an individualistic) system.

(3d ed.)

§ 613. Conditions Imposed.—There is plenty of room for caution in applying the principle. What constitutes "public interest" or "public benefit" may be very difficult to determine in actual application,[21] especially when the public has no share in the actual use. If pressed too far, in the development of their private estates men of means could gather up for themselves alone the water-rights of their poorer neighbors, and condemnation might become only a question of how strongly one man may covet his neighbor's property. Consequently, it is well to note some conditions usually imposed upon condemnation of one man's right for another's private enterprise.

When building a ditch or enlarging another's ditch under such statute, it is on the theory of condemnation for a public use, and the various restrictions and safeguards of the law of eminent domain, some of which are below considered, such as due notice in advance, apply. Specially there may be noted that the statutes in this connection usually declare that no enlargement will be allowed in the absence of great necessity, nor where another road is practicable,[22] and in building a new ditch, the shortest possible route must be taken, nor must a new one be built where an old one can be enlarged with the same efficacy.[23] The landowner must have due notice in advance.[24] In condemnation under such a statute the right of way has a money value to be assessed as damages,[1] and the enlargement must be made without requiring expenditure or work on the part of the original ditch owner.[2] The

21 See, for example, Young v. Hinderlider (N. M.), 110 Pac. 1045. See *supra*, sec. 174, and *infra*, sec. 649.

22 Downing v. More, 12 Colo. 316, 706, 20 Pac. 766 (holding enlargement applies only to *through* ditches, and not to ditches wholly within private bounds); Tripp v. Overacker, 7 Colo. 73, 1 Pac. 695.

23 *Ibid.*, and Paxton Co. v. Farmers' Co., 45 Neb. 885, 50 Am. St. Rep. 585, 64 N. W. 343, 29 L. R. A. 853.

24 Sterritt v. Young, 14 Wyo. 146, 116 Am. St. Rep. 994, 82 Pac. 946, 4 L. R. A., N. S., 169.

1 Sand Creek etc. Co. v. Davis, 17 Colo. 326, 29 Pac. 742.

2 *Ibid.*

enlarger must bear the cost, and pay damages to the man whose ditch is enlarged or over whose land it runs.[3] Whether the ditch of a competing company may be enlarged by its competitor, *quaere*.[4]

Some typical statutory expressions of these conditions are mentioned in the note.[5]

(3d ed.)

§ 614. **The French Irrigation System.**—In a matter so newly established and just developing, and at the same time so far-reaching, it is interesting to note the experience of other countries. The basic civil law is that of riparian rights, but it has been supplemented by an extensive use of the power of eminent domain along the lines of Clark v. Nash. In France two statutes were passed upon these lines which form the basis of most of the French irrigation law, and seem to have been borrowed in Italy.

The first French statute, passed April 29, 1845, provided for obtaining water against riparian owners, and rights of way for canals over private land, for another's private irrigation, upon paying compensation to be fixed, after a hearing, by public authorities. The first two sections are quoted (translated) in the note.[6] This

[3] Clark v. Nash, 198 U. S. 361, 25 Sup. Ct. Rep. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1174; Sand Creek Co. v. Davis, 17 Colo. 326, 29 Pac. 742; Patterson v. Brown etc. Ditch Co., 3 Colo. App. 511, 34 Pac. 769; Salt Lake City v. Gardner (Utah, 1911), 114 Pac. 147.

The writer is informed of a case in Utah where the damages upon enlargement were assessed by a jury at seventy-five thousand dollars.

[4] *Infra*, sec. 615.

[5] In Colorado, condemnation for a private right of way for a new ditch, or enlargement of an old one or change of point of diversion so requiring, must be upon due notice and compensation, not more than one ditch being built where enlargement of existing ditches is possible, and the shortest route must be taken. Colo. Rev. Stats. 1908, secs. 3167–3174; Gen. Stats., secs. 1712–1721; Gen. Stats., secs. 1373–1376; Rev. Stats., sec. 363; Laws 1861, p. 67; Laws 1870, p. 158; Laws 1879, p. 95; Laws 1881, pp. 161, 164.

In Nebraska, "No tract of land shall be crossed by more than one ditch, canal, or lateral without the written consent and agreement of the owner thereof, if the first ditch, canal, or lateral can be made to answer the purpose for which the second is desired or intended." Cobbey's Ann. Stats., sec. 6730 or 6750.

[6] "Article 1. Every proprietor who may wish to be served for the irrigation of his property with the natural or artificial waters of which he has the right to dispose, can obtain the passage for these waters over intermediate lands by previously paying a just indemnity. There are excepted from this servitude houses, pleasure grounds, gardens, parks, and inclosures belonging to dwellings." "Article 2. The proprietors of lower lands will have to receive the waters which percolate from lands thus irrigated; being indemnified, however, if damaged. Houses, pleasure grounds, gardens, parks, and inclosures belonging to dwellings will be equally excepted from this servitude."

right is confined to building new ditches, and does not extend to enlarging an existing canal, nor does it apply to any uses other than irrigation, and there must be a substantial benefit to the party initiating such work, outweighing the inconvenience to the servient estate.[7] The servient owner has no right to share in the use of such waters in their passage over his land, a law to so permit him having been defeated.[8]

The second French statute was passed July 11, 1847, and gave a right to build dams on the banks of a stream on another's land, similar to the right conferred in the former statute for ditches and subject to much the same terms. Article 2, however, provided for the joint use of such dam by the man constructing it and the landowner on whose land it is built, saying: "The riparian owner of the lands upon which the right will have been claimed can always demand the common usage of the dam by contributing one-half of the expenses of the establishment and maintenance of it. Any indemnity will not be due in this case, and if any has been paid it must be returned. When this common usage will only be claimed after the commencement, or the completion of the works, the payment which the second proprietor will have to make in order to have the right to use it, will only be that amount which it is necessary to expend in order to make it available for taking out water on his bank."[9]

Provisions similar to these statutes are contained in the codes of Sardinia[10] and Lombardy,[11] neither being limited to use for irrigation, however. In the former it is further provided that the ditch-builder must show first that he has a water-right sufficient for his land when carried there; that he has chosen the line of least possible damage to the landowner consistent with the circumstances; that payment must be made in advance, covering all probable damages, including the damage due to thus dividing the servient estate into two parts, or other general deterioration in value, and including in addition, as a kind of bonus, one-fifth of the final estimate; that if the right is asked for a period of less than nine years the compensation is reduced one-

7 Droit Civile Francais, by Aubrey & Rau, 4th ed., vol. III, pp. 13, 17. Within the last few years there has been a movement to extend the acts to power development also. Water Supply Paper 238, U. S. Geol. Survey.

8 *Ibid.*, p. 18.

9 See, also, Aubrey & Rau, *ut supra*, p. 21.

10 Articles 622 to 640.

11 Articles 52, 53.

half, subject to the duty at the end thereof to restore the servient estate to its original condition; and numerous other provisions. The Lombardy Code is much the same, but shorter; the bonus here is one-fourth in excess of estimated damage.

These statutes are similar to that considered in Clark v. Nash in that they allow ditch-building over private land for another's private irrigation, by exercise of the power of eminent domain. They do not, however, allow the enlarging of existing canals, as did the statute in Clark v. Nash, because it seems to have been found unsatisfactory by experience. One commentator says: "The power of acquiring a right of way for waters through existing canals, which, as we have seen, was admitted by the ancient legislation of Piedmont, has, for good reasons, been left out in the formation of the new code. . . . . The authors of this code found, with reason, that it was unjust to impose upon proprietors the obligations to receive strange waters into their canals, races, or ditches, as experience had proven that such mingling as resulted therefrom seldom failed to lead to litigation, disastrous to all interests." [12]

This matter in the civil law rests upon the power of eminent domain, very similar to Clark v. Nash. It is a principle of civil law as much as common law that private property shall not be taken for public use without just compensation, but that has not, in civil-law countries, the binding force which it has in this country, where it is contained in constitutions, and these European statutes take a wide scope in allowing condemnation for private purposes.[13]

[12] De Buffon on Agriculture, vol. II, p. 329.

Another commentator likewise says: "The vexed question of the right of passage through previously existing channels has been very judiciously disposed of by the Sardinian legislation. To have continued this right to the possessor of water in the absolute manner established by the ancient legislation of Piedmont would, as experience had already shown, have led to constant and harassing disputes. The edict of Charles Emanuel, on which the right spoken of was founded, had been followed by repeated lawsuits; and though the judicial tribunals had necessarily decided all cases in accordance with its provisions, the Senate of Turin had especially recorded its opinion that the law was one of great severity. It is also recorded that there was scarcely ever a single case in which the results of the union in the same canal, and the subsequent division of the water belonging to two different proprietors, were satisfactory to both." (Smith, Italian Irrigation, vol. II, p. 270.)

In regard to using a *natural stream* to convey an artificial supply of water, reference is made to a previous chapter (*supra*, sec. 38 et seq., recapture). Our concern here is confined to enlarging private and artificial waterways.

[13] It may be remarked that the continental European countries do not confine it to waters. One may there likewise enter private land to search

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§ 615. Procedure and Miscellaneous.—Condemnation proceedings for a right of way, however, must be on proper notice and compensation, and a statute authorizing entry otherwise is unconstitutional.[14]

The acquisition of rights by condemnation and by appropriation are entirely different,[15] and the statutes for posting notice, filing maps, etc., regarding appropriation have no application to condemnation unless the statutes expressly so declare.[16]

A water-right and a ditch right may be condemned separately.[17] It has been held that a water-right must be first acquired before condemning for a ditch,[18] but the contrary has also been held.[19]

Damages on condemnation of land for an irrigation canal or reservoir may cover injury from probable seepage;[20] upon condemnation of a water-right, evidence of condition, improvement, and productivity of land is admissible to show damages.[21] The necessity for a taking must be determined before damages are

for and work mines, upon payment of damages, the right to authorize this flowing from the "Regalian doctrine" of mines that exists in the civil law. See Yale on Mining Claims and Water Rights, p. 44 et seq.

[14] Sterritt v. Young, 14 Wyo. 146, 116 Am. St. Rep. 994, 82 Pac. 946, 4 L. R. A., N. S., 169.

[15] State ex rel. Kettle Falls etc. Co. v. Superior Court, 46 Wash. 500, 90 Pac. 653.

[16] Apply to condemnation of right of way for ditches by special Washington statute. State ex rel. Kettle Falls etc. Co. v. Superior Court, 46 Wash. 500, 90 Pac. 653.

Quaere, whether Cal. Civ. Code, 1415, as amended in 1907 (see statutes) so enacts.

[17] Schneider v. Schneider, 36 Colo. 518, 86 Pac. 348.

[18] Castle Rock etc. Co. v. Jurisch, 67 Neb. 377, 93 N. W. 690. See Cal. Stats. 1885, p. 95, *semble* accord. Compare Cal. Civ. Code, sec. 1415, as amd. in 1907. Cf. also, Nippel v. Forker, 26 Colo. 74, 56 Pac. 577; O'Reiley v. Noxon (Colo.), 113 Pac. 486.

In Washington, water companies for city supply, before they can condemn water-rights, must show that they have obtained from the city the privilege of supplying it, and that defendant refused to supply the city himself. State ex rel. Shropshire v. Superior Court (1909), 51 Wash. 386, 99 Pac. 3.

[19] Schneider v. Schneider, 36 Colo. 518, 86 Pac. 347; Prescott Irr. Co. v. Flathers, 20 Wash. 454, 55 Pac. 635; State ex rel. Kettle Falls etc. Co. v. Superior Court, 46 Wash. 500, 90 Pac. 653.

[20] Middelkamp v. Bessemer etc. Co. (1909), 46 Colo. 102, 103 Pac. 280, 23 L. R. A., N. S., 795, *dictum*.

[21] Benninghoff v. Town of Palisade (Colo.), 108 Pac. 983.

As to measure of damages on eminent domain, see, also, Denver Co. v. Midaugh, 12 Colo. 434, 13 Am. St. Rep. 234, 21 Pac. 565; Cal. Code Civ. Proc., sec. 1248.

It has been held that the presence of percolating water was not an element that could be considered in estimating the value of property taken on eminent domain. (City of Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585.) But the rule may be different under the recent modification of the law of percolating waters. (*Infra*, sec. 1039 et seq.)

assessed.[22] There is no right to a jury unless by express statute.[23] The statutes of Idaho do not contain such provisions,[24] but it is usually contained in other States.[25] A decree of condemnation must provide that the money shall be paid to the clerk of the court before work upon the ditch shall be commenced.[1] The condemnor may take possession upon tender to defendant or payment into court of the damages assessed on eminent domain.[2]

In California it has been said: "It seems not to be important whether the corporation through whose instrumentality the object is to be obtained be a domestic or foreign corporation."[3] In a recent Montana case the contrary was held,[4] but this was immediately changed by statute.[5] In Alaska it has been held that a California corporation cannot exercise the power of eminent domain.[6] The United States may condemn only under State law for the Reclamation Service.[7] A corporation organized for commercial purposes, essentially private, cannot exercise the power of eminent domain, though also offering to supply the public at the same time.[8] But where organized for purposes primarily public, claiming to condemn water-rights for purposes both public and private, a decree allowing condemnation may be made, but it will not carry any sanction of the private use, which may be prevented in subsequent proceedings.[9] The fact that articles of

22 Portneuf Irr. Co. v. Budge (1909), 16 Idaho, 116, 100 Pac. 1046.

23 *Ibid.*

24 *Ibid.*

25 E. g., California and Colorado Constitutions, quoted *supra*, sec. 605.

1 Fulton v. Methow etc. Co., 45 Wash. 136, 88 Pac. 117. For a question of procedure in Oregon, see Grande Ronde etc. Co. v. Drake, 46 Or. 243, 78 Pac. 1031.

2 Portneuf Irr. Co. v. Budge (1909), 16 Idaho, 116, 100 Pac. 1046. Costs of appeal should not be upon defendant, as it would deprive him of full value for his property. Portneuf Co. v. Portneuf Co. (Idaho), 114 Pac. 19.

3 Gilmer v. Lime Point, 18 Cal. 251. Accord, Kirk etc. Co. v. American Assn., 128 Ky. 668, 108 S. W. 232.

4 Helena etc. Co. v. Spratt, 35 Mont. 108, 88 Pac. 773, 8 L. R. A., N. S., 567, 10 Ann. Cas. 1055, citing Chestatee Pyrites Co. v. Cavenders Cr. M. Co., 119 Ga. 354, 100 Am. St. Rep. 174, 46 S. E. 422; Vanderpoel v. Gorman, 140 N. Y. 563, 37 Am. St. Rep. 601, 35 N. E. 932, 24 L. R. A. 548; South Yuba Water Co. v. Rosa, 80 Cal. 333, 22 Pac. 222 (which, however, is not in point); Rumbough v. Southern Im. Co., 106 N. C. 461, 11 S. E. 528; Postal Tel. Co. v. Cleveland etc. Ry. Co. (C. C.), 94 Fed. 234. But limiting its decision to corporations of the character of the respondent in the principal case.

5 Spratt v. Helena Co., 37 Mont. 60, 94 Pac. 631.

6 Miocene D. Co. v. Lyng, 2 Alaska, 265.

7 United States v. Burley (Idaho, 1909), 172 Fed. 615; Same v. Same (1910), 179 Fed. 1, 102 C. C. A. 429. See Mont. Stats. 1905, p. —— (House Bill No. 219).

8 State ex rel. Tolt Power etc. Co v. Superior Court, 50 Wash. 13, 96 Pac. 519.

9 State ex rel. Shropshire v. Superior Court (1909), 51 Wash. 386, 99 Pac. 3.

incorporation include incidental private uses with the public one will not bar condemnation, since the right acquired thereby extends only to the public uses alone.[10]

Condemnation may be made of property already devoted to public use, for a more necessary public use.[11] Irrigation rights may be condemned to furnish a city water supply.[12] Land may be condemned for a reservoir, though containing a public highway, the reservoir being a more necessary public use.[13] As to how far condemnation will lie for water already devoted to a public use, *quaere*.[14] Between two rival public service corporations, the one first started may condemn the water-rights of a later one, where only one is possible.[15] One irrigation company may, by condemnation under such statutes as that upheld in Clark v. Nash, enlarge the canal of another company, so as to make it do the service of both; that is, to irrigate the two thousand five hundred acres of the existing company and an additional twenty thousand acres to be supplied by the new company.[16] Relative necessity is not measured by the extent of the relative uses. The irrigation of a greater area is not *per se* a more necessary use.[17]

The fact that water-rights and ditch rights sought on eminent domain may conflict with the rights of other appropriators who are not parties to the action cannot be raised.[18] The rights of strangers to the suit cannot be allowed to influence condemnation

10 Walker v. Shasta Power Co., 160 Fed. 856, 87 C. C. A. 660. But cf. Hercules W. Co. v. Fernandez, 5 Cal. App. 726, 91 Pac. 401, holding that a complaint to condemn water-rights to supply specified towns "and other places" is defective, since "other" places would include uses not public uses.

11 For example, see Wyo. Stats. 1909, c. 68, sec. 3.

12 City of Helena v. Rogan, 26 Mont. 452, 68 Pac. 798, 27 Mont. 135, 69 Pac. 709.

13 Marin Co. etc. Co. v. Marin County, 145 Cal. 586, 79 Pac. 282.

14 See, also, Junction etc. Co. v. City of Durango, 21 Colo. 194, 40 Pac. 356 (condemnation not lie by city to enlarge company ditch). Denver etc. Co. v. Denver etc. Co., 30 Colo. 204, 69 Pac. 568, 60 L. R. A. 383 (concerning condemnation of railway for reservoir). Sand Creek Co. v. Davis, 17 Colo. 326, 29 Pac. 742; San Luis Co. v. Kenilworth Co., 3 Colo. App. 244, 32 Pac. 860; Salt Lake etc. Co. v. Salt Lake City, 25 Utah, 441, 71 Pac. 1067; Reclamation Dist. v. Superior Court, 151 Cal. 263, 90 Pac. 545 (allowing condemnation of a reclamation levee for a railway roadbed). Portneuf Irr. Co. v. Budge (1909), 16 Idaho, 116, 100 Pac. 1046 (allowing enlargement of irrigating canal). See, also, *supra*, section 308, as to what are preferred uses.

15 State ex rel. Kettle Falls etc. Co. v. Superior Court, 46 Wash. 500, 90 Pac. 653; State v. Superior Court (1909), 53 Wash. 321, 101 Pac. 1094.

16 Portneuf Irr. Co. v. Budge (1909), 16 Idaho, 116, 100 Pac. 1046, citing Clark v. Nash and Railway cases.

17 Portneuf Irr. Co. v. Budge (1909), 16 Idaho, 116, 100 Pac. 1046.

18 Schneider v. Schneider, 36 Colo. 518, 86 Pac. 348.

proceedings.[19] To secure a right to a whole stream, condemnation must be made of all rights from source to mouth and not merely of those above (or below) the point of diversion.[20]

The right of condemnation for a ditch is not lost from the fact that water might be put upon the land in some other way, as by a pump,[21] especially if not pleaded;[22] nor from the fact that without irrigation the land might still have some agricultural value.[23]

In Nebraska the condemnation procedure follows that of condemnation by railroads.[24]

Condemnation of *land* for sewage purposes does not necessarily include a right to send sewage into a *stream* on the land.[25]

Section 1415 of the California Civil Code as amended in 1907[1] is difficult to understand, but seems to fix a statute of limitations of sixty days after posting a notice of appropriation, within which to begin condemnation proceedings. This feature is dropped, however, in an amendment in 1911.

Some questions peculiar to condemnation of riparian rights are considered in a later chapter.[2]

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§ 616. A Question of Procedure.—Mr. Mills[3] remarks: "It would seem, however, that in instances where the stream system is of considerable size and the number of riparian proprietors who would be affected by a diversion of water is large, the proceedings to condemn their respective rights and compensate each for his injury or loss of the flow of the stream would be of such

19 Denver etc. Co. v. Denver etc. Co., 80 Colo. 204, 69 Pac. 568, 60 L. R. A. 383; Walker v. Shasta Power Co. (Cal.), 160 Fed. 856, 87 C. C. A. 660 (no defense to condemnation that plan cannot be successful because of outstanding rights also requiring condemnation). See *infra*, sec. 627.

20 In re Board of Water Supply, 58 Misc. Rep. 581, 109 N. Y. Supp. 1036.

21 State ex rel. Galbraith v. Superior Court (Wash.), 110 Pac. 429.

22 "Whether, as has been suggested, an equally feasible, or more feasible, scheme might not be devised, and whether some other reservoir site might not be selected, are immaterial inquiries. The record discloses no circumstances or conditions taking the case out of the general rule that, in the absence of bad faith, the judgment of the party exercising the right of eminent domain as to what and how much land shall be taken is conclusive." United States v. Burley (Idaho), 172 Fed. 615, affirmed in 179 Fed. 1, 102 C. C. A. 429.

23 State ex rel. Galbraith v. Superior Court (Wash.), 110 Pac. 429.

24 Crawford v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647, 93 N. W. 781, 60 L. R. A. 889. See Comp. Stats. 1901, art. 2, sec. 41, art. 3, sec. 10.

25 *Semble*, Village of Twin Falls v. Stubbs, 15 Idaho, 68, 96 Pac. 195.

1 See *infra*, statutes.

2 *Infra*, sec. 864 et seq.

3 Mills' Irrigation Manual, p. 276.

magnitude and so expensive as to practically bar the appropriator from attempting it." Such a case may arise where a water company seeks to acquire a stream for the supply of a city. Condemnation proceedings may be instituted against perhaps fifty defendants (riparian owners) below the point of diversion, but such condemnation would be inadequate because it ignores the riparian proprietors upon the upper half of the stream and would not destroy their right of use on their own lands, and hence would not secure to the company the exclusive right to the whole stream which it sought. To secure the exclusive right to the entire stream would necessitate the condemnation of riparian rights from source to mouth.[4] The same is true under the new law of percolating water. And it is no less true of appropriative water-rights; for condemnation of all appropriations below the point of diversion of a proposed public use would not affect the rights of any of the appropriators upon the rest of the stream above the point of diversion; to obtain the right to an entire stream in an appropriation jurisdiction it is equally necessary to condemn all rights from source to mouth.[5]

Since water-rights (whether riparian or appropriative) may be condemned for a public use on eminent domain proceedings, and since the important and large enterprises are usually for purposes which are public uses (especially in view of the decision in Clark v. Nash above considered, that the taking may in some cases and under certain circumstances, be for an individual's private enterprise alone, and not necessarily for general supply), anything which facilitates condemnation is likely to be eagerly resorted to. And there is a tendency to allow a short cut to condemnation which, if generally adopted, will likely give rise to a system of condemnative water-rights in a class by itself.

The principle in question is that the special proceedings for condemnation, which are cumbersome and lengthy and expensive, need not be followed. In the law of eminent domain, wherever the special proceedings are necessary and not followed, equity will enjoin simply because the taking of a man's property is an extraordinary proceeding which must be done by the prescribed method strictly or not at all. But there is a line of decisions concerning railroads holding that such injunction will be refused

[4] See, for example, In re Board of Water Supply, 58 Misc. Rep. 581, 109 N. Y. Supp. 1036.

[5] *Infra*, sec. 626 et seq.

when the acts complained of are not a taking of property but a collateral damaging of it, such as where property values along a railroad decrease because of the noise, smoke or other similar matters. In such cases the injunction to stop the running of the railroad until the eminent domain formalities are complied with is frequently refused, and the damages to the property owners are instead assessed in the injunction suit.[6]

This is now fairly well established in the law of water-rights of all kinds. Since constitutions usually provide that private property cannot be taken for public use without compensation, damages must be paid; but relief by injunction against one who has, at great expenditure, actually diverted water from its owner for public use, is refused after expenditure has been incurred and public necessity has arisen, although condemnation proceedings were never instituted.

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§ 617. Same.—The authorities are cited and a more particular presentation is made in a later section under the topic of injunctions.[7] Something may be said here as to the things which suggest themselves in its bearing upon taking property for public use.

Since the constitutional provision says property cannot be taken for public use until damages are ascertained and paid, the rule under consideration does not technically pass any property by refusing the injunction; but there are some Nebraska cases considering it as recognizing an actual property to the diversion which would support an affirmative action of injunction and to quiet title against the real owner without paying damages.[8] The court relegated the owner to a separate action for damages. So that the foregoing principle seems to be carried to the extent in Nebraska that the burden in condemnation is thrown upon owners to sue for their compensation instead of for the condemnor to sue for the property.[9]

The Nebraska cases further construed the rule in a way which makes the Board of Irrigation the condemnation tribunal instead

[6] See Fresno etc. Co. v. S. P. Co., 135 Cal. 202, 67 Pac. 773; Southern Ry. Co. v. Slauson, 138 Cal. 342, 94 Am. St. Rep. 58, 71 Pac. 352.

[7] *Infra*, sec. 651.

[8] Crawford v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647, 93 N. W. 781, 60 L. R. A. 889; McCook Irr. Co. v. Crews, 70 Neb. 115, 102 N. W. 249; Cline v. Stock, 71 Neb. 70, 98 N. W. 454, 102 N. W. 265.

[9] The principle is avowedly stated as one of procedure only. "The question in this case, however, which it is

of the courts. The Nebraska court laid stress upon the fact that the condemnor had, under claim as appropriator, secured the approval of the State Board of Irrigation; the court holding (contrary to the usual authority elsewhere)[10] that the determination of the State board is conclusive upon the courts and considered that the permit of the State board passed a title which would support an action to quiet title against the real owner. This gives to the board the power to license (so as to be binding on the court) what would otherwise be a trespass; to create rights in one, by taking them from another; to violate the constitution guaranteeing private property rights.

The cases arose after the court had declared riparian rights to exist in Nebraska (as in California), which was an unpopular position. The property taken in these cases was the riparian right, and the court took this way of largely nullifying its former decisions. One need not find fault with decisions making an open rejection of riparian rights, but only with decisions which go around by the back way to nullify rights which previous cases, at the front door, said they were upholding.

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§ 618. **Same.**—Another question is, What will be the application of this rule in connection with Clark v. Nash?[11] In Clark v. Nash the rule was established that, under certain circumstances, water-rights and other property can be condemned for private advantage without devoting it to public supply. Can one, then, in a case of diverting water from its owner's to one's own private field for irrigation, defend an injunction on the ground that condemnation would lie and multiplicity of actions is to be avoided? If so, injunctions in water suits would cease, for under Clark v. Nash private irrigation may be a use for which condemnation will lie, and defendants in ordinary injunction suits would need only to pay damages. Or will it be said that the irrigation by both private parties is equally a public use, so that the taker must show a more necessary use? If so,

proposed to further consider, relates more to the remedial rights of the parties to the controversy, than to a determination of the substantive rights or interests in property of which they may be possessed." McCook Irr. Co. v. Crews, 70 Neb. 115, 102 N. W. 249. Yet denying the owner the procedure by which his right is protected, his right is, in effect, denied in substance. The court takes away the private right when it takes away the means by which it lives.

[10] *Infra*, secs. 1192 et seq., 1194.

[11] *Supra*, sec. 607 et seq.

will a greater private necessity for the other man's water-right make it a more necessary use and prevent injunction? In other words, if you need another farmer's water-right more on your own farm than he does on his, can you simply take it and make him accept damages when he sues for an injunction?

This rule of procedure making condemnation proceedings unnecessary in certain circumstances, and the rule of Clark v. Nash holding that condemnation may (under certain circumstances) lie for private enterprise and not necessarily for general supply, when taken together, so facilitate the taking of private property from its owner as to be far-reaching in their practical results; opening the way for a system of condemnation water-rights easily obtained; and in time may constitute a system of condemnative water-rights in a class by itself.

§§ *619–623. (Blank numbers.)*

CHAPTER 27.

PROCEDURE.

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§§ 659–665. (Blank numbers.)

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§ 624. The preceding chapters have been devoted to the substantive law, defining and bounding an appropriator's rights. In the protection of these rights, there remain over various matters concerning procedure. Some arise out of the new statutes which provide special procedures. These we leave to a special part of this book below.[1] Here we will deal with the procedure aside from special irrigation legislation, and under the general law of the land.[2]

Owing to the fact that water suits deal with rights of numerous people (and, as settlement advances, of whole communities) in a common and to a large extent indivisible supply, procedure is frequently complicated because of the large number of rights involved at the same time; further, because of the fluid nature of the subject matter of the litigation, "which does not stay quiet in a certain place, but is always running from one place to another"; because, moreover, of its fluctuating volume or condition with the varying seasons, localities and surroundings.[3]

By way of recapitulating some general introductory ideas in respect to the test of wrongful interference with a right of appropriation, there may be noted the departure from the common law between riparian proprietors. That system is founded upon the equality of right of all riparian proprietors, each riparian owner having the right to a reasonable use of the stream, although by

1 *Infra*, Part VI.

2 Such matters as arise exclusively under the system of riparian rights as distinguished from appropriation are not generally considered in this chapter. See *infra*, sec. 880 et seq. As a rule, however, the matters herein considered apply throughout the water law.

3 It was said in a recent case: "Water suits are, in a sense, *sui generis;* for the complications and many intricacies developed by litigation of this character, of late years, when all available lands are rapidly becoming settled, resulting in most instances in the demand for water exceeding the supply, necessarily give rise to new questions of practice, not covered by the statute nor aided by precedent. The courts, then, are confronted with the dilemma either of exercising their discretion in such matters or of making an exception to that well-known maxim, which is the foundation of all equitable jurisdiction, that 'equity will not suffer a right to be without a remedy.'" Mr. Justice King in Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

See, for example, Jackson v. Indian etc. Co., 13 Idaho, 513, 110 Pac. 251; Windsor Res. Co. v. Lake Supply Co., 44 Colo. 214, 98 Pac. 729.

exercising it the use of the stream by another riparian proprietor was made less favorable. Neither riparian proprietor can claim an exclusive right; their rights are correlative. But under the law of appropriation the prior appropriator gets an independent and exclusive right, any material interference with which is wrongful, however reasonable the interference might have been between riparian owners. The rules of the common law based upon correlative rights have no application.[4] The question under the law of appropriation generally is whether the flow is, in any substantial degree at all, made less fit for the prior appropriator (his right still being exclusive of and paramount in every way to any subsequent claimant), and if it is so interfered with, the interference is wrongful. "In all controversies, therefore, between him and parties subsequently claiming the water, the question for determination is necessarily whether his use and enjoyment of the water *to the extent of his original appropriation* have been impaired by the acts of the defendant."[5]

A. PARTIES.

(3d ed.)

§ **625. Cases are Governed by the Relative Rights of the Parties Before the Court.**—It is a general principle of law that the court can determine the rights only of the parties to the suit, and only as between themselves. They may both be wrongdoers as against a third person, yet that third person may never set up his right against either of them. It is the office of the court to adjudge only the relative rights in actual controversy of the plaintiffs against the defendants and *vice versa*. Hence it is that different decrees often award to different persons the whole of a stream, such awards being in different suits between different parties, though as against other appropriators who have not taken part in the litigation they may have no right at all. In order to determine what right one absolutely has in the stream as against all claimants, all claimants must be brought into court; otherwise the court can adjudge only

[4] Except so far as considered *supra*, sec. 310 et seq.

[5] Per Mr. Justice Stephen Field in Atchison v. Peterson, 87 U. S. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 383. Italics ours. As to Judge Field's views upon this matter, see, however, *supra*, sec. 312.

For the distinction between the exclusive right of the law of appropriation and the correlative rights of the common law, compare Hill v. King, 8 Cal. 336, 4 Morr. Min. Rep. 533, and Bear R. Co. v. N. Y. Co., 8 Cal. 327, 68 Am. Dec. 325, 4 Morr. Min. Rep. 526.

the relative rights of those before it. Possession is a sufficient right to the whole stream against a wrongdoer as to the possessor.

One of the grounds for indictment of the system of appropriation has been this feature that one decree will absolutely enjoin John Smith from diverting any water of the whole stream against Tom Jones, and another, in a different suit to which John Smith is not a party (and who, consequently, is in no way bound thereby), will in the same way enjoin Frank Doe from diverting any water of the whole stream against Richard Roe. This is unavoidable, for it would be against justice, and constitutional principles of due process of law, to bind by a decree the rights of a man who was not before the court, or to apply them for the benefit of a litigant to whom they do not belong. It is too obvious to require elaboration that the parties to a lawsuit must fight it out between themselves, and at the same time its results affect them alone. The law guarantees to every man his day in court and a right to a hearing before his right can be adjudged.

It is in recognition of this fundamental principle that the water codes have provided a special procedure to determine rights by bringing all appropriators upon a stream into court in a single suit, in which all litigate, and the decree may hence be absolute in its determination. This special procedure is elsewhere considered at length.[6]

(3d ed.)

§ 626. Rights of Strangers to a Suit cannot be Bound.—A judgment or decree can bind only the parties before the court, and any that tries to do more is void. The supreme court of California says: "It may, perhaps, be unnecessary to add that the foregoing discussion has reference simply to the rights of the parties *inter se*. The right of third parties to take a part of the water of the lake, or to complain of a diversion by any of the parties to this action, is not here involved, and cannot be affected by anything here decided."[7] The supreme court of Washington says: "In the argument submitted in support of the action of the trial court it seems to be assumed that these decrees fix the rights of the parties to the waters of Moses Lake and Crab Creek, not only as

6 *Infra*, secs. 1206, 1222 et seq.

7 Duckworth v. Watsonville Co., 158 Cal. 206, 110 Pac. 927. In Same v. Same, 150 Cal. 520, 89 Pac. 338, the court said that the right "cannot be vicariously contested by another on behalf of the owner of the better right."

between themselves, but as to other and third parties claiming interests adverse to such parties. But a moment's reflection must convince anyone that this view is erroneous. Although general in form, and broad enough in language to include the whole world, they can have no such effect. They are binding on the parties to the action and their privies, but upon no one else. As to strangers claiming rights in the waters of the lake the decrees in no manner affect them. The decrees are not even evidence of adverse rights. Strangers may proceed as if the decrees had never been entered."[8]

An action to enjoin a water commissioner from diverting water from a stream, to be effective for the end desired, must, it is held, join as defendants the persons for whose benefit it is diverted, since a decree against a water commissioner, alone, does not affect owners who were not parties to the suit.[9] A decree adjudicating rights between two parties does not govern as to a right later purchased by one of them from a stranger to the suit.[10] A decree based upon the rights of owners in one water district cannot be binding upon them when rendered in another district in a suit to which they were not parties.[11]

A statute in Montana[12] seems to say that appropriators are bound by decree in suits decided prior to their appropriation, though not parties thereto. Except possibly on the theory of the decree acting as additional notice, operating as a notice of appropriation, this violates a rule "as old as the law that no man shall be condemned in his rights of property, as well as in his rights of person, without his day in court,"[13] and its constitutionality may perhaps be questionable. The Montana court has held that a decree cannot bind persons who were not parties (nor privy to any parties) to the action, and who had no connection with the litigation or with the parties thereto.[14]

[8] State ex rel. McConihe v. Steiner (Wash.), 109 Pac. 57.

[9] Squire v. Livezey, 46 Colo. 302, 85 Pac. 181; Boulder etc. Co. v. Hoover (Colo.), 110 Pac. 75; McLean v. Farmers' etc. Co., 44 Colo. 184, 98 Pac. 16, citing Farmers' Highline C. & R. Co. v. White, 32 Colo. 114, 75 Pac. 415; Brown v. Farmers' Highline C. & R. Co., 26 Colo. 66, 56 Pac. 183.

[10] Josslyn v. Daly, 15 Idaho, 137, 96 Pac. 568.

[11] McLean v. Farmers' Co., 44 Colo. 184, 98 Pac. 16. But see *infra*, secs. 1232, 1233.

[12] Laws 1907, p. 489, sec. 12.

[13] Terrell v. Allison, 21 Wall. 293, 22 L. Ed. 634.

[14] State ex rel. Pew v. District Court, 34 Mont. 233, 85 Pac. 525.

(3d ed.)

§ 627. Nor can Rights of Strangers Affect the Result Between the Parties Litigant.—Not being bound nor before the court at all, the rights of strangers correspondingly cannot affect the suit; it must be determined upon the relative rights alone of those before the court. It cannot avail one party to say that some stranger to the suit has a better right than his opponent. The supreme court of the United States has said: "Neither do we think that the trial court was called upon, at the instance of the defendants, entire strangers in every aspect to other appropriators, to inquire into and pass upon the question whether appropriators of water below the mouth of the proposed canal of appellee would be injured by the construction of the canal. The rights of such persons will not, of course, be injuriously affected by the decree in this cause, and *non constat* but that they may yet intervene for their own protection, if they deem that the construction of the canal will be an invasion of their rights, or that they may be willing to forego objection to the construction of the canal."[15]

The question whether the appropriation of water interferes with the rights of other appropriators cannot be raised by parties who are strangers to such other appropriators not parties to the action.[16] Rights of strangers cannot be set up as a defense to condemnation proceedings.[17] Nor, in an action in Colorado to change the point of diversion, is it any defense that the change might injure intermediate users on the stream who are not parties to the action.[18] The rights of third parties cannot be set up unless they are brought into court. If the defense to an action for diversion is that plaintiff has no title to the water-right and that there are

[15] Gutierres v. Albuquerque etc. Co., 188 U. S. 545, 23 Sup. Ct. Rep. 338, 47 L. Ed. 588.

[16] Gutierres v. Albuquerque etc. Co., 188 U. S. 545, 23 Sup. Ct. Rep. 338, 47 L. Ed. 588; Senior v. Anderson, 138 Cal. 716, 72 Pac. 349; Utt v. Frey, 106 Cal. 396, 39 Pac. 807; Clark v. Ashley, 34 Colo. 285, 82 Pac. 588; Burkart v. Meiberg, 37 Colo. 187, 119 Am. St. Rep. 279, 86 Pac. 99, 6 L. R. A., N. S., 1104; Silva v. Hawkins (Cal.), 9 Pac. 72; Buckers etc. Co. v. Farmers' etc. Co., 31 Colo. 62, 72 Pac. 49; Seven Lakes Co. v. New Loveland etc. Co., 40 Colo. 382, 93 Pac. 485, 17 L. R. A., N. S., 329; Boulder etc. Co. v. Hoover (Colo.), 110 Pac. 75; Hackett v. Larimer etc. Co. (Colo.), 109 Pac. 965; Humphreys T. Co. v. Frank, 46 Colo. 524, 105 Pac. 1093; Carnes v. Dalton (Or.), 110 Pac. 170.

[17] Schneider v. Schneider, 36 Colo. 518, 86 Pac. 347; Denver etc. Co. v. Denver etc. Co., 30 Colo. 204, 69 Pac. 568, 60 L. R. A. 383; Walker v. Shasta etc. Co., 160 Fed. 859, 87 C. C. A. 660. See *supra*, sec. 615.

[18] Crippen v. Glasgow, 38 Colo. 104, 87 Pac. 1073; Lower Latham etc. Co. v. Bijou etc. Co., 41 Colo. 212, 93 Pac. 483; Diez v. Hartbauer, 46 Colo. 599, 105 Pac. 868.

appropriators prior to him, such appropriators should be brought into court by a cross-bill.[19] The contention that water and ditch rights sought on eminent domain may conflict with the rights of other appropriators who are not parties to the action cannot be raised.[20] That prior appropriators below stream will have a right to complain gives an appropriator above no right of action against a diversion by a defendant as between the two. If plaintiff fears that he will be blamed by the lower appropriators for defendant's diversion, he should join them as defendants.[21] In a suit by the United States to enjoin a canal upon public land, rights of settlers over whose land the canal might also pass are immaterial.[22] That an appropriation interferes with the navigability of a navigable stream cannot be set up by anyone but the State or United States, or someone interfered with in navigating.[1] That one claiming an appropriation on public land is an alien can only be raised by the United States, if at all.[2] Whether acts of a corporation in distributing water are *ultra vires* cannot be raised by a stranger diverting water above on the same stream.[3] A right to use water through a ditch over land of another can be objected to only by the owner of the land.[4] That a ditch is bringing water to plaintiff's land by trespassing on the land of a third person cannot avail a party who is a stranger to such third person.[5] "It may be that the holder of the true title may not wish to assert his right, and if he should not wish to assert his title, the defendant has no right to assert it for him."[6]

That there are other wrongdoers is no defense to an action for damages (although receivable in mitigation)[7] or injunction;[8]

[19] Humphreys v. McCall, 9 Cal. 59, 70 Am. Dec. 621.

[20] Schneider v. Schneider, 36 Colo. 518, 86 Pac. 347.

[21] Larimer etc. Co. v. Water Supply Co., 7 Colo. App. 225, 42 Pac. 1020.

[22] United States v. Lee (N. M.), 110 Pac. 607.

[1] *Supra*, sec. 339.

[2] Santa Paula W. W. v. Peralta, 113 Cal. 38, 45 Pac. 168.

[3] *Semble*, Arroyo D. Co. v. Baldwin (1909), 155 Cal. 280, 100 Pac. 874.

[4] Hough v. Porter (1909), 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

[5] Ellis v. Tone, 58 Cal. 289; Pendola v. Ramon, 138 Cal. 517, 71 Pac. 624; Turner v. James Canal Co. (1909), 155 Cal. 82, 132 Am. St. Rep. 59, 99 Pac. 520, 22 L. R. A., N. S., 401, 17 Ann. Cas. 823.

[6] Humphreys v. McCall, 9 Cal. 63, 76 Am. Dec. 621.

[7] Gould v. Stafford, 77 Cal. 66, 18 Pac. 879; Kevil v. City of Princeton (Ky. Civ. App.), 118 S. W. 363; Beck v. Bono (Wash.), 110 Pac. 13.

[8] Gould v. Stafford, 77 Cal. 66, 18 Pac. 879; Lakeside D. Co. v. Crane, 80 Cal. 181, 22 Pac. 76; Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. 755; Humphreys T. Co. v. Frank, 46 Colo. 524, 105 Pac. 1093; Carnes v. Dalton (Or.), 110 Pac. 170 (citing this book, 2d ed., sec. 196); Beck v. Bono (Wash.), 110 Pac. 13; Weeks etc. Co. v. Glenside W. Mills, 64 Misc.

although it has been held that if there are sufficient other wrongdoers taking the whole even without defendant, such total diversion by others is a defense.[9] This should seem to be the rule only where it amounts to a disproval that defendant contributed at all to the injury. Again, persons against whom an action is brought to cancel their rights in an irrigation company cannot complain that the action is not also maintained against others having no better rights.[10]

(3d ed.)

§ 628. **Recurrence of the Principle in the Law of Waters.**—The principle and the idea upon which it rests are far-reaching and underlie a very large part of the law; colloquially expressed, that possession is nine points of the law. In fact, so often does it come up that one is sometimes tempted to lose perspective and to think that the whole law of real property is a possessory law—that possession is the whole law of real property instead of only nine-tenths of it—and that actual *title* against the world is but a fringe of the fabric, so often must cases be decided without reference thereto, the real title being not represented in court. The following are some of the instances where this principle has been important in the preceding chapters.

(a) The early law of possessory rights on the public domain, and therefore of the law of appropriation of water itself, was rested upon it. The real title to the public lands, mines and waters was regarded as being in the United States as landowner of the public lands, so that the pioneers were declared by some to be, in true law, mere trespassers subject to ouster. But Congress remaining silent and the Federal title not being represented in court, the courts decided cases between private persons without reference to such outstanding Federal title. As between the pioneers themselves, possession was nine points of the law, and priority governed though neither had any positive right of *title*. The results of this we have shown throughout, such as, for example, the survival of the old rule as to parol sales. But in the act of 1866 the theory that the waters were open to free acquisition by the people displaced that; the appropriators on public land

Rep. 205, 118 N. Y. Supp. 1027; United States v. Conrad Inv. Co., 156 Fed. 123.

[9] West Point etc. Co. v. Moroni etc. Co., 21 Utah, 229, 61 Pac. 16.

[10] Blakeley v. Ft. Lyon Co., 31 Colo. 224, 73 Pac. 249.

have since been regarded in California as grantees of the United States enjoying a full *title;* an appropriation no longer depends upon the present principle, and instead has to-day the dignity of a fee—a freehold—an absolute right in real property against the world. This is considered in the opening chapters of Part II of this book.

(b) The question whether the law of appropriation applies to ditches on private land or, under the California doctrine, to waters thereon. Against the landowner it does not; but against strangers to the landowner, this principle of possession being nine points of the law—a possessory as distinguished from a freehold right—governs; that is, no one but the injured riparian owner will be heard to set up the existence of private land or riparian rights on the stream.[11]

(c) As to the use of the ditches or other works of a stranger to the suit.[12]

These are matters elsewhere considered, and there are many other connections in which the principle arises. In the note are given some citations enforcing the principle in one form or another.[13]

At the same time, some exceptions may be noted. The main one is that where the parties are engaged in a *crime* upon the

11 *Supra,* sec. 246. In this *quasi* sense, one California Justice declares that the law of prior appropriation applies in California to ditch-building and to waters upon private lands. See *supra,* sec. 246, and *infra,* secs. 828, 1106 and 1158.

12 *Supra,* sec. 390.

13 The following list is not intended to be complete, and other cases are cited in the previous sections:

California.—Humphreys v. McCall, 9 Cal. 59, 70 Am. Dec. 621; Ellis v. Tone, 58 Cal. 289; Emerson v. Bergin, 71 Cal. 335, 12 Pac. 242; Gould v. Stafford, 77 Cal. 66, 18 Pac. 879; Lakeside D. Co. v. Crane, 80 Cal. 181, 22 Pac. 76; Utt v. Frey, 106 Cal. 396, 39 Pac. 807; Senior v. Anderson, 138 Cal. 716, 72 Pac. 349; Craig v. Crafton Water Co., 141 Cal. 178, 74 Pac. 762; Silva v. Hawkins, 152 Cal. 138, 92 Pac. 72; Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. 338; Same v. Same, 158 Cal. 206, 110 Pac. 927; People's Ditch Co. v. Fresno etc. Co., 152 Cal. 87, 92 Pac. 77; Turner v. James Canal Co., 155 Cal. 82, 132 Am. St. Rep. 59, 99 Pac. 520, 22 L. R. A., N. S., 401, 17 Ann. Cas. 823; Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. 755. For an illustration where the decision is possibly erroneous for having overlooked this, see Cave v. Tyler, *supra,* secs. 246, 247.

Colorado.—Larimer etc. Co. v. Water Supply Co., 7 Colo. App. 225, 42 Pac. 1020; Buckers etc. Co. v. Farmers' etc. Co., 31 Colo. 62, 72 Pac. 49; Clark v. Ashley, 34 Colo. 285, 82 Pac. 588; Burkhart v. Meiberg, 37 Colo. 187, 119 Am. St. Rep. 279, 86 Pac. 99, 6 L. R. A., N. S., 1104; Schneider v. Schneider, 36 Colo. 518, 86 Pac. 347; Crippen v. Glasgow, 38 Colo. 104, 87 Pac. 1073; Clark v. Ashley, 34 Colo. 285, 82 Pac. 588; Denver Co. v. Denver Co., 30 Colo. 204, 69 Pac. 568, 60 L. R. A. 383; Hackett v. Larimer etc. Co. (Colo.), 109 Pac. 965; Lower Latham Co. v. Bijou Co., 41 Colo. 212, 93 Pac. 483; Blake-

real owner, or acts involving moral turpitude, the court will grant no relief to either, being *in pari delicto;* it will consider the outstanding title to that extent. A second exception is that in suits in equity as distinguished from law (such as injunctions or bills for specific performance), the discretion of the chancellor is appealed to, and the better authority is that he may refuse relief if a decree between the two disputants will work great hardship upon the public or upon a third party without sufficient benefit to the actual litigant parties to offset it.[14] A third exception is that in an action for damages, the existence of other wrongdoers than the defendant, while no defense to him, may, perhaps, be evidence in mitigation of the amount of damages.[15] Likewise there may be some exception under statutes allowing one owner to sue "for the benefit of all,"[16] or where defendant's acts amount to a public nuisance and the attorney general sues to abate it upon behalf of the water-using public;[17] in such cases

ley v. Fort Lyon Co., 31 Colo. 224, 73 Pac. 249; McLean v. Farmers' etc. Co., 44 Colo. 184, 98 Pac. 16; Seven Lakes Co. v. New Loveland Co., 40 Colo. 382, 93 Pac. 485, 17 L. R. A., N. S., 329; Boulder etc. Co. v. Hoover (Colo.), 110 Pac. 75; Humphreys T. Co. v. Frank, 46 Colo. 524, 105 Pac. 1093; Diez v. Hartbauer, 46 Colo. 599, 105 Pac. 868.

Idaho.—Josslyn v. Daly, 15 Idaho, 137, 96 Pac. 568; Hill v. Standard Min. Co., 12 Idaho, 223, 85 Pac. 907; Montpelier Co. v. Montpelier (Idaho), 113 Pac. 741.

Montana.—State ex rel. Pew v. District Court, 34 Mont. 233, 85 Pac. 525. See, also, Sloan v. Byers, 37 Mont. 503, 97 Pac. 855.

New Mexico.—United States v. Lee (N. M.), 110 Pac. 607.

Oregon.—Hayden v. Long, 8 Or. 244; Browning v. Lewis, 39 Or. 11, 64 Pac. 304; McCall v. Porter, 42 Or. 49, 70 Pac. 820, 71 Pac. 976; Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728; Whited v. Cavin (Or. 1909), 105 Pac. 396; Carnes v. Dalton (Or.), 110 Pac. 170. But see Brown v. Baker, 39 Or. 66, 65 Pac. 799, 66 Pac. 193 (appearing to have overlooked the point).

Washington.—State ex rel. McConihe v. Steiner (Wash.), 109 Pac. 57; Beck v. Bono (Wash.), 110 Pac. 13.

Federal courts.—Gutierres v. Albuquerque etc. Co. (N. M.), 188 U. S. 545, 23 Sup. Ct. Rep. 338, 47 L. Ed. 588; Walker v. Shasta Power Co. (Cal.), 160 Fed. 856, 87 C. C. A. 660; Union Mining Co. v. Dangberg, 81 Fed. 73; United States v. Conrad Inv. Co. (Cal.), 156 Fed. 123.

Miscellaneous.—Long v. Louisville etc. Co., 128 Ky. 26, 107 S. W. 203, 13 L. R. A., N. S., 1063, 16 Ann. Cas. 673; Liliuokalani v. Pang Sam, 5 Hawaii, 14. See, also, *infra,* sec. 1233.

[14] This is a matter, however, upon which there is considerable dispute. *Infra,* sec. 648 et seq., balance of convenience.

[15] Gould v. Stafford, 77 Cal. 67, 18 Pac. 879, affirmed in Same v. Same, 91 Cal. 146, 27 Pac. 543; Same v. Same, 101 Cal. 32, 35 Pac. 429. See, also, Beck v. Bono (Wash.), 110 Pac. 13; Kevil v. City of Princeton (Ky. Civ. App.), 118 S. W. 363.

[16] See Cloyes v. Middleburg Co., 80 Vt. 109, 66 Atl. 1039, 11 L. R. A., N. S., 693. See, also, Cal. Code Civ. Proc., sec. 382; Haese v. Heitzig (Cal., March 16, 1911), 114 Pac. 816.

[17] People ex rel. Ricks etc. Co. v. Elk River Co., 107 Cal. 228, 48 Am. St. Rep. 121, 40 Pac. 486 (*dictum*); People v. New York Carbonic etc. Co., 196 N. Y. 421, 90 N. E. 441.

perhaps the rights of all owners may be considered without their being actual parties to the suit. Possibly there may be a further exception where the action is strictly *in rem* (but it may be that the apparent exception there relates only to the manner of serving process).

(3d ed.)

§ 629. **Joinder of Parties.**—In order to settle the rights of all claimants upon a stream against each other, all must, hence, be brought into court in the same suit.[18] That all the owners of outstanding rights in the stream be brought into court so that the rights of each against all may be determined by the decree, is now frequently provided by statute, as already mentioned.[18a] And in the absence of a statute so commanding it is within the inherent power of the court to order the joinder in any suit of all the other claimants. In Hough v. Porter,[19] Mr. Justice King said: "The discretion of the court below in this respect was exercised by requiring all persons owning lands adjoining or claiming an interest in the waters of Silver Creek, its tributaries, or branches, to be brought in and made parties, either plaintiff or defendant, as their interests appeared, with directions to interplead as to each other, and we think the evidence adduced at the trial confirms the wisdom of the course pursued. It is consonant with public policy, and public interests require, that when in the determination of conflicting claims to the right to the use of public streams, for irrigation, manufacturing, or other useful purposes, it appears that many suits must eventually be brought to determine the various rights of persons whose property is to be affected by such use, it should be within the sound discretion of the trial court to require all, or any of the persons interested, to be made parties, as was done here, in order that the rights of each may be adjudicated and finally determined in one proceeding. . . . . In the case at bar, however, the order of the court, a copy of

[18] Charnock v. Higuerra, 111 Cal. 473, at 481, 52 Am. St. Rep. 195, 44 Pac. 171, 32 L. R. A. 190; Frost v. Alturas etc. Co., 11 Idaho, 294, 81 Pac. 996. See Creer v. Bancroft etc. Co., 13 Idaho, 407, 90 Pac. 228. See Rickey etc. Co. v. Wood, 152 Fed. 22, 81 C. C. A. 218. (See *infra*, sec. 654.)

[18a] *Infra*, secs. 1206, 1222 et seq. See Idaho Stats., 1911, c. 224, p. 709, providing a summary procedure to establish rights omitted from or arising subsequent to an adjudicating decree.

[19] 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728. See, also, Lytle Creek Co. v. Perdew (Cal.), 2 Pac. 731; Williams v. Altnow, 51 Or. 275, 95 Pac. 200, 97 Pac. 539.

which was directed to, and served upon, each, required that all should appear within a time there specified, and plead and interplead with respect to each other as their several interests might appear, which was in effect the same, and served the same purpose, as a summons, and was sufficient to require the appearance and interpleas demanded." And finally, without statute or court order, it is allowed to the parties to voluntarily join all the claimants they see fit, in an action to determine rights. Several owners on the same stream, though not holding by any common or joint title, nor any unity of design, may join as plaintiffs in an injunction suit or a suit to settle rights, or be joined as defendants[20] (although they cannot join or be joined in an action for damages, whether also claiming injunction or not).[21]

But in the absence of statute, such court order for joinder of outstanding rights is discretionary only, and such voluntary joinder of them is permissive only. In the absence of statute, it is not *essential* to have them all brought in. If they remain out and the court does not think it advisable to order them in, the decree can settle nothing against them, and can only determine the relative rights of those in court; but that it can do, and as to that the others are not necessary parties. They are necessary to the rendition of a decree good "against the world," but not necessary to a decree only as against the specific party who is in court. The court may determine that he is a wrongdoer against the plaintiff without determining what plaintiff's rights are against the rest of the world. "This court must deal with the situation of the parties as it finds them, and pro-

[20] Barnum v. Hostetter, 67 Cal. 272, 7 Pac. 689; Foreman v. Boyle, 88 Cal. 290, 26 Pac. 94; Miller v. Highland etc. Co., 87 Cal. 430, 22 Am. St. Rep. 254, 25 Pac. 550; Schultz v. Winter, 7 Nev. 130; Ronnow v. Delmue, 23 Nev. 29, 41 Pac. 1074; Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. 1113; Saint v. Guerrerio, 17 Colo. 448, 31 Am. St. Rep. 320, 30 Pac. 335; Desert etc. Co. v. McIntyre, 16 Utah, 398, 52 Pac. 628; United States v. Conrad Inv. Co., 156 Fed. 131; Norton v. Colusa etc. Co., 167 Fed. 202; Churchill v. Lauer, 84 Cal. 233, 24 Pac. 107; Daly v. Randall, 137 Cal. 674, 70 Pac. 784; Blaisdell v. Stephens, 14 Nev. 17, 33 Am. Rep. 523, 7 Morr. Min. Rep. 599; People v. Gold Run Ditch & Min. Co., 66 Cal. 138, 4 Pac. 1152; Woodruff v. Mining Co. (The Debris Case), 8 Saw. 628, 16 Fed. 25; In re North Bloomfield etc. Co., 27 Fed. 795, and authorities there cited; Union Mining Co. v. Dangberg, 81 Fed. 73. See Rickey etc. Co. v. Wood, 152 Fed. 22, 81 C. C. A. 218; Ames etc. Co. v. Big Indian etc. Co., 146 Fed. 166.

May join in a suit to settle rights. Creer v. Bancroft etc. Co., 13 Idaho, 407, 90 Pac. 228. See, also, *infra*, secs. 654, 655 (settling rights).

[21] Foreman v. Boyle, 88 Cal. 290, 26 Pac. 94; Geurkink v. City of Petaluma, 112 Cal. 310, 44 Pac. 570; Senior v. Anderson, 138 Cal. 723, 72 Pac. 349.

But see Hillman v. Newington, 57 Cal. 56, *contra* concerning suit for damages.

ceed to determine the rights of the persons within its jurisdiction who have been properly brought before it, where their rights can be determined without bringing in other parties who would oust the court of its jurisdiction." [22]

(3d ed.)

§ 630. **Joinder of Issue Between the Parties.**—Upon like principles, where there are several plaintiffs, their rights among themselves cannot be determined if they have not made issue thereof between themselves. Likewise of several defendants.[23] To determine rights of several plaintiffs or defendants *inter se*, they must join issue *inter se*.[24] Defendant may file a cross-bill for this purpose.[1]

In a recent case objection was made against adjudicating the relative rights of defendants as to each other, for the reason that the record did not disclose that any issue was made, or attempted to be framed, between them. And the court held: "This point we deem well taken. Such would have been within the discretionary power of the court had all the parties, by its order, been brought in, but declined to appear or plead, and a determination of their relative interests found essential to a determination of the rights of those framing issues.[2] But the exercise of this discretion is not essential to a determination of the rights between plaintiffs and the answering defendants. The evidence adduced is also inadequate for that purpose. The decree must therefore be modified by setting aside all that part respecting the relative rights of any of the parties. We do not deem it necessary, however, to remand this cause for the purpose of trying out the matters here left unsettled, and will leave all unadjudicated points for deter-

22 Union Mining Co. v. Dangberg, 81 Fed. 73. See, also, Sloan v. Byers, 37 Mont. 503, 97 Pac. 855; Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728; Whited v. Cavin (Or.), 105 Pac. 396; Carnes v. Dalton (Or.), 110 Pac. 170; Frost v. Idaho Irr. Co. (Idaho), 114 Pac. 38; and cases cited in the foregoing sections, especially section 627, *supra*.

23 Nevada etc. Co. v. Bennett, 30 Or. 59, 60 Am. St. Rep. 777, 45 Pac. 472; Sloan v. Byers (1908), 37 Mont. 503, 97 Pac. 855; Conley v. Dyer, 43 Colo. 22, 95 Pac. 304.

24 Bathgate v. Irvine, 126 Cal. 135, 77 Am. St. Rep. 158, 58 Pac. 442, commented on in Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. 1113; Strong v. Baldwin, 154 Cal. 150, 129 Am. St. Rep. 149, 97 Pac. 178.

1 Rickey etc. v. Wood, 152 Fed. 22, 81 C. C. A. 218; Ames etc. Co. v. Big Indian etc. Co., 146 Fed. 166.

2 Citing Hough v. Porter, 51 Or. 318, 439, 441, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

mination in such proceeding, if any, as the parties interested may hereafter see fit to bring."[3]

(3d ed.)

§ 631. **Parties (Concluded).**—The owner of the water-right has the usual recourse to the courts, as he has in the protection of any other property.

A mortgagee has been held to have a right of action against a water company for failure to supply water.[4] A contract of purchase gives the intended purchaser a right to bring an action to change the point of diversion.[5] The owner of arid agricultural lands, having a right to use the water of a river for irrigation purposes, has such an interest in the water different from that of the general public as entitles him to maintain an action to restrain deposits of mineral debris in streams tributary to such river, which would render the water unfit for use.[6]

Consumers from a corporation ditch are not necessary parties where the corporation, as itself an appropriator, sues a wrongdoer.[7] Where several water users having rights as riparian owners and by adverse use form a corporation to distribute water among themselves, the corporation, whether it becomes the owners of the water titles or only an agent, has sufficient interest to bring an action to quiet title against an upper claimant, and for an injunction.[8] A stockholder may enjoin the corporation from taking contracts beyond its capacity.[9] With regard to the relative status as parties of corporations and their consumers or stockholders, reference is made to a later section.[10]

Both lessor and lessee are liable to a stranger for damage caused by seepage from a pit or pond that was on the leased land at the time of the lease.[11] A tenant having the right of possession

[3] Whited v. Cavin (Or.), 105 Pac. 396.

[4] Equitable etc. Co. v. Montrose etc. Co., 20 Colo. App. 465, 79 Pac. 747.

[5] Wadsworth etc. Co. v. Brown, 39 Colo. 57, 88 Pac. 1060. The original owner of land for which water was appropriated *held* not liable to a purchaser of one of the tracts into which the land was divided, for diversion of water by third persons: Booth v. Trager, 44 Colo. 409, 99 Pac. 60.

[6] Arizona Copper Co. v. Gillespie (Ariz.), 100 Pac. 465.

[7] Montrose etc. Co. v. Loutsenhizer, 23 Colo. 233, 532, 48 Pac. 532; Farmers' etc. Co. v. Agricultural etc. Co., 22 Colo. 513, 55 Am. St. Rep. 149, 45 Pac. 444.

[8] Arroyo D. Co. v. Baldwin (1909), 155 Cal. 280, 100 Pac. 874.

[9] McDermott v. Anaheim etc. Co., 124 Cal. 112, 56 Pac. 779.

[10] *Infra*, sec. 1245 et seq.

[11] Canyon City v. Oxtoby (1909), 45 Colo. 214, 100 Pac. 1127.

may sue a stranger, the injunction obtained becoming inoperative at the end of the lease.[12] The landlord can sue a stranger for diversion or sue a canal company on a water supply contract, though tenant is in possession,[13] but is not liable for a wrongful diversion by his tenant in the absence of concurrence or consent on the landlord's part.[14] Questions concerning tenants in common are considered in an earlier chapter.[15]

Questions arising under recent special water code legislation are considered elsewhere.[16]

B. PLEADING AND PRACTICE.

(3d ed.)

§ 632. **Jurisdiction.**—A diversion operates upon the whole of a ditch and is an injury to every part of it. Consequently an action can be brought in Tulare County, for a diversion at the head of the ditch in Fresno County, the ditch lying in both counties.[17] Likewise of a ditch in two States; a diversion in Montana is actionable in Wyoming into which State the ditch runs.[18] In the California case above cited,[19] plaintiff and defendant diverted the water of Kings River in Fresno County. Plaintiff's ditch was about twenty miles in length, of which about eighteen miles was in Tulare County, and the damage was sustained by plaintiff in the last-named county, in which county the action was brought. The acts complained of being the prevention of water from flowing in plaintiff's ditch, which was located in both counties, while the specific act of diversion complained of occurred in Fresno County, it was held that the subject of the action was

[12] Heilbron v. Fowler etc. Canal Co., 75 Cal. 426, 7 Am. St. Rep. 183, 17 Pac. 535; Sacchi v. Bayside Lumber Co., 13 Cal. App. 72, 108 Pac. 885 (action for damages).

[13] Heilbron v. Last Chance Water etc. Co., 75 Cal. 117, 17 Pac. 65.

[14] Gould v. Stafford, 101 Cal. 32, 35 Pac. 429.

[15] *Supra*, secs. 320, 321.

[16] Part VI, below.

For example, a South Dakota statute requires the State Engineer to be served with pleadings in every water suit tried in the State. S. D. Stats. 1907, c. 180, sec. 15.

[17] Lower Kings River etc. Co. v. Kings River etc. Co., 60 Cal. 408; Last Chance etc. Co. v. Emigrant etc. Co., 129 Cal. 277, 61 Pac. 960; Deseret etc. Co. v. McIntire, 16 Utah, 398, 52 Pac. 628.

[18] *Supra*, sec. 344; Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210 (citing and relying on Lower Kings River etc. Co. v. Kings etc. Co.); Taylor v. Hulett, 15 Idaho, 265, 97 Pac. 39, 19 L. R. A., N. S., 535; Slack v. Walcott, 3 Mason, 508, Fed. Cas. No. 12,932, Story, J., at p. 516; Mannville Co. v. Worcester, 138 Mass. 91, 52 Am. Rep. 261, Holmes, J.

[19] Lower Kings River etc. Co. v. Kings River Co.

in both counties, and the action might have been brought in either.

The Idaho court, having obtained jurisdiction over the person of a Wyoming appropriator, may enjoin him from injuring an Idaho appropriation, though only Wyoming courts can enforce it after obtaining a similar decree in Wyoming, based on that granted by Idaho.[20] A State engaging directly in diverting water or licensing those who are, may be sued by a lower State acting as "*parens patriae*," and the Supreme Court of the United States will have original jurisdiction.[21] Concerning suits regarding interstate use or interstate streams, reference is made to a preceding section on that topic.[22]

Venue or place of *trial* in an action to abate a nuisance lies where the injury is done, being a local action, and not where the defendants reside.[23] In California, actions concerning title to realty must be not only tried, but also *commenced* in the county where the realty lies.[24] Actions to quiet title to water-rights are within this.[25]

An appeal from the State Engineer to a State court is removable to the Federal court.[1] A suit to determine priority between appropriators does not involve a Federal question merely because it is concerned with section 2339 of the Revised Statutes of the United States.[2] A suit to establish water-rights resting on Mexican grant involves no Federal question, *per se*.[3] A suit by a State to annul a Carey Act grant is removable to the Fed-

20 Taylor v. Hulett, 15 Idaho, 265, 97 Pac. 37, 19 L. R. A., N. S., 535.

Compare the following: Noxious vapors created in New Jersey and passing over land in New York are actionable in New York. Ruckman v. Green, 9 Hun, 225.

21 Kansas v. Colorado, 185 U. S. 125, 22 Sup. Ct. Rep. 552, 46 L. Ed. 838.

22 *Supra*, sec. 340 et seq.

23 City of Marysville v. North Bloomfield etc. Co., 66 Cal. 343, 5 Pac. 507 (tailings deposited on lands below stream); Drinkhouse v. Waterworks, 80 Cal. 308, 22 Pac. 252 (threatened injury from building of a dam, injunction); Last Chance etc. Co. v. Emigrant Co., 129 Cal. 277, 91 Pac. 960; Litchfield v. International Co., 58 N. Y. Supp. 856; Cox v. Little Rock Co., 55 Ark. 454, 18 S. W. 630.

24 Const., art. 6, sec. 5.

25 Pacific Club v. Sausalito Co., 98 Cal. 487, 33 Pac. 322 (restraining order only incidental); Fritts v. Camp, 94 Cal. 393, 29 Pac. 867 (pollution of a stream held action concerning title); Miller v. Madera etc. Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A., N. S., 391; but see Miller v. Kern Co., 140 Cal. 133, 73 Pac. 836, holding an action for damages only, to a ditch, is not within the provision.

1 Waha etc. Co. v. Lewiston etc. Co. (Idaho), 158 Fed. 137.

2 Telluride etc. Co. v. Rio Grande etc. Co., 175 U. S. 639, 20 Sup. Ct. Rep. 245, 44 L. ed. 305.

3 Crystal Springs Co. v. Los Angeles, 177 U. S. 169, 20 Sup. Ct. Rep. 573, 44 L. Ed. 720. See Boquillas etc. Co. v. Curtis, 213 U. S. 339, 29 Sup. Ct. Rep. 493, 53 L. Ed. 822. See *supra*, sec. 68.

eral courts, as a suit arising under the laws of the United States.[4] Organizing a foreign corporation in order to get into the Federal courts on the ground of diversity of citizenship may become collusive and void.[5]

(3d ed.)

§ 633. **Joinder of Causes of Action.**—A count for an injunction may be joined with one for damages.[6] A count for diversion (injury to water-right) and for injury to a ditch or other structure used in connection with the water-right may be joined but must be separately stated.[7] But in a complaint in equity to enjoin diversion and to have the amount of water to which plaintiff is entitled determined, these need not be separately stated.[8] A count as appropriator may be joined with one as riparian owner.[9] A plaintiff claiming alternatively as appropriator and riparian owner and also under a contract need not, it is held in Washington, state these in separate counts.[10]

(3d ed.)

§ 634. **Pleading (Continued)—Allegations in Complaint.**—An appropriator's complaint is distinct from one based on riparian rights; and an allegation that plaintiff claims as an appropriator will not allow him to recover as a riparian proprietor or *vice versa*.[11] The two rights may be set up in the same complaint by separate counts.[12] The appropriator should allege that he is entitled to the use of so much water as an appropriator, not that he is "the owner" thereof,[13] He need not allege that defendant has no right, as any right in defendant is a matter for the defense

4 State v. Three Sisters Irr. Co. (Or.), 158 Fed. 346.

5 Miller v. East Side Canal Co. (1908), 211 U. S. 293, 29 Sup. Ct. Rep. 111, 53 L. Ed. 189. As to Federal jurisdiction on ground of diversity of citizenship, see, also, Anderson v. Bassman, 140 Fed. 10.

6 Jacob v. Lorenz, 98 Cal. 332, 33 Pac. 119; Watterson v. Saluubehere, 101 Cal. 107, 35 Pac. 432; The Salton Sea Cases, 172 Fed. 820, 97 C. C. A. 242; but see Foreman v. Boyle, 88 Cal. 290, 26 Pac. 94, *semble contra*.

7 Nevada etc. Co. v. Kidd, 37 Cal. 282; Bear River Co. v. Boles, 24 Cal. 359.

8 Patterson v. Mills, 138 Cal. 276, 71 Pac. 177; and see Silver Creek etc. Co. v. Hayes, 113 Cal. 142, 45 Pac. 191.

9 *Semble*, Huffner v. Sawday, 153 Cal. 86, 94 Pac. 424.

10 Hutchinson v. Mt. Vernon W. Co., 49 Wash. 469, 95 Pac. 1023.

11 Riverside etc. Co. v. Gage, 89 Cal. 410, 26 Pac. 889; San Luis etc. v. Estrada, 117 Cal. 168, 48 Pac. 1075; Strong v. Baldwin, 137 Cal. 432, 70 Pac. 288. See Shenandoah etc. Co. v. Morgan, 106 Cal. 409, 39 Pac. 802. But cf. Hutchinson v. Mt. Vernon W. Co., 49 Wash. 469, 95 Pac. 1023.

12 Huffner v. Sawday (1908), 153 Cal. 86, 94 Pac. 424.

13 Smith v. Green, 109 Cal. 228, 41 Pac. 1022.

to plead.[14] Likewise plaintiff need not allege that his own right has not been lost by nonuser, as, if it has, it is matter of defense, to be alleged by defendant;[15] nor, in a complaint for flooding his land, need plaintiff negative that defendant ever acquired a right to do so by condemnation.[16] Plaintiff need allege only the ultimate facts showing his right and acts of defendant which, if unexplained, would be an invasion thereof.

A statement that plaintiff has a priority as appropriator superior to that of defendant has been held in Colorado not a sufficient allegation of plaintiff's right, without the facts which show such appropriation and its priority.[17] But that is unsound in principle, and it is usually held that title need not be deraigned in the complaint.[18] "It was not only unnecessary, but it would have been surplusage, for plaintiff to have pleaded the historical deraignment of its title and the varying methods of its use."[19] The contrary rule violates the principle that only ultimate facts, and not evidence, are to be pleaded; and in general, the extreme to which plaintiff is often put in filling a complaint with subordinate matters of evidence and in negativing matters properly defensive (which should be left to the defense to plead) if they exist at all, is one of the regrettable traps and formalities into

[14] Town of Sterling v. Pawnee Co., 42 Colo. 421, 94 Pac. 339, 15 L. R. A., N. S., 238.

[15] Corea v. Higuera, 153 Cal. 451, 95 Pac. 882, 17 L. R. A., N. S., 1018.

[16] Bingham v. Walter (1909), 80 Kan. 617, 103 Pac. 120.

[17] Carroll v. Vance, 39 Colo. 216, 88 Pac. 1069, *sed qu.* In Town of Sterling v. Pawnee etc. Co., 42 Colo. 421, 94 Pac. 339, 15 L. R. A., N. S., 238, it was held that this applied to a bill to quiet title; but in Kimball v. Northern Irr. Co., 42 Colo. 412, 94 Pac. 333, decided about the same time, the rule was held not applicable to bills to quiet title, but only to bills for injunction. The former case went so far even as to hold that plaintiff must plead his means of use to show that it is not wasteful. See, also, Hyatt, J., in Farmers' etc. Co. v. Southworth (1889), 13 Colo. 111, 21 Pac. 1028, 4 L. R. A. 767; Church v. Stillwell, 12 Colo. App. 43, 54 Pac. 395; Farmers' Co. v. Agricultural Co., 3 Colo. App. 255, 32 Pac. 722; Hackett v. Larimer etc. Co. (Colo.), 109 Pac. 965.

An allegation in a complaint to enjoin the diversion of the waters of a creek that defendant's object was purely speculative *held* insufficient to raise an issue that defendant's diversion was not for a beneficial use. Sternberger v. Seaton etc. Co. (1909), 45 Colo. 401, 102 Pac. 168, saying: "The complaint should state the facts as to what particular use defendant has made or proposes to make of its diversion from the stream, and it is for the court to determine therefrom whether or not the use is a lawful one."

[18] Corea v. Higuera, 153 Cal. 451, 95 Pac. 884, 17 L. R. A., N. S., 1018; Wutchumna Co. v. Pogue, 151 Cal. 105, 90 Pac. 362; Fudeckar v. East Riverside Co., 109 Cal. 36, 41 Pac. 1024; Beach v. Spokane etc. Co., 25 Mont. 379, 65 Pac. 111; Hague v. Nephi etc. Co., 16 Utah, 421, 67 Am. St. Rep. 634, 52 Pac. 765, 41 L. R. A. 311; Hutchinson v. Mt. Vernon Co., 49 Wash. 469, 95 Pac. 1023.

[19] Wutchumna Water Co. v. Pogue, 151 Cal. 105, 90 Pac. 362.

which modern procedure has fallen, and has given rise to much of the present dissatisfaction.

Although, in a suit to quiet title to an irrigation ditch, the complaint alleged plaintiff to be the owner of the ditch in fee, it did not preclude the court from finding a right or ownership in the nature of an easement.[20] Title by prescription can be proved under a general allegation of ownership.[21] Plaintiff's right should be stated in inches or gallons, and not merely by dimensions of ditch.[22] Averments of possession of land, mill and water privileges sufficiently allege appropriation.[23] The place of use need not be alleged.[24]

A former decree, to be relied upon, must be alleged in the complaint.[25] A right to the use of an irrigation ditch may be alleged in general terms, without detailed allegation of ownership of right of way, headgate, and other particular details interfered with.[1] Complaint against water officials must contain facts showing that they were acting in excess of their official authority.[2] The allegation that "defendant is informed and believes" certain facts without also alleging on information and belief that those facts do exist is insufficient.[3] An allegation that defendants threatened to take "the waters" of the river has been held an allegation that they intended to take all of it;[4] but an allegation that plaintiff had a right to "all the water in the creek during the dry season" has been held too indefinite for specific relief.[5]

A complaint must state facts sufficient to constitute a cause of action.[6]

(3d ed.)

§ 635. **Alleging Local Customs.**—The local customs referred to in United States Revised Statutes, section 2339, need not be al-

20 Bashore v. Mooney, 4 Cal. App. 276, 87 Pac. 553.

21 Montecito etc. Co. v. Santa Barbara, 144 Cal. 576, 594, 77 Pac. 1113.

22 Lakeside etc. Co. v. Crane, 80 Cal. 181, 22 Pac. 76.

23 McDonald v. Bear R. etc. Co., 13 Cal. 220, 1 Morr. Min. Rep. 626.

24 Rincon etc. Co. v. Anaheim etc. Co., 115 Fed. 543. *Contra*, Miller & Lux v. Rickey, 127 Fed. 573.

25 Davis v. Chamberlain, 51 Or. 304, 98 Pac. 154.

1 Miller v. Kern etc. Co. (1909), 154 Cal. 785, 99 Pac. 179. See Lockwood v. Freeman (1909), 15 Idaho, 395, 98 Pac. 295.

2 McLean v. Farmers' etc. Co., 44 Colo. 184, 98 Pac. 16.

3 Swank v. Sweetwater Co. (1909), 15 Idaho, 353, 98 Pac. 297; Bank of North America v. Rindge (C. C.), 57 Fed. 279.

4 Miller v. Bay Cities Co., 157 Cal. 256, 107 Pac. 115. See, also, *infra*, sec. 639, note 11.

5 Porter v. Pettingill (Or.), 110 Pac. 393.

6 But see concurring opinion of Shaw, J., in Duckworth v. Watsonville Co., 158 Cal. 206, 110 Pac. 927.

leged or proved. In Oregon and Washington there has been some confusion on the point that has not occurred elsewhere. The principle is, as stated in Basey v. Gallagher,[7] that the rules of appropriation have everywhere in the West now passed into judicial decision or statute or both, thereby superseding the original customs on which decisions and statutes are based. The Oregon court now says it takes judicial notice of the customs, reaching the same result, but in a roundabout way, which still bases appropriation on custom instead of on decision and statute.[8] In Washington[9] it is held that judicial notice will be taken of the fact that at least that portion of the State east of the Cascade Mountains was included in the territory where the customary law of miners was in force, and the right of appropriating water for agricultural and manufacturing purposes existed, although the common-law rule of riparian ownership was a part of the law of the State.[10] This seems to be making separate rules for separate parts of the State.[11]

(3d ed.)

§ 636. **Evidence.**—It has been said[12] that most water suits are tried upon the theory that each would avail himself of what-

[7] 87 U. S. (20 Wall.) 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683. Cf. Drake v. Earhart, 2 Idaho, 716 (750), 23 Pac. 543.

[8] Parkersville etc. Dist. v. Wattier (Or.), 86 Pac. 775.

[9] Isaacs v. Barber, 10 Wash. 124, 45 Am. St. Rep. 772, 38 Pac. 871, 30 L. R. A. 665.

[10] See, also, Drake v. Earhart, 2 Idaho, 716 (750), 23 Pac. 541; Crawford etc. Co. v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647, 93 N. W. 781, 60 L. R. A. 889. But see Telluride etc. Co. v. Rio Grande etc. Co., 175 U. S. 639, 20 Sup. Ct. Rep. 245, 44 L. Ed. 305, and 187 U. S. 579, 23 Sup. Ct. Rep. 178, 47 L. Ed. 307.

[11] See *supra*, sec. 112.

In the early California days it was enacted: "In actions respecting mining claims, proof shall be admitted of the customs, usages or regulations established and in force at the bar, or diggings, embracing such claim, and such customs, usages, or regulations, when not in conflict with the constitution and laws of this State, shall govern the decision of the action." Cal. Stats. 1851, Practice Act, sec. 621, now sec. 748, Code Civ. Proc. (This statute was early copied in almost all the other Western States; e. g. Utah Rev. Stats. 1898, sec. 3521. See, also, Riborado v. Quang Pang M. Co., 2 Idaho, 136 (144), 6 Pac. 125; Mallett v. Uncle Sam Mining Co., 1 Nev. 188, 90 Am. Dec. 484, 1 Morr. Min. Rep. 17.) It is many years since this statute has been even referred to in California water cases, the reason being, as above stated, that the customs have long been superseded by decision and statute based upon them, both as to waters and as to mines.

Some recent statutes provide that local customs and rules shall not be displaced thereby; e. g., N. M. Stats. 1907, p. 71, sec. 57; Idaho Stats. 1905, p. 174, amending Stats. 1903, p. 223, sec. 9.

[12] Hough v. Porter, 51 Or. 318, 195 Pac. 732, 98 Pac. 1083, 102 Pac. 731. Another recent case says: "Perhaps there is in all water-right cases some mysterious relation between the quantity of water and the quantity of language—a law of supply and demand which requires that the volume of language shall increase in direct

ever defense the court, after trial, might discover he had, and, as a result, plead all defenses and rights available, with the apparent hope and expectation that they might, at least, come within hailing distance of some of them; and this dragnetic system of pleading and proof is not unusual in the trial of this class of cases. Pursuant to such policy, the litigants introduce all evidence at hand deemed likely to have any bearing upon the case, regardless of the claim of right or defense under which their proof might eventually be classed; a very loose procedure, however, not to be commended, and resulting chiefly from the confusion which has surrounded rights in water by appropriation.

The party alleging the existence of a water-right has the burden of proof and must prove it unequivocally.[13] The burden of proving an abandonment [14] or a right by adverse use [15] is on the party asserting it. One claiming a subsequent appropriation has the burden of proving that there was a surplus over the prior appropriation.[16]

The value of expert evidence has been doubted.[17] Expert evidence is not admissible as to whether a certain body is a lake or a running stream.[18]

ratio to the deficiency in volume of water." Redwater Co. v. Reed (S. D.), 128 N. W. 702.

[13] Smith v. Duff (1909), 39 Mont. 374, 133 Am. St. Rep. 582, 102 Pac. 981.

[14] *Supra*, sec. 567.

[15] *Supra*, secs. 579, 587.

[16] Petterson v. Payne, 43 Colo. 184, 95 Pac. 301. Perry v. Calkins (Cal.), 113 Pac. 136.

[17] Robertson v. Wilmoth, 40 Colo. 74, 90 Pac. 95; Twaddle v. Winters, 22 Nev. 88, 85 Pac. 280, 89 Pac. 289.

"In its investigation the court cannot say that the testimony of experts as to the amount of water used or required must be accepted as against the farmers of the vicinage who had been living in the valley and using the water for several years. It may be difficult for the courts to determine with mathematical certainty the precise amount of water running in a stream, or the carrying capacity of ditches and flumes, when the testimony, as in the present case, is conflicting; but the experts, who ought to know, differ as widely in their measurements as do the ordinary farmers in their method of calculation. A reference to what was said by this court in Union Mill & Mining Co. v. Dangberg, 81 Fed. 99, 100, without comment, shows that even experts are liable to make mistakes in their methods of measuring water, and in their judgment as to the amount of water necessary to irrigate an acre of land." Rodgers v. Pitt, 129 Fed. 932.

By statute in Nevada it is provided that "the court is hereby authorized to employ a hydraulic engineer or other expert to examine and make report under oath upon any subject matter in controversy, the cost of such employment to be equitably apportioned by the court and charged against the parties to the suit as costs. Nev. Stats. 1907, p. 30, sec. 19. Such a statute was held unconstitutional in People v. Dickerson (Mich.), 129 N. W. 198.

See, also, as to expert evidence, Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. 755; Evans v. Lakeside D. Co., 13 Cal. App. 119, 108 Pac. 1027.

[18] Duckworth v. Watsonville Co., 158 Cal. 206, 110 Pac. 927.

It has been said that testimony as to the quantity of water required for proper irrigation of lands in a certain vicinity amounts only to opinion evidence,[19] and that the estimate by the nonexpert witnesses as to the quantity of water in a ditch or diversion must always be taken with caution.[20]

Judicial notice has been taken (without actual proof) "that the flow from irrigated lands is heaviest in the fall";[21] that where the climate is arid and the state of cultivation high, "the court might *almost* take judicial notice that in years of ordinary rainfall there is no surplus of water in the stream over that used by the various owners under claim of right";[22] that light sagebrush soil requires irrigation to make it productive;[23] that a claim that seventeen inches per acre is needed for irrigating land is absurd.[24]

Official maps of the State Engineer are admissible in evidence without authentication, though their correctness may be disputed by evidence.[25] Records of the Federal land office have been held not admissible to prove the date of settlement by a riparian owner in a controversy with a nonriparian owner;[1] but the recitals in a certificate of final entry issued by the local land office have been held admissible evidence of the facts so recited.[2]

Best evidence of a decree entered in a judgment-book is the decree as so spread on the records.[3] Parol proof of possession and use of a water-right for irrigation is *prima facie* evidence of title.[4]

(3d ed.)

§ **637. Damages.**—In alleging damages, the quantity of water diverted should be alleged, and recovery will be limited to that;

19 Whited v. Cavin (Or.), 105 Pac. 396.

20 Ison v. Sturgill (Or.), 109 Pac. 579.

21 Smith v. Duff (1909), 39 Mont. 374, 133 Am. St. Rep. 582, 102 Pac. 984.

22 Anaheim W. Co. v. Fuller, 150 Cal. 335, 88 Pac. 978, *sed qu.*

23 Prescott Irr. Co. v. Flathers, 20 Wash. 454, 55 Pac. 635.

24 Whited v. Cavin (Or.), 105 Pac. 396.

25 Farmers' etc. Co. v. Riverside Irr. Dist. (1909), 16 Idaho, 52, 102 Pac. 481. See Nev. Stats. 1909, p. 31, secs. 8, 26b.

1 Driskill v. Rebbe, 22 S. D. 242, 117 N. W. 1135.

2 Davis v. Chamberlain, 51 Or. 304, 98 Pac. 154, citing Willamette Co. v. Gordon, 6 Or. 175.

3 Bates v. Hall, 44 Colo. 360, 98 Pac. 3.

4 Bates v. Hall, 44 Colo. 360, 98 Pac. 3. Evidence held insufficient to sustain a finding of an appropriation of water for a specified reservoir. Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co., 44 Colo. 214, 98 Pac. 729.

but as the allegation of amount of damages is not a material part of a complaint, proof of diversion of less than the precise quantity alleged, while limiting damages thereto, is not a bar to recovery.[5] The damages claimed for diversion of a natural stream must be for the injury to plaintiff's enterprise consequent to the loss of the flow and use of the water, not for the value of the water at so much per inch or gallon, since plaintiff does not own the *corpus* of the water, but a usufruct.[6] But it is otherwise with water reduced to possession,[7] and for that, damages may be measured by the reasonable value of the water as such; that is, where a trespasser digs a well and is notified by the landowner to quit taking water or be charged fifty dollars for each day water is taken, the landowner may get an injunction, but can recover damages only for reasonable value, of the water as such, and not at fifty dollars per day.[8]

It is to some extent the duty of plaintiff not to willfully or affirmatively increase the injurious effect of defendant's wrongful acts after they have been committed. (The doctrine of "avoidable consequences," an uncertain point in the law.)[9]

Where a ditch is interfered with, not wholly destroying its carrying capacity, but greatly increasing the difficulty and expense of keeping it clean and in repair, and the interference is of a permanent character (such as the location of a railway along and across the ditch), plaintiff may recover not only for loss at time of suit but also prospective damages.[10]

Exemplary damages may be awarded in a proper case.[11]

It has been held that an appropriator cannot recover damages to a current water-wheel, caused by backing water so as to reduce

[5] McDonald v. Bear River Co., 15 Cal. 145, 1 Morr. Min. Rep. 639.

[6] Parks etc. Co. v. Hoyt, 57 Cal. 44.

[7] *Supra*, sec. 30 et seq.

[8] Wright v. County of Sonoma (1909), 156 Cal. 475, 134 Am. St. Rep. 140, 105 Pac. 409. See Hagerman Co. v. McMurray (N. M.), 113 Pac. 823.

[9] See McLellan v. Brownsville Co. (Tex. Civ. App.), 103 S. W. 206; McCook Irr. Co. v. Crews, 70 Neb. 115, 102 N. W. 249; Cline v. Stock, 71 Neb. 70, 98 N. W. 454, 102 N. W. 265.

[10] Denver etc. Co. v. Heckman (1909), 45 Colo. 470, 101 Pac. 976.

[11] Cal. Stats. 1885, c. 115, p. 98: Lowe v. Yolo etc. Co., 8 Cal. App. 167, 96 Pac. 379; S. C., 157 Cal. 503, 108 Pac. 297.

the velocity of the stream below that to which the wheels are adapted.[12]

(3d ed.)

§ 638. **Measure of Damages.**—The measure of damages for failure to deliver, or for diversion of water for irrigation, or for injury to a ditch, is, where plaintiff has no crops (the injury having prevented him from beginning cultivation), the depreciation in permanent value (sale or rental value) of plaintiff's estate in the land from loss of water,[13] being the difference between the market value of the land or plaintiff's estate therein prior to the injury and after the injury,[14] and not the value of producible crops.[15] In determining the value of the land, a plan or adaptability to use land for a reservoir site cannot be considered in determining its market value.[16]

12 Schodde v. Twin Falls etc. Co. (Idaho), 161 Fed. 43, 88 C. C. A. 207, *sed qu.* See *supra*, secs. 310 et seq., 313.

13 Burrows v. Fox (Cal.), 30 Pac. 768; Denver etc. Co. v. Dotson, 20 Colo. 304, 38 Pac. 322 (destruction of a ditch); Young v. Extension D. Co., 13 Idaho, 174, 89 Pac. 296; City of Florence v. Calmet, 43 Colo. 510, 96 Pac. 183; Stock v. Hillsdale, 155 Mich. 375, 119 N. W. 435; Crow v. San Joaquin Co., 130 Cal. 310, 62 Pac. 562, 1058; Pallett v. Murphy, 131 Cal. 192, 63 Pac. 366.

14 *Ibid.*

The measure of damages for permanent injury to land resulting from pollution of a stream by mining or sewage is the difference between the market value of the land prior to the injury and after the injury. Morris v. Missouri Ry. (1909), 136 Mo. App. 393, 117 S. W. 687. See Kellogg v. City of Kirksville, 132 Mo. App. 519, 112 S. W. 296, concerning measure of damages for pollution.

15 Reisert v. New York, 69 App. Div. 302, 74 N. Y. Supp. 673 (Gagnon v. Molden, 15 Idaho, 727, 99 Pac. 765, holding evidence of improvements made in *anticipation* of receiving water not admissible in evidence).

16 Especially not, when the proposed plan is unpractical and fanciful. In re Board of Water Supply, 58 Misc. Rep. 581, 109 N. Y. Supp. 1036.

The California court has recently said in this connection: "It is seen, therefore, that this court by its latest utterances has definitely aligned itself with the great majority of the courts in holding that damages must be measured by the market value of the land at the time it was taken; that the test is not the value for a special purpose, but the fair market value of the land in view of all the purposes to which it is naturally adapted; that therefore while evidence that it is 'valuable' for this or that or another purpose may always be given and should be freely received, the value in terms of money, the price, which one or another witness may think the land would bring for this or that or the other specific purpose is not admissible as an element in determining that market value. For such evidence opens wide the door to unlimited vagaries and speculations concerning problematical prices which might under possible contingencies be paid for the land, and distracts the mind of the jury from the single question—that of market value—the highest sum which the property is worth to persons generally, purchasing in the open market in consideration of the land's adaptability for any proven use." Sacramento etc. Ry. Co. v. Heilbron (1909), 156 Cal. 408, 104 Pac. 979.

But where cultivation has actually begun and there are growing crops, the measure of damages is not only the loss (if any) in permanent value of plaintiff's estate, but also the value of the producible crop (probable value at maturity, and not merely at time of destruction) less the expense of producing and marketing it.[17] In such case evidence is admissible of the loss, during the water shortage, in value of the crops naturally produced as compared with those produced by plaintiff in previous years,[18] and of the difference in value, at the time the water is shut off, of the crop with a water-right, and its value without one,[19] and of the size and market value of crops on neighboring land;[20] and, it has been held, the actual net loss of money profit on the crops in marketing them;[21] and the value of any portion of the crop saved may be deducted.[22] Evidence is admissible (against a public

[17] *California.*—Teller v. Bay etc. Co., 151 Cal. 209, 90 Pac. 942, 12 L. R. A., N. S., 267; Dennis v. Crocker etc. Co. (1910), 6 Cal. App. 58, 91 Pac. 425; Salstrom v. Orleans etc. Co., 153 Cal. 551, 96 Pac. 292; Lowe v. Yolo etc. Co., 157 Cal. 503, 108 Pac. 297; Sacchi v. Bayside Lumber Co., 13 Cal. App. 72, 108 Pac. 885.

Colorado.—Northern etc. Co. v. Richards, 22 Colo. 450, 45 Pac. 423; Tubbs v. Roberts, 40 Colo. 498, 92 Pac. 220.

Montana.—Carron v. Wood, 10 Mont. 500, 26 Pac. 388; Watson v. Colusa etc. Co., 31 Mont. 513, 79 Pac. 14.

Nebraska.—Clague v. Tri-State etc. Co., 84 Neb. 499, 133 Am. St. Rep. 637, 121 N. W. 570.

Nevada.—Candler v. Washoe Lake Co., 28 Nev. 151, 80 Pac. 751, 6 Ann. Cas. 946.

New Mexico.—**Smith v. Hicks,** 14 N. M. 560, 98 Pac. 136, reviewing the authorities extensively.

Texas.—Gulf etc. Co. v. McGowan, 73 Tex. 355, 11 S. W. 336; San Antonio etc. Co. v. Kiersey (Tex. Civ. App.), 81 S. W. 1045.

Utah.—Lester v. Highland Boy Co., 27 Utah, 470, 101 Am. St. Rep. 988, 76 Pac. 341, 1 Ann. Cas. 761.

Washington.—Shotwell v. Dodge, 8 Wash. 337, 36 Pac. 254; Hutchinson v. Mt. Vernon etc. Co., 49 Wash. 469, 95 Pac. 1023.

Where there are growing crops and several years elapse before the injury is complete, the landowners are entitled to damages for the loss in value of their land and also for the yearly injury to their crops caused by the continuing nuisance. Watson v. Colusa, Parrott Min. etc. Co., 31 Mont. 513, 79 Pac. 14, measure of damages for pollution.

[18] Hutchinson v. Mt. Vernon W. Co., 49 Wash. 469, 95 Pac. 1023.

[19] Clague v. Tri-State Co. (1909), 84 Neb. 499, 133 Am. St. Rep. 637, 121 N. W. 570.

[20] Smith v. Hicks, 14 N. M. 560, 98 Pac. 144; Lester v. Highland etc. Co., 27 Utah, 470, 101 Am. St. Rep. 988, 76 Pac. 341, 1 Ann. Cas. 761; Dennis v. Crocker etc. Co., 6 Cal. App. 58, 91 Pac. 425 (damage to crops from flooding).

[21] Tubbs v. Roberts, 40 Colo. 498, 92 Pac. 220.

[22] Candler v. Washoe etc. Co., 28 Nev. 151, 80 Pac. 751, 6 Ann. Cas. 946.

In a recent case, logging operations caused overflow which injured dairy land. Plaintiff holding the land by a lease, the measure of damages was held to be the loss in value of his leasehold, and evidence was allowed of special adaptability of his land for certain crops; of the yield of previous years; the number of cows grazed the previous year; of having to rent new land to feed his cows after the flood; cost of destroyed headgates; work required to replace old conditions; cost of feed purchased for cows; and vari-

service company refusing to supply water for irrigating land) of the cost of restoring the land to the condition it would have been in if supplied with water, and the value of its use during the time lost.[23]

If one alleges only loss of profits from crops, evidence of loss of rental value of the land has been held inadmissible.[24]

(3d ed.)

§ 639. **Decree.**—Decrees should be as definite as language can make them.[25] "A practical view ought to be taken of all the conditions, surroundings and situations. The rights of all parties must be protected by the decree. The difficulty of enforcing it without the necessity of bringing independent suits should be avoided, if possible. Certainty in its terms, positiveness in its requirements, justice in its conclusions, will materially aid in the accomplishment of such a purpose."[1] Decrees awarding a party "enough to irrigate his land,"[2] or "sufficient water for household purposes"[3] or "one good irrigation stream of water,"[4] have been held defective for uncertainty. A decree should specify second-feet or definite fractions of a stream,[5] and not merely dimensions of ditch.[6] If a decree is based on capacity of

ous other details. Sacchi v. Bayside Lumber Co., 13 Cal. App. 72, 108 Pac. 885.

In one case (Lester et al. v. Highland Boy Gold Min. Co., 27 Utah, 470, 101 Am. St. Rep. 988, 76 Pac. 341, 1 Ann. Cas. 761), the court says: "In cases of destruction of growing crops it is proper and important to introduce and admit evidence showing the kind of crops the land is capable of producing, the kind of crops destroyed, the average yield per acre of each kind on the land not destroyed and on other similar lands in the immediate neighborhood, cultivated in like manner, the stage of growth of the crops, at the time of injury or destruction, the expense of cultivating, harvesting and marketing the crops, and the market value at the time of maturity, or within a reasonable time after the injury or destruction of the crops."

23 Lowe v. Yolo Co. (1910), 157 Cal. 503, 108 Pac. 297, saying it may be different where the destruction is of growing trees, which cannot be restored.

24 North Alabama etc. Co. v. Jones, 156 Ala. 360, 47 South. 144, *sed qu.* The *quantum* of damages in the *ad damnum* clause is usually held an immaterial allegation.

25 Authors v. Bryant, 22 Nev. 242, 38 Pac. 439; Patterson v. Ryan (Utah), 108 Pac. 1118.

1 Judge Hawley, in Union Mining Co. v. Dangberg, 81 Fed. 73.

2 Walsh v. Wallace, 26 Nev. 299, 99 Am. St. Rep. 692, 67 Pac. 914; Leavitt v. Lassen Irr. Co. (1909), 157 Cal. 82, 106 Pac. 404 (modifying Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. 858, 15 L. R. A., N. S., 359); Lassen Irr. Co. v. Long, 157 Cal. 94, 106 Pac. 409.

3 Powers v. Perry, 12 Cal. App. 77, 106 Pac. 595.

4 Smith v. Phillips, 6 Utah, 376, 23 Pac. 932.

5 Nephi etc. Co. v. Vickers, 15 Utah, 374, 49 Pac. 301.

6 Lakeside etc. Co. v. Crane, 80 Cal. 181, 22 Pac. 76. See Logan v. Guichard (Cal. 1911), 114 Pac. 989, holding "water *to the extent of* three inches" too uncertain.

ditch alone, it is erroneous, as it should be further limited to beneficial use, or a limitation to beneficial use will be implied and read into the decree.[7] Concerning this, reference is also made to preceding sections.[8]

No definite quantity of water can be decreed where the evidence does not disclose the amount entitled.[9] But a decree not specifying the number of acres to be irrigated is not necessarily void.[10]

Where a court finds that plaintiff is entitled to the use of *all* the water from October 1st to May 1st, each year, and the amount is difficult to ascertain, the decree may enjoin defendants absolutely during that period without specifying any quantities.[11]

A decree concerning a water-right does not *per se* concern a ditch, and *vice versa*.[12]

"The point is made that the decree should have permitted the defendants to divert the water, on condition that they returned it to the river above plaintiff's lands, no less diminished than it would have been in its natural flow to the point of return. It may be that a decree so limited would have been proper if the evidence had shown that the defendants were able and willing to make such return of the water."[13]

A decree concerning a stream governs also as to its tributaries.[14] An erroneous entry of a decree in the judgment-book may be amended to speak the truth as to what the decree was.[15] A decree, except in cases where a large number of parties have been brought in and the proceedings have been lax, is presumed satisfactory, on appeal, as to those not appealing.[16]

7 *Infra*, sec. 642.

8 *Supra*, secs. 471, 478; *infra*, sec. 642.

9 Simpson v. Harrah (1909), 54 Or. 448, 103 Pac. 58, 1007; Rodgers v. Overacker, 4 Cal. App. 333, 87 Pac. 1107. See, also, *infra*, secs. 883, 884.

10 Bates v. Hall, 44 Colo. 360, 98 Pac. 3.

11 Miller v. Bay Cities W. Co., 157 Cal. 256, 107 Pac. 115; Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. 755, citing Vernon Irr. Co. v. Los Angeles, 106 Cal. 237, 39 Pac. 762; City of Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585. See Porter v. Pettingill (Or.), 110 Pac. 393.

12 Parke v. Boulware, 7 Idaho, 490, 63 Pac. 1045; Nevada etc. Co. v. Kidd, 37 Cal. 282.

13 Huffner v. Sawday, 153 Cal. 86, 94 Pac. 424. Citing Gould v. Eaton, 117 Cal. 539, 49 Pac. 577, 38 L. R. A. 175; Montecito Valley Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. 1113. See, also, Miller v. Bay Cities Co., 157 Cal. 256, 107 Pac. 115.

14 Josslyn v. Daly, 15 Idaho, 137, 96 Pac. 568.

15 Bates v. Hall, 44 Colo. 360, 98 Pac. 3, *dictum*, holding decree as entered binding, however, until corrected in the book.

16 Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728; Seaweard v. Duncan, 47 Or. 640, 84 Pac. 1043.

A decree is not *res adjudicata* as to rights purchased by one of the parties subsequent to the decree from a stranger to the suit.[17] How far a decree based upon the common law of riparian rights is *res adjudicata* after the State has changed the law and repudiated that doctrine, *quaere*.[18]

The court can make reasonable regulations in the decree for its enforcement, fixing the times, quantity and manner of taking the water.[19]

As to decrees under the special water code procedures for determining rights, reference is made to a later chapter.[20]

Service of process (upon parties to the suit) by publication will, in some cases, be sufficient to support decrees *in rem* or *quasi in rem;*[21] but no decree, whether *in rem* or *in personam*, can bind persons who were not made parties (nor in privity with parties) to the action.[22]

(3d ed.)

§ **640. Miscellaneous Matters of Practice.**—Summons may be served by publication in a newspaper where the statutes so provide, and the action is one *in rem* or *quasi in rem*, and the defendants so served are unknown or concealed or out of the State.[23] In confirmation proceedings upon the organization of irrigation districts, the statutes usually provide service by publication.[24]

The facts and existence of a nuisance to a water-right and the amount of damages are to be tried by a jury in a suit at law for damages unless a jury is waived.[25] But there is no right to

[17] Joslyn v. Daly, 15 Idaho, 137, 96 Pac. 568.

[18] See Union Mining Co. v. Dangberg, 81 Fed. 73.

[19] Burr v. Maclay R. Co. (1909), 154 Cal. 428, 98 Pac. 260; Hough v. Porter (1909), 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

"If, at any time deemed necessary by it, the court should require the sheriff, or other officer or person as it may designate for the purpose, including an engineer or other assistant, as may be required, to fix at the points of diversion or other proper places suitable boxes or headgates, with a view to being able, in accordance with this decree, properly to measure, regulate, and distribute the water between those who, under this decree, may be entitled to the use thereof, the costs for which should be taxed against each in such proportion as the court may deem just and equitable." Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728. See, also, Whited v. Cavin (Or. 1909), 105 Pac. 396.

[20] *Infra*, sec. 1222 et seq.

[21] *Infra*, sec. 1227.

[22] *Supra*, sec. 625 et seq.

[23] See *infra*, sec. 1227.

[24] See Knowles v. New Sweden Irr. Dist. (1909), 16 Idaho, 217, 101 Pac. 81, holding the defendant in that case not entitled to personal service as distinguished from the publication.

[25] Chessman v. Hale, 31 Mont. 557, 79 Pac. 257, 68 L. R. A. 410.

a jury in a suit in equity for injunction, though joined with a claim for damages.[1] A jury in equity cases, if one is had, is only advisory.[2]

Costs may be awarded or apportioned as the court may deem proper, or each party adjudged to pay his own costs, where the result of the suit is beneficial to all.[3]

Defendants may file cross-bills.[4] In an action by a riparian owner, defendant's claim as appropriator is properly set up by a cross-complaint.[5]

To authorize a private person to maintain an action to abate a public nuisance, he must show a special injury different in kind, and not merely in degree, from that suffered by the public generally.[6]

Where a court of equity has acquired jurisdiction of a suit to enjoin a continuing trespass upon land, it may also, to prevent a multiplicity of suits, award damages for the injury already done, although the same would also be recoverable by an action at law.[7]

Ordinarily, a judgment by default will not be disturbed; but water suits being *sui generis*, the court may exercise its discretion, and where a quantity of water was awarded to plaintiff, as against nonanswering defendants, far greater than necessary for his use, the decree will be modified by reducing the quantity.[8]

Water codes and special statutes providing water commissioners are elsewhere considered;[9] but without statute, courts may appoint commissioners to enforce decrees,[10] or appoint a receiver.[11] Pending irrigation litigation a bond may be given in

1 McCarthy v. Gaston etc. Co., 144 Cal. 542, 78 Pac. 7.

2 Pealer v. Gray's etc. Co. (1909), 54 Wash. 415, 103 Pac. 451; Davis v. Martin, 157 Cal. 657, 108 Pac. 866.

3 Hough v. Porter, 51 Or. 318, 95 Pac. 752, 98 Pac. 1083, 102 Pac. 728; Boise etc. Co. v. Stewart, 10 Idaho, 38, 77 Pac. 31, 321. As to costs, see, also, Ison v. Sturgill (Or.), 110 Pac. 535.

See, also, *infra*, sec. 1231.

4 Rickey etc. Co. v. Wood, 152 Fed. 22, 81 C. C. A. 218; Ames etc. Co. v. Big Indian etc. Co., 146 Fed. 166.

5 Van Bibber v. Hilton, 84 Cal. 585, 24 Pac. 308, 598.

6 Arizona Copper Co. v. Gillespie (Ariz.), 100 Pac. 465.

7 The Salton Sea Cases, 172 Fed. 792, 97 C. C. A. 214.

8 Whited v. Cavin (Or.), 105 Pac. 396.

9 *Infra*, Part VI. Compare, somewhat differently, Mont. Laws 1909, p. ——, House Bill, 106; Laws 1905, p. 145; Laws 1911, c. 43, p. 72.

10 Montezuma Co. v. Smithville Co. (Ariz.), 218 U. S. 371, 31 Sup. Ct. Rep. 67, 45 L. Ed. 1074 (citing the second edition of this book); Sullivan v. Jones (Ariz.), 108 Pac. 476.

11 Idaho Fruit Co. v. Great Western Co., 17 Idaho, 273, 105 Pac. 562.

lieu of an injunction.[12] An injunction has been held, in California, not in force until the order is entered in the proper book.[13]

C. INJUNCTION.

(3d ed.)

§ 641. **Irreparable Injury.**—The most efficient remedy is, of course, the writ of injunction, whereby interference is stopped forthwith. The chief requisites to support a case for an injunction are as follows:

The injury involved must be irreparable.[14] An injury to a ditch which will not destroy its efficiency and can be easily repaired will not support a case for an injunction—the owner will be left to his less drastic remedies.[15].

Instances of irreparable injury are such as pollution of the water, or that the life of fruit trees will be destroyed,[16] or threatened destruction of headgates and other water appliances.[17]

This element (irreparable injury) is not present where plaintiff has already taken or can easily take means to prevent the injury,[18] or where defendant has abated the nuisance before the decree,[19] an injunction will be refused.

(3d ed.)

§ 642. **Injuria Sine Damno.**—As to all rights not depending upon use, a continuous violation may be an irreparable injury without causing actual present damage; since the continued violation, if not stopped, may ripen into a title by prescription divesting the title of the owner. *Nominal damages* will be given at law, or on injunction in equity. This is the well-established doctrine of "*injuria sine damno.*" The action in such case is

12 Cal. Code Civ. Proc., sec. 532; and probably this is within the inherent power of a court of equity in the absence of statute.

13 Rickey L. & W. Co. v. Glader (1908), 153 Cal. 179, 94 Pac. 768.

14 Ladd v. Redle, 12 Wyo. 362, 75 Pac. 691; Krause v. Oregon Steel Co., 77 Pac. 833; Watts v. Spencer, 51 Or. 262, 94 Pac. 39; Strang v. City of New York, 127 N. Y. Supp. 231.

15 Clark v. Willett, 35 Cal. 534, 4 Morr. Min. Rep. 628; Lorenz v. Waldron, 96 Cal. 243, 31 Pac. 54; Jacobs v. Day, 111 Cal. 571, at 580, 44 Pac. 243; Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748.

16 Smith v. Stearns Rancho Co., 129 Cal. 58, 61 Pac. 662; Cushman v. Highland Ditch Co., 3 Colo. App. 437, 33 Pac. 344. Regarding pollution, see *supra*, sec. 522.

17 Hayois v. Salt R. Co. (1903), 8 Ariz. 285, 71 Pac. 944.

18 Atchison v. Peterson, 1 Mont. 561, 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583.

19 McCarthy v. Gaston etc. Co., 144 Cal. 542, 78 Pac. 7.

allowed for the vindication and preservation of plaintiff's *title*.[20] The chief illustration is in regard to rights of way over land. Claiming and exercising adversely a right of way over another's land does him irreparable injury if continued, because, if not stopped, a prescriptive right to the way will in time arise, and although the landowner never uses that portion of his land and suffers no present damage from the mere passing over it, yet he would finally lose his title to it, or suffer an encumbrance thereto. Consequently ditch-building over private land will be absolutely enjoined, even though the actual money damage as yet suffered by the landowner is nominal only.[21] So likewise the continued flooding of another's land will be enjoined; and even though the flood has already occurred and completely ruined the land, yet the title thereto still remains to be protected.[22] So, also, under the common law of riparian rights, since a riparian proprietor may use the water when he will or not at all (his right not depending upon present use), he may enjoin any diversion (beyond a reasonable riparian use of another riparian proprietor) although showing no actual present use or present damage, if the diversion in time would, by prescription, impair the plaintiff's capacity to use the water on his land when he will in the future.[23] And so also, under the earlier history of the law of prior appropriation, when the appropriator's right was primarily a possessory one to the flow of a portion of the stream to capacity of ditch, rather than a right to a use, the doctrine of *injuria sine damno* was applied to protect the *flow* to that capacity, whether plaintiff was using the water or not (so long as he did not mean to abandon it), and although he suffered no actual present damage to use of the water. Consequently we find Professor Pomeroy, writing in former days, saying:[24] "Hence, also, the complaint

[20] Brown v. Ashley, 16 Nev. 312. It was first fixed by the decision of Lord Holt in Ashby v. White, 2 Ld. Raym. 938, 92 Eng. Reprint, 126, considered one of his greatest decisions, having been a case where a voter was allowed to recover damages against one who prevented him from voting, though his vote was intended for the man who in fact won the election and the voter hence suffered no actual damage. It was first clearly applied to water-rights by Justice Story in Webb v. Portland Cement Co., 3 Sum. 189, Fed. Cas. No. 17,322, a great case in the law of riparian rights. *Infra*, sec. 816.

[21] Vestal v. Young, 147 Cal. 715, 721, 82 Pac. 381, 383; Winslow v. Vallejo, 148 Cal. 723, 113 Am. St. Rep. 349, 84 Pac. 191, 5 L. R. A., N. S., 851. See *supra*, sec. 221 et seq., ditches on private land.

[22] The Salton Sea Cases, 172 Fed. 792.

[23] *Infra*, sec. 816.

[24] Pomeroy on Riparian Rights, p. 108, sec. 69.

in an action by an appropriator of water to restrain the unlawful diversion of the stream need not allege that the plaintiff is in a position to use the water himself," etc. In the note are collected a number of earlier authorities applying this to the rights of appropriators of water.[25]

But there has been a change going steadily forward in the law of prior appropriation; namely, the transition we have frequently pointed out from a possessory system to one depending upon use.[1] Actual use, rather than actual diversion, to-day creates the right; beneficial use rather than capacity of ditch measures it; nonuse rather than voluntary abandonment loses it; and in the present connection present damage to actual use is becoming necessary to secure injunctions. Cases now are refusing an injunction to an appropriator who is not using the water, and granting it only where he is using it and suffers actual present damage to present use from defendant's act. The modern rule is to regard injunctions granted to appropriators as based strictly upon beneficial use and as not restraining a defendant while the plaintiff is not himself using the water, even if the decree does not (as it should) expressly so declare;[2] so that only where there is actual damage to present use would an injunction be granted to prevent prescription. In the absence of such damage no prescription would arise.[3] Injunction will not be granted where the act would not ripen into an easement, and causes no actual damage, as where there is water enough

[25] Moore v. Clear Lake etc. Co., 68 Cal. 146, 8 Pac. 816; Stanford v. Felt, 71 Cal. 249, 16 Pac. 900; Conkling v. Pacific etc. Co., 87 Cal. 296, 25 Pac. 399; Walker v. Emerson, 89 Cal. 456, 26 Pac. 968; Spargur v. Hurd, 90 Cal. 221, 27 Pac. 198; Mott v. Ewing, 90 Cal. 231, 27 Pac. 194; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; Rigney v. Tacoma etc. Co., 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425; Lytle Creek Co. v. Perdew, 65 Cal. 447, 4 Pac. 426; Union Min. Co. v. Dangberg, 81 Fed. 73, citing cases. See cross-references *supra*, sec. 139.

[1] See cross-references *supra*, sec. 139.

[2] Gotelli v. Cardelli, 26 Nev. 382, 69 Pac. 8; Twaddle v. Winters, 29 Nev. 88, 85 Pac. 283, 89 Pac. 289; Medano etc. Co. v. Adams, 29 Colo. 317, 68 Pac. 431; Woods v. Sargent, 43 Colo. 268, 95 Pac. 932; Drach v. Isola (Colo.), 109 Pac. 748; Mann v. Parker, 48 Or. 321, 86 Pac. 598; Gardner v. Wright, 49 Or. 609, 91 Pac. 286; Crawford etc. Co. v. Needle Rock etc. Co. (Colo.), 114 Pac. 655. See, also, *infra*, sec. 1231 et seq.

"Whenever it is not needed by the plaintiffs, it should be turned to the defendants, if they have any beneficial use for it, and not permitted to waste. It may be implied by the law; but it is better to have decrees specify, and especially so in this case, in view of the testimony stated and of the perpetual injunction, that the award of water is limited to a beneficial use at such times as it is needed." Twaddle v. Winters, 29 Nev. 88, 85 Pac. 280, 89 Pac. 289.

[3] *Supra*, sec. 588.

for all,[4] or where the diversion is during plaintiff's nonuse.[5] In stating the distinction between the law of appropriation and that of riparian rights in this respect it has been said: "In so far, however, as the rights of plaintiffs rest upon prior appropriation and use, it was no doubt necessary for them to show that the proposed diversion would diminish the flow of water which they *had been receiving for use* upon their lands."[6]

At the same time, while this change has been going steadily forward, it is not complete.[7] The chief thing to be noted is the period (fixed by statute, usually) before nonuse causes forfeiture of right; which statutory period implies that the rule of *injuria sine damno* applies to protect a flow (although unused) during the statutory period. Reference is made to other sections in this regard.[8]

As the remedy sought in water cases is usually by injunction, most of the fundamental questions of the law of waters can be viewed as wrapping themselves around the application of the rule of *injuria sine damno*, to those who prefer to take up the law from the standpoint of procedure, for this admitted rule can never be applied without first deciding what the nature of the right is.

(3d ed.)

§ 643. Prospective.—The damage must be prospective. The interference must be likely to continue in the future, or there must be a threat of continuance.[9] An injury to a ditch already

[4] Clough v. Wing, 2 Ariz. 364, 17 Pac. 453; Davis v. Chamberlain, 51 Or. 304, 98 Pac. 154; Bates v. Hall, 44 Colo. 360, 98 Pac. 3, and cases just above cited.

[5] Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728, citing cases. See cases collected generally secs. 478, 481, *supra*, under the topic "Beneficial Use."

[6] Huffner v. Sawday, 153 Cal. 86, 94 Pac. 424. Italics ours.

[7] Consider, for example, the inconsistency between Moore Clear Lake W. Co. (*supra*), 68 Cal. 146, 8 Pac. 816, and Smith v. Hawkins, 110 Cal. 122, 42 Pac. 453; Smith v. Hawkins, 120 Cal. 87, 52 Pac. 139, 19 Morr. Min. Rep. 243.

[8] See cross-references *supra*, sec. 139; especially secs. 476 et seq., and 577.

It should be further noted that the change mentioned is in regard to injunctions or actions for damages. The rule of *injuria sine damno* remains unimpaired even under the law of prior appropriation in equitable bills "*quia timet*," such as actions to remove a cloud upon title. Such actions lie in favor of appropriators to-day even though the hostile claim has not yet caused actual damage. Whited v. Cavin (Or.), 105 Pac. 396; Carnes v. Dalton (Or.), 110 Pac. 170.

[9] Tenney v. Miners' etc. Co., 7 Cal. 340, 11 Morr. Min. Rep. 31; Orcutt v. Pasadena L. & W. Co. (1908), 152 Cal. 599, 93 Pac. 497.

accomplished in the past will not support a case for an injunction.[10]

(3d ed.)

§ **644. Laches.**—There must be no laches or delay.[11] Parties who have appropriated water for irrigation purposes pursuant to law, and continued the use of water under such appropriation for more than seven years, cannot be enjoined from the continued use of such right by a lower riparian owner whose mill privilege may be injured thereby. His remedy is an action for damages.[12] Where a ditch is built over one's land, his remedy after delay is solely for damages. He cannot destroy it by force. On the contrary, force will be enjoined.[13] The proprietor who waits two years, for example, after the wrongful act, has been held to have no right to an injunction.[14] Laches is a favored defense to a public service company because of the public interest involved.[15]

The defense of laches is not made out where defendant was urged solely by extreme necessity for water, hoping plaintiff would not interfere, but proposing to continue, nevertheless, until plaintiff prevented him. Holding that no laches was shown in the case, it is said:[16] "It is suggested that, although the facts found may come short of creating an estoppel, they are sufficient to show that the plaintiffs are barred by their laches. It is well-established doctrine that the defense of laches does not rest entirely upon lapse of time, nor require any specific period of delay, as does the statute of limitations. But in order to constitute laches, there must be something more than mere delay

[10] Tuolumne etc. Co. v. Chapman, 8 Cal. 392, 11 Morr. Min. Rep. 34; Clark v. Willett, 35 Cal. 534, 4 Morr. Min. Rep. 628; Lorenz v. Waldron, 96 Cal. 243, 31 Pac. 54.

[11] Lux v. Haggin, 69 Cal. 255, at 265, 16 Pac. 674; Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748; Stuart v. Holland, 179 Fed. 969.

[12] Cline v. Stock, 71 Neb. 70, 98 N. W. 454, 102 N. W. 265.

[13] The case turned also on peculiar facts regarding Alaska mining claims, on the balance of convenience, on the fact that the ditch owner was entitled to condemn right of way, and on something like blackmail by claim owners and other peculiar facts. Miocene etc. Co. v. Jacobsen, 146 Fed. 680, 77 C. C. A. 106. Cf. McCook v. Crews, 70 Neb. 115, 102 N. W. 249.

[14] Loud Gold M. Co. v. Blake (C. C.), 24 Fed. 249; Thomas v. Woodman, 23 Kan. 217, 33 Am. Rep. 156; Clark v. Cambridge Irr. Co., 45 Neb. 798, 64 N. W. 239. See Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. 1113. See, also, Stock v. City of Hillsdale (1909), 155 Mich. 375, 119 N. W. 435, at 438.

[15] *Infra*, sec. 651.

[16] Verdugo W. Co. v. Verdugo (1908), 152 Cal. 655, 93 Pac. 1021, per Mr. Justice Shaw.

by the plaintiff, accompanied by an expenditure of money or effort on the part of the defendant. It must also appear that it will be inequitable to enforce the claim. The reason upon which the rule is based is not alone the lapse of time during which the neglect to enforce the right has existed, but the changes of condition which may have arisen during the period in which there has been neglect."

Laches or acquiescence must be distinguished from estoppel, elsewhere considered, as estoppel would bar a right, and there must be some degree of turpitude to raise it, whereas laches but bars an injunction because of lack of diligence in seeking the remedy while leaving an action at law for damages.[17]

(3d ed.)

§ 645. **Making Out Right at Law.**—There is no necessity of first making out the legal right at law.[18] In Lux v. Haggin, the court says: "Under our codes the riparian proprietor is not required to establish his right at law by recovering a judgment in damages before applying for an injunction. The decisions (in cases of alleged nuisances) based on the failure of the complainant to have had his right established at law have no appositeness here. Here the plaintiff must, indeed, clearly make out his right in equity, and show that money damages will not give him adequate compensation. If he fails to do this, relief in equity will be denied; but, if he proves his case, relief will be granted, although he has not demanded damages at law. In the case at bar the plaintiffs do not admit that damages would constitute compensation, and ask for an injunction until they shall recover such compensation in an action for damages. The decisions which bear on that class of cases, and which require of the plaintiff to show that he has promptly sought redress at law, have little applicability."[19]

At the same time, in cases of exceptional difficulty, where there is grave conflict of evidence, and where an action at law for damages is already begun before the injunction was applied

[17] See *supra*, sec. 593 et seq., estoppel.

[18] Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Tuolumne etc. Co. v. Chapman, 8 Cal. 392, 11 Morr. Min. Rep. 34.

[19] While this is said of a riparian proprietor, the same was said of an appropriator in the Tuolumne case, on the ground that legal and equitable relief under the combined or reformed practice are administered in the same court (whenever the equitable rules are not overlooked).

for, it is advisable (though not compulsory) to have the right first established at law.[20]

(3d ed.)

§ 646. Mandatory Injunction (Abatement of Nuisance by Suit).—Mandatory injunctions may be granted to order abatement of a nuisance, such as the removal of the means of diversion,[21] or removal of a railway embankment,[22] or the removal of an obstruction from the stream,[23] or to compel the removal of dams[24] which have wrongfully diverted water onto plaintiff's property, the effect of which will be to destroy trees and cut gulches, although plaintiff has not established his right to damages by a verdict of jury or finding of court,[25] or to put in a measuring-box,[1] or to compel restoration of the water diverted.[2] Acts may be ordered done in another jurisdiction.[3]

The decree may be molded, enjoining on condition, instead of mandatory. Thus pollution by tailings from a gold quartz-mill will be enjoined at suit of a prior appropriator whose use for irrigation is impaired thereby, the decree being framed to restrain the operation of the defendant's mill "until it has made suitable provision to prevent injury to plaintiff's irrigating ditches, and to the water used by him."[4]

(3d ed.)

§ 647. Defenses to Injunction.—By way of defense to an injunction suit, the defense that the water would not reach plaintiff anyway has often been asserted, and the authorities conflict where the acts of defendant are, within possibility, a con-

[20] McCarthy v. Bunker Hill etc. Co. (Idaho), 164 Fed. 927, 92 C. C. A. 259.

[21] Rigney v. Tacoma etc. Co., 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425 (removal of dam); Ramsay v. Chandler, 3 Cal. 90, 4 Morr. Min. Rep. 240; Nicholson v. Getchell, 96 Cal. 394, 31 Pac. 265.

[22] International etc. Ry. v. Davis (Tex. Civ. App.), 29 S. W. 483.

[23] Nicholson v. Getchell, 96 Cal. 394, 31 Pac. 265; Johnson v. Superior Court, 65 Cal. 567, 4 Pac. 576; Evans v. Ross (Cal.), 8 Pac. 88 (*dictum*).

[24] Bingham v. Walter (1909), 80 Kan. 617, 103 Pac. 120; Wilhite v. Billings etc. Co. (1909), 39 Mont. 1, 101 Pac. 168 (*part* of a dam ordered taken down); The Salton Sea Cases, 172 Fed. 792, 820, 97 C. C. A. 214, 242.

[25] Allen v. Stowell, 145 Cal. 666, 104 Am. St. Rep. 80, 79 Pac. 371, 68 L. R. A. 223.

[1] Elliott v. Whitmore, 10 Utah, 246, 37 Pac. 461.

[2] Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. 1113.

[3] The Salton Sea Cases, 172 Fed. 820, 97 C. C. A. 242.

[4] Brown v. Gold Coin etc. Co., 48 Or. 277, 86 Pac. 361. For a case refusing a mandatory injunction, see Lanham v. Wenatchee Co., 48 Wash. 337, 93 Pac. 522.

tributing cause. Injunction was granted, for example, in one case,[5] saying such defense is as old as irrigation and perhaps as old as trespass itself.[6] In denying the validity of the defense, a recent case says that while the natural flow may not reach plaintiff on the surface, the upper diversion might deprive him of the benefit of the subflow.[7]

(3d ed.)

§ 648. Balance of Inconvenience Between the Parties.—Another defense on which the authorities are in great conflict is that known as "the balance of convenience" or "comparative hardships." The cases conflict as to the propriety of the rule as to balance of convenience and also as to its application. It is sometimes said that the balance of convenience will not be considered;[8] that slight damage to plaintiff is no defense,[9] and that expense to defendant is not to be considered.[10]

In one case it is said that it is not enough for defendant to say that, admitting plaintiff's right to be a substantial one, defendant in invading it does so because he cannot otherwise work his mine, and will take all precaution to keep the money damage small. That is no defense to an injunction, the court held,[11] saying: "But even had the defendants after having admitted the property rights of plaintiffs in their ditch, as alleged in their complaint, admitted their intention to wash away the ground upon which it was constructed, as alleged by plaintiffs, and alleged in justification of such purpose their design to substitute in place of so much of plaintiff's ditch as they should

[5] Morris v. Bean, 146 Fed. 436.

[6] For examples where the injunction was refused on a showing that the stream would dry up anyway before reaching plaintiff, or not reach him for other reasons, see Paige v. Rocky Ford etc. Co., 83 Cal. 84, 21 Pac. 1102, 23 Pac. 875; Union Min. Co. v. Dangberg (C. C. Nev.), 81 Fed. 73; Raymond v. Wimsette, 12 Mont. 551, 33 Am. St. Rep. 604, 31 Pac. 537; Gutierrez v. Wege, 145 Cal. 730, 79 Pac. 449; West Point etc. Co. v. Maroni etc. Co., 21 Utah, 229, 61 Pac. 16; Booth v. Trager (1909), 44 Colo. 409, 99 Pac. 60. See *supra*, sec. 279.

[7] Huffner v. Sawday, 153 Cal. 86, 94 Pac. 424. See *infra*, sec. 1078.

[8] 6 Pomeroy's Equitable Remedies, sec. 562, note 24. See 22 Harvard Law Review, 596, note.

[9] Carron v. Wood, 10 Mont. 500, 26 Pac. 388, and cases heretofore cited.

[10] Cole Silver M. Co. v. Virginia etc. Co., 1 Saw. 470, 7 Morr. Min. Rep. 503; Fed. Cas. No. 2989; Suffolk etc. Co. v. San Miguel etc. Co., 9 Colo. App. 407, 48 Pac. 828. See Wilhite v. Billings etc. Co. (1909), 39 Mont. 1, 101 Pac. 168.

"Against a clear and explicit rule of law, no argument from inconvenience, however forcibly urged, can prevail." Judge John R. Garber in Van Sickle v. Haines, 7 Nev. 249.

[11] Gregory v. Nelson, 41 Cal. 278, at 289, 12 Morr. Min. Rep. 124.

wash away, a flume or metal pipe for conducting the water for the use of plaintiffs, and that such flume or pipe would answer plaintiffs' purposes as well as the ditch, with a prayer that the court, by its judgment and decree, authorize them to consummate their designs, upon their filing a bond payable to plaintiffs, conditioned to keep such flume or metal pipe in repair until plaintiffs' claims should be worked out, I know of no principle of law or power in a court of equity to justify or authorize such an invasion of the property rights of one private party to serve the wishes, convenience or necessities of another private party. Such a principle, if once adopted by judicial tribunals upon ground of necessity in view of the peculiar relations and character of private property rights of miners on the public domain, would readily be invoked as applicable to other property rights, and its practical application would result in a system of judicial condemnation of the property of one citizen to answer an assumed paramount necessity or convenience of another citizen. It is the duty of courts to protect a party in the enjoyment of his private property, not to license a trespass upon such property or to compel the owner to exchange the same for other property to answer private purposes or necessities."[12]

On the other hand, many cases say that because of the rule known as the "balance of convenience," an injunction may be refused;[13] that is, because the loss to the appropriator (plaintiff) would be small, as compared to the loss to the defendant if his works were enjoined. Thus, no injunction will be granted if the defendant will restore to the stream the amount he has been taking from it.[14] "Where the title to the property is in dispute between the parties, the extent of inconvenience and expense to which the defendant would be subjected by the granting of the

[12] See Pomeroy on Riparian Rights, sec. 67; Weiss v. Oregon etc. Co., 13 Or. 496, 11 Pac. 255; High on Injunctions, sec. 795; Woodruff v. North Bloomfield etc. Co., 18 Fed. 753, 9 Saw. 441; Teel v. Rio Bravo Oil Co., 47 Tex. Civ. App. 153, 104 S. W. 423.

[13] Slade v. Sullivan, 17 Cal. 102, 7 Morr. Min. Rep. 419; Clark v. Willett, 35 Cal. 534, 4 Morr. Min. Rep. 628; Heilbron v. Fowler etc. Canal Co., 75 Cal. 426, 7 Am. St. Rep. 183, 17 Pac. 535; Modoc etc. Co. v. Booth, 102 Cal. 151, 36 Pac. 431; McCarthy v. Bunker Hill Co. (Idaho), 164 Fed. 927, 92 C. C. A. 259; City of Aberdeen v. Lytle etc. Co. (Wash.), 108 Pac. 945; William v. Heath, 1 L. T., N. S., 267; Shaw J., concurring in Miller v. Bay Cities W. Co., 157 Cal. 256, 107 Pac. 115, citing Peterson v. Santa Rosa, 119 Cal. 391, 51 Pac. 557; Jacob v. Day, 111 Cal. 571, 580, 44 Pac. 243; 2 High on Injunctions, 4th ed., sec. 470; 2 Beach on Injunctions, sec. 1067.

[14] Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. 1113.

injunction, as compared with the injury the plaintiff would be likely to suffer if refused, often forms an important consideration in determining the right to an injunction."[15] The refusal of an injunction because of the rule concerning the balance of convenience is perhaps illustrated in the following case. A mining company was depositing tailings upon land below its mill. For the purpose of speculation, plaintiff bought up this land, and asked an injunction. That was refused on the ground that it would mean ruin to the mining company, and plaintiff had bought the land merely with a view to litigation.[16] It was held in another case that where, in an action to recover damages and to enjoin defendant from maintaining a ditch upon plaintiff's land, it appears that the land was of little value; that the injury to the land was not real; that the damages were merely nominal; that defendant was not insolvent; and that plaintiff's remedy at law was adequate, then the court did not err in refusing to grant an injunction.[17] Says a recent case applying the principle: "Such mischief as appellant is likely to feel from the insistence of respondent that its water supply be kept pure and clear can be obviated at an expense so trifling that compliance with the order of the court cannot be called a hardship or work a loss of property rights. On the other hand, any obstruction tending to the pollution of the waters of Stewart Creek might work irreparable mischief, reaching far beyond the inconvenience of the landowner."[18]

The rule as to the balance of convenience, or comparative hardship, is more favored in refusing a preliminary injunction than a permanent one;[19] while, on the other hand, it is equally clear that it can apply only in equity and has no application to an action at law for damages.[20]

[15] Real Del Monte M. Co. v. Pond M. Co., 23 Cal. 82, 7 Morr. Min. Rep. 452. Citing Hicks v. Compton, 18 Cal. 210; 3 Daniell's Chancery Practice, 1860; Adams' Equity, 357; Bruce v. Delaware & Hudson Canal Co., 19 Barb. (N. Y.) 371.

[16] Edwards v. Allouez Co., 38 Mich. 46, 31 Am. Rep. 301, 7 Morr. Min. Rep. 577.

[17] Hoye v. Sweetman, 19 Nev. 376, 12 Pac. 504, and see Mann v. Parker, 47 Or. 321, 86 Pac. 598; Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. 1113.

[18] City of Aberdeen v. Lytle etc. Co. (Wash.), 108 Pac. 945.

[19] California etc. Co. v. Enterprise etc. Co. (C. C. S. D. Cal.), 127 Fed. 741. In Contra Costa W. Co. v. City of Oakland, 165 Fed. 518, it was said to be the settled rule on preliminary injunctions. See, also, Spring Valley Co. v. San Francisco, 165 Fed. 712.

[20] See McCarthy v. Bunker Hill etc. Co. (Idaho), 164 Fed. 927, 92 C. C. A. 259; Wilhite v. Billings etc. Co., 39 Mont. 1, 101 Pac. 168.

(3d ed.)

§ 649. Same—Hardship on the Public.—The same conflict appears where the hardship is on the public instead of on a private party. Here again Mr. Pomeroy states that the better rule is that an injunction should not be refused on that account.[21] Professor Pomeroy[22] in discussing the general question of public policy in the law of waters[23] said: "The following observations concerning the influence which the 'public interests' should have upon the decisions of cases involving private rights are of weighty importance in this community as well as in Nevada and every other State. While courts most certainly have a legislative function, since the great body of common law and of equity has been built up by courts, it should never be forgotten that courts do not rightfully possess the power of legislating from motives of mere policy and expediency. The duty of courts is to declare and protect private rights of suitors by applying or extending some established principle or doctrine to new conditions of facts. The court say:[24] 'Before proceeding to an investigation of the legal questions really involved in the case, we may state, once for all, that the fact that the case is of great interest to the public, whose rights, it is claimed, "are seriously disturbed by the decision," is a consideration which, in very doubtful cases, may, and perhaps should, have some weight with judicial tribunals. But that the interests of the public should receive a more favorable consideration than those of any individual, or that the legal rights of the humblest person in the State should be sacrificed to the weal of the many, is a doctrine which, it is to be hoped, will never receive sanction from the tribunals of this country. The public is in nothing more interested than in scrupulously protecting each individual citizen in every right guaranteed to him by the law, and in sacrificing none, not even the most trivial, to further its own interests.' "[25]

21 Pomeroy's Equitable Remedies, sec. 531, but citing conflicting authorities.

22 The work on "Equity Jurisdiction" was written by Professor Pomeroy, and after his death his son added the two volumes on "Equitable Remedies."

23 Specifically in connection with whether the court could deny a right of a riparian owner out of consideration for public interest asserted by an appropriator claiming that no law of waters but appropriation should be recognized, a matter fully considered elsewhere. *Supra*, secs. 112 et seq., 167 et seq.

24 Citing Van Sickle v. Haines, 7 Nev. 249, at 259, 14 Morr. Min. Rep. 503.

25 Pomeroy on Riparian Rights, sec. 119.

A California case dealing with percolating water recently said, per Mr. Justice Henshaw:[1] "We do not set forth the small quantity of the land so irrigated out of the tract of forty or fifty square miles with any idea that because the use was little and the value small the defendant and the inhabitants of Corona which it supplied should in any way receive any preference, or should for such reason be thought to have any superior right. Such an argument has no standing in a court of law and is distinctly repudiated."[2] Another expression is:[3] "In a state of society the rights of the individual must to some extent be sacrificed to the rights of the social body; but this does not warrant the forcible taking of property from a man of small means to give it to the wealthy man, on the ground that the public will be indirectly advantaged by the greater activity of the capitalist. Public policy, I think, is more concerned in the protection of individual rights than in the profits to inure to indivduals by the invasion of those rights."[4]

On the other hand, there is the great volume of decisions under the "Colorado doctrine" that out of public policy the courts may deny the rights of riparian owners.[5] So there are cases cited in the next section looking to hardship upon the public in conflicts between mining and agriculture. And there are cases considering comparative hardship upon the public in other ways; such as those in a later section denying injunctions against distributers of water serving the public. And the reader is acquainted with Mr. Roosevelt's position that judges should decide according to public interest.

1 Newport v. Temescal W. Co., 149 Cal. 531, 87 Pac. 372, 6 L. R. A., N. S., 1098.

2 See, likewise, Lux v. Haggin, 69 Cal. 255, 10 Pac. 674, and Miller v. Madera Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A., N. S., 391, refusing to reject the rights of riparian owners out of "public policy." But see Mr. Justice Henshaw in San Joaquin Co. v. Fresno Flume Co. (Cal. 1910), 158 Cal. 626, 112 Pac. 182; and Mr. Justice Shaw in Katz v. Walkinshaw, 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, adjusting the law of percolating water on grounds of public policy.

3 McCleery v. Highland Boy Gold Min. Co. (C. C.), 140 Fed. 951.

4 See, also, Sullivan v. Jones & Laughlin Steel Co., 208 Pa. 540, 57 Atl. 1065, 66 L. R. A. 712.

In Pennington v. Brinsop etc. Co., L. R. 5 Ch. D. 769, injunction against pollution by a colliery was granted. An argument based on the ground that a large force of colliery employees will be thrown out of work, considered, but held not *such* balance of inconvenience as to be sufficient to justify refusal of injunction.

5 *Supra*, secs. 112 et seq., 167 et seq.

(3d ed.)

§ 650. Same—Conflict Between Mining and Agriculture.—The question has been much mooted in the West in conflicts between mining interests and agricultural interest upon streams because of mining debris or tailings polluting the streams, and, as such, involves two large classes of the public, rather than the parties to the suit alone; that is, the community of laborers, storekeepers and others dependent upon mining for their occupation, and the community lower down the stream dependent upon agriculture.[6] As such, these cases involve the question of balance of hardship on the public as well as upon the defendant itself.

The following recent cases illustrate the tendency of present decisions:[7] "A number of eminent courts support the contention of appellant that the comparative injury to the parties in granting or withholding relief must also be considered.[8] . . . . It seems to us that to withhold relief where irreparable injury is, and will continue to be, suffered by persons whose financial interests are small in comparison to those who wrong them is inconsistent with the spirit of our jurisprudence. It is in effect saying to the wrongdoer, 'If your financial interests are large enough so that to stop you will cause you great loss, you are at liberty to invade the rights of your smaller and less fortunate neighbors.' We prefer the doctrine adhered to by Judge Hawley in his dissenting opinion in Mountain Copper Co. v. United States,[9] and by Judge Sawyer in Woodruff v. North Bloomfield Gravel Min. Co.[10] In the latter case, it is said: 'Of course great interests should not be overthrown on trifling or frivolous grounds, as where the maxim "*De minimis non curat lex*" is applicable; but every substantial, material right of person or property is entitled to protection against all the world. It is by protecting the most humble in his small estate against the encroachments of large capital and large interests that the poor man is ultimately enabled to become a capitalist himself. If the smaller interest must yield to the larger, all small property rights, and all smaller and less important enterprises, industries, and pursuits would sooner or later be absorbed by the larger, more powerful few; and their development to a condition of great value and importance,

6 In this regard reference is made to a preceding chapter upon pollution.

7 Arizona Copper Co. v. Gillespie (Ariz.), 100 Pac. 465. Italics ours.

8 Citing McCarthy v. Bunker Hill & Sullivan Min. etc. Co., 164 Fed. 927.

9 142 Fed. 625, 73 C. C. A. 621.

10 (C. C.), 18 Fed. 753, 8 Saw. 628.

both to the individual and the public, would be arrested in its incipiency.' To the same effect are the remarks of Judge Marshall in McCleery v. Highland Boy Gold Min. Co.,[11] wherein he says: 'The substantial contention of the defendant is that it is engaged in a business of such extent, and involving such a large capital, that the value of the plaintiff's rights sought to be protected is relatively small, and that therefore an injunction, destroying the defendant's business, would inflict a much greater injury on it than it would confer benefit upon the plaintiff. Under such circumstances, it is asserted, courts of equity refuse to protect legal rights by injunction and remit the injured party to the partial relief to be obtained in actions at law. Stated in another way, the claim in effect is that one wrongfully invading the legal rights of his neighbor will be permitted by a court of equity to continue the wrong indefinitely on condition that he invest sufficient capital in the undertaking. I am unable to accede to this statement of the law. If correct, the property of the poor is held by uncertain tenure, and the constitutional provisions forbidding the taking of property for private use would be of no avail. As a substitute, it would be declared that private property is held on the condition that it may be taken by any person who can make a more profitable use of it, provided that such person shall be answerable in damage to the former owner for his injury.' '' In a recent case the Idaho court refused to consider that its decree enjoining the deposit of tailings in streams would depopulate Shoshone County and cause the abandonment of all mining,[12] saying: ''It is earnestly urged by counsel for respondents that if this court should hold that there is error in sustaining the demurrers to the complaints, or either of them, it would result in 'the depopulation of Shoshone County, the abandonment of all mining and milling therein, and the consequent bankruptcy of the inhabitants thereof.' Deplorable as this might be, if true, it furnishes no excuse for the court to shirk its responsibilities in disposing of the question before us on the merits. The law is no respecter of persons, corporations or individuals, and in its creation and enforcement reaches out and protects the lone settler in his rights, let them be ever so meager, as well as the capitalists, the corporation or individual with it or his millions. . . . . The

[11] (C. C.), 140 Fed. 951.

[12] Hill v. Standart Min. Co., 12 Idaho, 223, 85 Pac. 908.

law does not measure the rights of litigants by the amount involved, nor the manner in which it may affect others not parties to the litigation." Reference may be further made to the "Debris Cases" in California, already considered.[13]

On the other hand, this Idaho case quotes the following expression from McCarthy v. Bunker Hill etc. Co.[14] per Judge Beatty: "Without detailing the reasons, such order would mean the closing of every mine and mill, of every shop, store, or place of business in the Coeur d'Alenes. There are about twelve thousand people, the majority of whom are laboring people dependent upon the mines for their livelihood; not only would their present occupation cease, but all these people must remove to other places, for the mines constitute the sole means of occupation, and when they finally close, Wallace and Wardner, Gem and Burke and their surrounding mountains will again become the abode only of silence and wild fauna. Any court must hesitate to so act as to bring such results." The case last quoted refused the injunction and went to the United States circuit court of appeals, where the decision refusing the injunction was affirmed, without prejudice to an action for damages, and to a later suit for injunction should the damage suffered by plaintiff sufficiently increase over that so far actually inflicted. The court examines the decisions in the supreme court of the United States and holds the granting of the specific remedy by injunction to be discretionary (the plaintiff having other less drastic remedies), and that this discretion should be exercised in the public interest rather than against it. The court also says: "Furthermore, where, as in the present case, it is sought to enjoin a lawful business, the court should give due consideration to the comparative injury which will result from the granting or refusal of the injunction sought."[15] There is also a much-discussed Pennsylvania case (usually disapproved, however) where injunction against pollution of a stream by mine refuse was refused, partly, at least, upon the ground of hardship upon the mining public.[16] Likewise it should

[13] *Supra*, "Pollution," secs. 527, 528.

[14] (Idaho), 147 Fed. 981 (a case of pollution of a stream by mine tailings). For the same case on appeal, see 164 Fed. 927, 92 C. C. A. 259.

[15] McCarthy v. Bunker Hill etc. Co. (Idaho), 164 Fed. 927, 92 C. C. A. 259. See, also, Oroville v. Indiana etc. Co. (Cal. 1908), 165 Fed. 550.

[16] Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 57 Am. St. Rep. 445, 6 Atl. 453. The decision has, however, been widely disapproved. See Young v. Bankier etc. Co. (H. of L.), [1893] App. Cas. 691; Roaring etc.

be noted that the recent Arizona case quoted above[17] refused the injunction because the case did not present *such* a balance of hardship on public interest upon its facts, rather than that it disputed the rule.[18] It appeared (and this was the chief reason for denying this defense) that the shut-down of the great mines involved would affect only one-third of the mining plant and would be only temporary, because impounding works for the debris might be built; while as to the public, the injury thereto from the injunction was not clear, and the injury to a whole irrigation community from a refusal was patent. The court thus did not deny the rule, but only denied that the case was such as to call for its application.

The supreme court of the United States refused a writ of *certiorari* in McCarthy v. Bunker Hill Co., *supra;* and in the case of New York v. Pine, considered in the next section below, unequivocally gave its support to one phase of the doctrine that hardship upon the public may be ground for refusal of equitable relief.

Public policy, public interest or public hardship cannot deny to any man his rights so long as our constitutions protect them (hence the conflict which has waged about the "Colorado doctrine" denying riparian rights); if public interest so demands, the law of eminent domain, after hearing and compensation, is open. But considering now specifically the remedy by injunction —an equitable remedy—the writer's understanding of the matter as a general principle of equity is that extreme balance of hardship upon defendant or upon third persons, or especially upon the public, is properly ground for refusal of an injunction if clearly showing that the injunction will work more injustice than justice; remembering that the remedy is an extraordinary one, discretionary to some degree with the chancellor; the refusal not barring the right, and still leaving the remedy by an action at law for damages (or by assessment of damages in the equity suit).

Co. v. Anthracite etc. Co., 212 Pa. 115, 61 Atl. 811; Bowling etc. Co. v. Ruffner, 117 Tenn. 180, 100 S. W. 116, 9 L. R. A., N. S., 923, 10 Ann. Cas. 581; Straight v. Hover, 79 Ohio, 263, 87 N. E. 174, 22 L. R. A., N. S., 276; Teel v. Rio Bravo etc. Co., 47 Tex. Civ. App. 153, 104 S. W. 420; Williams v. Haile Min. Co. (S. C.), 66 S. E. 117.

[17] Arizona Copper Co. v. Gillespie (Ariz.), 100 Pac. 465.

[18] The court said: "Counsel press upon us the proposition that we should consider the comparative damage that will be done by granting or withholding an injunction in this case, alleging that the effect of an injunction will be to stop the operation of extensive works, deprive thousands of

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§ 651. Same—Against Public Service Companies.—Where the public interest is represented by a public service company, defendant, having the power of eminent domain, an injunction may be refused (upon tender of damages) because of the public interest in having the operations of defendant continued. The leading water case in support of this rule is the decision of the supreme court of the United States in New York v. Pine,[19] where, after the city of New York had built and was using city waterworks, a private owner upon the stream below two years later sought to enjoin the continued diversion of the water; and it was held that such a long delay barred the action, especially as the city had expended a vast sum, the work had been completed, and the population were dependent thereon; that a court of equity, in which relief was sought, would not place a man in a position where he can enforce an extortionate demand, having waited until defendant was tied up with expensive works, and public necessity had arisen. In a recent case arising in California out of the break of the Imperial Canal, the United States circuit court of appeals ruled that a landowner whose land was flooded by the break in the canal was not entitled to a decree against the distributing company owning the canal "of such a positive and sweeping character that it would practically result in destroying all other interests in Imperial Valley."[20]

The rule is now well established in California in percolating water cases.[21] It is stated as follows by Mr. Justice Shaw in a

persons of employment, and cause loss and distress to other thousands. It is undoubtedly true that a court should exercise great care and caution in acting where such results are to follow." The case involved a conflict of interest between the mines at Clifton and Morence and the farmers of the upper Gila Valley, the farmers having, in December, 1907, before Judge S. F. Nave, secured an injunction against the deposit of tailing in the San Francisco River, which was affirmed on appeal in an opinion by Mr. Justice Campbell.

[19] 185 U. S. 93, 22 Sup. Ct. Rep. 592, 46 L. Ed. 820.

[20] The Salton Sea Cases, 172 Fed. 820, 97 C. C. A. 242. See, also, McCarthy v. Bunker Hill Co., 164 Fed. 927, 92 C. C. A. 259; Miocene Co. v. Jacobsen (Alaska), 146 Fed. 680, 77 C. C. A. 106; Boquillas Co. v. Curtis, 213 U. S. 339, 29 Sup. Ct. Rep. 493, 53 L. Ed. 822, *dictum;* Stock v. City of Hillsdale, 155 Mich. 375, 119 N. W. 435.

[21] Barton v. Riverside W. Co., 155 Cal. 509, 101 Pac. 790, 23 L. R. A., N. S., 331; Montecito W. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. 1113; Newport v. Temescal W. Co., 149 Cal. 531, 87 Pac. 372, 6 L. R. A., N. S., 1098; Verdugo W. Co. v. Verdugo (1908), 152 Cal. 655, 93 Pac. 1021.

See, also, Miller v. Madera Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A., N. S., 391. And Miller v. Bay Cities W. Co., 157 Cal. 256, 107 Pac. 115, both recognizing the principle, but holding it inapplicable to the facts presented. See, also, Crescent Canal Co. v. Mont-

percolating water case: "Where the complainant has stood by while the development was made for public use, and has suffered it to proceed at large expense to successful operation, having reasonable cause to believe it would affect his own water supply, the injunction should be refused, and the party left to his action for such damages as he can prove."[22] A very recent case has unequivocally established this doctrine in California percolating water cases, and is quoted at some length in that connection hereafter.[23]

In California this has, as yet, been applied only in percolating water cases, the cases where it was urged against a riparian owner on a stream having held it inapplicable upon the facts because plaintiff was not chargeable with any unnecessary delay in bringing suit and because no public use had yet actually arisen.[24]

gomery, 143 Cal. 252, 76 Pac. 1032, 65 L. R. A. 940; Logan v. Guichard (Cal. 1911), 114 Pac. 989; Stevinson v. San Joaquin etc. Co. (Cal.), March 20, 1911, rehearing granted April 19, 1911; Burr v. Maclay etc. Co. (Cal.), June 22, 1911.

[22] Katz v. Walkinshaw, 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236. Citing Fresno etc. Co. v. Southern Pacific Co., 135 Cal. 202, 67 Pac. 773; Southern Cal. Ry. Co. v. Slauson, 138 Cal. 342, 94 Am. St. Rep. 58, 71 Pac. 352, which were railway cases.

In a later California percolating water case, where an injunction was refused (chiefly upon other grounds, as to which see *infra*, sec. 1051), Mr. Justice Henshaw said: "And, finally, upon this proposition it may be said that where the interests of the public are involved and the court can arrive in terms of money at the loss which plaintiff has sustained, an absolute injunction should not be granted, but an injunction conditional merely upon the failure of the defendant to make good the damage which results from its work. Such an action, if successful, should be regarded in its nature as the reverse of an action in condemnation. The defendant in effect would be held to be damaging private property without just compensation first made to the owner, and failing to do so, should be enjoined from further damage." Newport v. Temescal W. Co., 149 Cal. 531, 87 Pac. 372, 6 L. R. A., N. S., 1098.

[23] Barton v. Riverside W. Co., 155 Cal. 509, 101 Pac. 790, 23 L. R. A., N. S., 331, quoted *infra*, secs. 1054, 1171.

[24] "The last point made by appellant is in the nature of an estoppel invoked against the plaintiff. It is insisted that no relief by injunction should be granted the plaintiff, because it is claimed that plaintiff knowingly stood by while appellant, as a public service corporation and at great expense and notoriously and publicly, constructed a large and extensive system of works designed for the public use, and brought them to completion before the commencement of this action; that under this state of alleged facts plaintiff is precluded from all right to equitable relief, and its only remedy is an action at law for damages. In support of this position, the principle announced in that respect in Katz v. Walkinshaw, 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, and Newport v. Temescal Water Co., 149 Cal. 531, 87 Pac. 371, 6 L. R. A., N. S., 1098, is invoked. The principle contended for and sustained by the cases cited and others is unquestionably correct." But holds the rule inapplicable upon the facts presented in that case, viz., the riparian proprietor for a long time did not know the proposed construction, or the likelihood of damage from the proposed use, and brought suit as soon as he knew such intention and likelihood of damage and similar facts. This case is Miller v. Madera

In New York v. Pine,[25] however, it was applied against a riparian owner, and there are several recent Nebraska cases in which it was also so applied.[1]

This rule is based primarily upon the balance of convenience in favor of the public represented by a public service agency having the power of eminent domain (avoiding multiplicity of suits by reaching the same result in the injunction suit as in a condemnation suit),[2] and secondarily upon laches in seeking the equitable remedy after great expense has been incurred. Consequently where no public necessity had yet arisen, nor great expense incurred, the injunction being promptly sought, the mere fact that defendant has the power of eminent domain does not make the rule applicable.[3] Likewise, since the rule does not bar plaintiff's right, but only the equitable remedy, it is of no force in a claim for damages (which distinguishes the rule from "estoppel," which would bar the right entirely);[4] and if the injunction is refused, it should be without prejudice to an action for damages[5] (and probably such refusal of injunction merely

Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A., N. S., 391. See, also, Verdugo Co. v. Verdugo, 152 Cal. 655, 93 Pac. 1021; Miller v. Bay City W. Co., 157 Cal. 256, 107 Pac. 115; Logan v. Guichard (Cal. 1911), 114 Pac. 989; Stevinson v. San Joaquin etc. Co. (Cal.), affirming injunction March 20, 1911, but granting rehearing April 19, 1911.

[25] *Supra.*

[1] Crawford Co. v. Hathaway, 60 Neb. 754, 84 N. W. 271, 61 Neb. 317, 85 N. W. 303, 67 Neb. 325, 108 Am. St. Rep. 647, 93 N. W. 781, 60 L. R. A., N. S., 889; McCook Co. v. Crewes, 70 Neb. 115, 102 N. W. 249; Cline v. Stock, 71 Neb. 70, 98 N. W. 454, 102 N. W. 265. These Nebraska cases, however, carried the rule too far, we believe. The rule is one of equitable defense to an injunction, whereas these Nebraska cases turned it around and allowed the wrongdoer to become the plaintiff and enjoin acts of the riparian owner, and quiet title against the riparian owner without having condemned his riparian right. There is a difference between denying equitable relief on the one hand, and granting affirmative equitable relief upon the other, where a constitution prescribes how property is to be taken for public use. There are other objections to these Nebraska cases above noted. *Supra*, sec. 617, et seq.

[2] The supreme court of the United States in New York v. Pine, *supra*, expressly says that if public necessity has arisen, the rule is applicable even if defendant does not have the power of eminent domain, adopting the broad ground of balance of convenience considered in the previous section; but it is usually in public service cases that the rule is invoked.

[3] Cases cited in note 24, just above.

In a recent New Jersey case this rule was recognized and discussed, and it was said: "But the circumstances must be exceptional," and it is *not* intended as a "general exception to the ordinary right of injunction in all cases of riparian rights." And refused to apply it in the case at bar, because the defendant did not in fact have power of eminent domain. City of Paterson v. East Jersey W. Co., 74 N. J. Eq. 49, 70 Atl. 472.

[4] See *supra*, secs. 593, 594.

[5] McCarthy v. Bunker Hill Co., 164 Fed. 927, 92 C. C. A. 259.

for want of equity would not bar a subsequent suit for damages even if not expressed to be without prejudice); or defendant may, at his election, have the damages assessed in the injunction suit.[6] And where the State constitution guarantees a jury trial in taking property for public use,[7] the defendant has a right to a jury to assess damages, whatever the forum may be in which they are determined.[8] And furthermore, all these cases recognize that if defendant refuses to pay the damages after they are assessed, the injunction will then lie under the constitutional provision that property cannot be taken or damaged for public use without compensation.[9]

Although the rule seems in some way a little hard to reconcile with the constitutional provisions guaranteeing a certain procedure *before* taking property for public use (in that these cases arise after the property is already taken), yet the decisions have now well established the rule, and it supports our conclusion in the previous section that balance of convenience favoring the public may (a matter discretionary with the chancellor) properly be a ground for refusing equitable as distinguished from legal relief

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§ 652. **Preliminary Injunctions.**—As to preliminary injunctions, it has been said concerning percolating water:[10] "In cases involving any class of rights in such waters, preliminary injunctions must be granted, if at all, only upon the clearest showing that there is imminent danger of irreparable and substantial injury, and that the diversion complained of is the real cause." And in a case involving surface streams: "Rights to the use of water for the purposes of irrigation are of that supreme importance to all entitled to take water from a common source of supply that a court to which an application is made for an interlocutory writ affecting such rights should exercise great care in granting it *ex parte*."[11]

6 New York v. Pine, *supra*.

7 See Cal. Const., art. 1, sec. 14.

8 New York v. Pine, *supra*.

9 E. g., Cal. Const., art. 1, sec. 14.

10 Katz v. Walkinshaw, 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236. In 1911 the legislature enacted in California that no preliminary injunction should be granted without notice, and that temporary restraining orders must be returnable on an order to show cause within ten days, etc. Cal. Code Civ. Proc., sec. 527, as amended by Stats. 1911, c. 42.

11 McLean v. Farmers' etc. Co. (1909), 44 Colo. 184, 98 Pac. 16.

At the same time, it rests much in the discretion of the trial court, and, if granted, will not be overthrown on appeal merely because of conflict of evidence; for "The granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. It merely determines that the court, balancing the respective equities of the parties, concludes that, pending a trial on the merits, the defendant should or that he should not be restrained from exercising the rights claimed by him. When the cause is finally tried, it may be found that the facts require a decision against the party prevailing on the preliminary application,"[12] All questions decided on a motion for a preliminary injunction are open for review on the final hearing, but the prior decision should be adhered to unless additional facts appear which require its modification or reversal, or it clearly appears that an error was committed.[13]

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§ 653. **Injunction (Conclusion).**—As a short statement of the equitable jurisdiction to enjoin, we quote the following from an opinion by Judge Field in the supreme court of the United States:

"But whether, upon a petition or bill asserting that his rights have been invaded, a court of equity will interfere to restrain the acts of the party complained of, will depend upon the character and extent of the injury alleged; whether it be irremediable in its nature; whether an action at law would afford adequate remedy; whether the parties are able to respond for the damages resulting from the injury, and other considerations which ordinarily govern a court of equity in the exercise of its preventive process of injunction."[14]

D. OTHER EQUITABLE REMEDIES.

(3d ed.)

§ 654. **Bills to Quiet Title, Settling Rights, and Allied Bills.**—Many suits have been allowed to quiet title to water-rights, as to

12 Miller v. Madera Co. (1909), 155 Cal. 59, 99 Pac. 502.

13 Rodgers v. Pitt (C. C. Nev.), 129 Fed. 932. An instance where preliminary injunction lies is Hagerman Co. v. McMurray (N. M.), 113 Pac. 823, where the act restrained would have ruined plaintiff's business of distributing water, before a final determination could be had.

14 Atchison v. Peterson, 87 U. S. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583. A somewhat extensive statutory regulation of injunctions appears in Wyo. Stats. 1907, p. 138, sec. 21, *et alia*.

other property.[15] In Katz v. Walkinshaw[16] it was said that a suit will lie by a landowner to have his right to percolating water declared against the appropriators, though he has sunk no well, or otherwise made use of it; and that was made matter for further consideration when the case later actually arose, and the decision made accordingly and the rule very clearly applied.[17]

If there are several appropriators or other claimants on the same stream, a suit may be brought to have the rights of all settled and determined. In such a case all parties on the stream must be brought into court.[18] (In Arizona, at the instance of the United States Reclamation Service a friendly suit to settle rights in the Salt River Valley involved four thousand eight hundred water users as defendants.) [19] The court must then make a specific finding of the amount to which each is entitled,[20] definite in time and amount.[21] Defendant may file a cross-bill.[22]

"No subject is, perhaps, so prolific of controversies as the use of water by different claimants for irrigation purposes, and a decree concerning it should be as certain as the language can make it." [23] This apportionment may be in time as well as amount, giving each the use of the whole for so many days or hours where there are appropriations originally based on time; that is, "periodical appropriations." [24] In making the apportionment, the court must confine itself to a declaration of pre-existing rights, not the creation of new ones; and if a stream becomes, from natural causes, insufficient for all claimants, prior appropriators must be given their full amount at all times in their

[15] E. g., Peregoy v. Sellick, 79 Cal. 568, 21 Pac. 966; Senior v. Anderson, 130 Cal. 29, 62 Pac. 563; Kimball v. Northern etc. Co., 42 Colo. 412, 94 Pac. 333.

[16] 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236.

[17] *Infra*, secs. 1053, 1156.

[18] *Supra*, sec. 625 et seq.

[19] Hurley v. Abbott.

[20] Lakeside etc. Co. v. Crane, 80 Cal. 181, 22 Pac. 76.

[21] Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. 338. See Same v. Same, 158 Cal. 206, 110 Pac. 927.

[22] See Rickey etc. Co. v. Wood, 152 Fed. 22, 81 C. C. A. 218; Ames etc. Co. v. Big Indian etc. Co., 146 Fed. 166.

[23] Authors v. Bryant, 22 Nev. 242, 38 Pac. 439.

[24] Santa Paula Water Co. v. Peralta, 113 Cal. 38, 45 Pac. 168; Rodgers v. Pitt, 129 Fed. 932; Union etc. Co. v. Dangberg, 81 Fed. 73; Craig v. Crafton etc. Co., 141 Cal. 178, 74 Pac. 762. In general, see, also, Frey v. Lowden, 70 Cal. 550, 11 Pac. 838; Steinberg v. Meyer, 130 Cal. 156, 62 Pac. 483; Bledsoe v. Decrow, 132 Cal. 312, 64 Pac. 397; Rose v. Mesmer, 142 Cal. 322, 75 Pac. 905; Suisun v. De Frietas, 142 Cal. 350, 75 Pac. 1092; Miller v. Thompson, 139 Cal. 643, 73 Pac. 583. See *supra*, sec. 305, regarding periodical appropriations.

proper order in preference to later claimants.[25] In Union Min. Co. v. Dangberg[1] Judge Hawley, nevertheless, held that the deficiency could be apportioned among appropriators by periods of time as though their rights were correlative as at common law. This is a modification of the doctrine of priority, whereby the prior appropriator had a paramount exclusive right *at all times.* It was followed in Anderson v. Bassman,[2] and represents a modification of the law of appropriation upon lines already considered.[3]

An action to quiet title to a water-right, being real estate, cannot be brought by an administrator.[4] The Utah court will not quiet title to Idaho claims on a stream, though it flows into Utah.[5]

A court of equity has jurisdiction of an action to quiet title to an irrigation ditch over the land of another and for an injunction restraining the latter from interfering with the ditch and the right of way therefor, and the court should administer complete relief, to the end that the adverse claim of defendant, if found to be invalid, may be annulled, and that plaintiff may be relieved from the annoyance of the claim and of the assertion thereof in the future by defendant.[6]

A mutual company formed to distribute water exclusively to its stockholders may maintain an action to quiet title against an upper diverter.[7]

A decree may be rendered refusing injunction, but declaring a right in plaintiff. This cannot be *in rem,* except by statute, but will be phrased *in personam,* enjoining defendant from claiming any right hostile to that declared in plaintiff; in effect, a decree quieting title.[8]

In settling the rights of carriers the court may examine the requirements of their consumers and apportion the supply between the carriers upon the basis of the consumers' requirements.[9]

[25] See Riverside etc. Co. v. Sargent, 112 Cal. 230, 44 Pac. 560. See *supra,* sec. 302 et seq.; *infra,* secs. 751, 1343.

[1] 81 Fed. 73.

[2] 140 Fed. 14.

[3] *Supra,* sec. 310 et seq.

[4] Travelers' Ins. Co. v. Childs, 25 Colo. 360, 54 Pac. 1020.

[5] Conant v. Deep Creek Co., 23 Utah, 627, 90 Am. St. Rep. 721, 66 Pac. 188; Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210. See *ante,* sec. 340 et seq., interstate streams.

[6] Cottonwood D. Co. v. Thom (1909), 39 Mont. 115, 101 Pac. 825, affirmed in 104 Pac. 281.

[7] Arroyo D. Co. v. Baldwin (1909), 155 Cal. 280, 100 Pac. 874.

[8] Burr v. Maclay R. Co., 154 Cal. 428, 98 Pac. 260. See *infra,* secs. 802, 831, 1053, 1138, 1156, declaratory decree.

[9] Montezuma Canal Co. v. Smithville Canal Co. (Ariz.), 89 Pac. 512; affirmed in 218 U. S. 371, 31 Sup. Ct. Rep. 67, 54 L. Ed. 1074.

Actual present damage is not necessary in actions to quiet title, settle rights, or bills *quia timet* generally. As was said in Oregon: "It may be regarded as well settled in this State that it is only necessary to maintenance of suits of this character, either that it appear the defendants claim adversely to the moving party, or, if not asserting a hostile claim, that those made defendants are necessary to a complete determination of the controversy." [10]

An irrigation district cannot sue to determine the rights of landowners in the distribution of water.[11]

Procedure for settling rights forms an important part of the recent legislation, as hereafter set forth.[12] "It is manifest from a careful examination of our statutes and from the repeated decisions of our courts that our proceeding, if not technically one to quiet title, is quite analogous thereto." [13] Such a special proceeding is exclusive of technical actions to quiet title.[14] But the same court recently also held: [15] "By the constitution, the district courts of this State are courts of general jurisdiction, both in law and in equity. By virtue of the authority thus conferred, such courts, independent of statutes, have jurisdiction in matters pertaining to the adjustment of water-rights for the purposes of irrigation." [16]

Proceedings for settling rights of tenants in common *inter se* have already been discussed.[17]

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§ 655. **Specific Performance and Allied Matters.**—A parol sale of a water-right by appropriation receives special treatment, as elsewhere discussed. Nevertheless equity will give specific performance of parol agreements where part performance has taken the case out of the statute of frauds; and will give irrevocable effect to parol licenses that were intended permanent and have been executed. This matter of parol sales and licenses is considered in another place.[18]

10 Whited v. Cavin (Or.), 105 Pac. 396. *Supra*, sec. 642.

11 Little Walla Walla Irr. Dist. v. Preston, 46 Or. 5, 78 Pac. 982.

12 *Infra*, Part VI.

13 Crippen v. X. Y. Z. Ditch Co., 32 Colo. 447, 76 Pac. 797.

14 Fluke v. Ford, 35 Colo. 112, 84 Pac. 469.

15 Farmers' etc. Co. v. Rio Grande etc. Co., 37 Colo. 512, 86 Pac. 1042.

16 Citing Broadmoor D. Co. v. Brookside W. & I. Co., 24 Colo. 541, 52 Pac. 792. See Kimball v. Northern Irr. Co., 42 Colo. 412, 94 Pac. 333, also holding that action to quiet title lies.

17 *Supra*, secs. 320, 321.

18 *Supra*, sec. 555 et seq.

In enforcing agreements in equity upon the principles of specific performance, another question may arise when the agreement is one with a water-supply company. So far as such agreements are primarily for service, it is questionable whether specific performance can be ordered in view of the asserted rule that equity cannot order specific performance of contracts for continual service. But the supply contract is sometimes regarded as conveying an incorporeal hereditament, a water-right, rather than a service right,[19] and the tendency is to decree specific performance.[20]

E. MISCELLANEOUS REMEDIES.

(3d ed.)

§ 656. Actions at Law.—Though every injury to a water-right is not a case for an injunction, it does give a right to recover money damages at law, being in the nature of a nuisance.[21] In a suit for damages, the damage must not be alleged as for the value of water at so much per inch or gallon, but for the damage to plaintiff's undertaking, consequent to the loss of the use of the water.[22]

Ejectment will not lie for a watercourse, for "*non moratur*, but is ever flowing."[23]

(3d ed.)

§ 657. Abatement of Nuisance by Act of Party—Use of Force. The remedy nearest at hand is, usually, a show of physical force on the part of the owner; and this is quite proper if not overdone. Reasonable physical force may always be used to put trespassers off one's property. In one case[24] the court says this extends to a "*molliter manus imposuit*," which, translated from the Latin, may be taken, "A gentle use of one's fists." In the following case trespassers entered upon another's land to build a ditch and

19 *Infra*, sec. 1315 et seq.; especially secs. 1324, 1338.

20 Perrine v. San Jacinto etc. Co., 4 Cal. App. 376, 88 Pac. 293 (*dictum*); Hunt v. Jones, 149 Cal. 297, 86 Pac. 688; Clyne v. Benicia Water Co., 100 Cal. 310, 34 Pac. 714. Cf. Stanislaus W. Co. v. Bachman (1907), 152 Cal. 716, 93 Pac. 858, 15 L. R. A., N. S., 359; Pomeroy's Equitable Remedies, sec. 761. Compare Jersey City v. Flynn, 74 N. J. Eq. 104, 70 Atl. 497; Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. 404.

21 Parke v. Kilham, 8 Cal. 77, 68 Am. Dec. 310, 4 Morr. Min. Rep. 522; Tuolumne etc. Co. v. Chapman, 8 Cal. 392, 11 Morr. Min. Rep. 34; McCarthy v. Gaston etc. Co., 144 Cal. 542, 78 Pac. 7.

22 Parks etc. Co. v. Hoyt, 57 Cal. 44.

23 Challenor v. Thomas, Yelv. 143; Shury v. Piggot, Poph. 169.

24 Mechanics' Foundry v. Ryall, 75 Cal. 601, 17 Pac. 703.

interfere with water-rights and were driven off; whereupon they brought suit. The court says: "One of the grievances of which the plaintiffs complain is that they were ejected from the possession of certain ground occupied by them for the purpose of constructing a dam and ditch. The object was to divert the water away from the defendants, and we think the plaintiffs have no right to complain of the means adopted to defeat this object. As against the defendants the diversion would have been illegal, and we regard their action in the premises as a proper and legitimate mode of averting the injurious consequences."[25]

One may go upon another's land to remove obstructions placed there without being held liable in trespass,[1] or to clean out or repair the ditch.[2] The subsequent appropriators may require the prior one to keep up his dam, or may themselves maintain the dam as they found it at the time of their location.[3] The landowner may take away and remove material brought on his land by a ditch owner to erect a saloon beside the ditch.[4]

In a recent case[5] it is said: "It is clear from these authorities that one who is in possession of real property without right cannot maintain an action of trespass on his person—assault and battery—against the owner of the property, having a right to its possession, or against those, acting at his instance or in his behalf, who make a forcible entry thereon to dispossess him, where no more force than is necessary is used to make the entry effective." Adding that if the trespasser is armed, it may (a question of fact) be reasonable for the owner to enter armed to dispossess him.

(3d ed.)

§ 658. **Crimes.**—Even aside from statute, it is larceny to take water out of a receptacle in which it is confined and reduced to possession, as water in artificial waterworks, so far as it is private property, is personal property, and the subject of larceny at common law.[6] "One may put the case, for example, where I

[25] Butte etc. Co. v. Morgan, 19 Cal. 609, at 616, 4 Morr. Min. Rep. 583. See, also, McCarty v. Fremont, 23 Cal. 196.

[1] Ennor v. Raine, 27 Nev. 178, 74 Pac. 1.

[2] Carson v. Genter, 33 Or. 513, 52 Pac. 506, 43 L. R. A. 130.

[3] Lobdell v. Simpson, 2 Nev. 274, 90 Am. Dec. 537.

[4] Whitmore v. Pleasant Valley etc. Co., 27 Utah, 284, 75 Pac. 748.

[5] Walker v. Chanslor (1908), 153 Cal. 118, 126 Am. St. Rep. 61, 94 Pac. 606, 17 L. R. A., N. S., 455.

[6] *Supra*, secs. 35, 36; Ferens v. O'Brien, 11 Q. B. D. 21. See Dolan v. State (Tex. Civ. App.), 129 S. W. 840.

go to dip water from a river. I acquire the ownership of the water which I have taken, and with which I have filled my pitcher, by title of occupancy, for this water, being a thing which belonged to no person, to which no person had any exclusive right whatever, I have been able, on taking it into my possession, to acquire the ownership of it *jure occupationis.* That is why, in case on returning from the river, I have, for some purpose, left my pitcher standing on the road, with the intention of returning later to fetch it where I left it, i.e. in the meantime, a passer-by, having found my pitcher, proceeds (to save himself the trouble of going to the river) to pour into his pitcher the water that was in mine, he has committed against me an actual *theft* of that water, which water was a thing of which I was actually the proprietor, and of which I retained the possession through the intention I had of returning for it at the place where I left it. Note that the flow of the body of the stream must not be confounded with the running water itself, which is designated *aqua profluens.*"[7] In California this principle is enacted in the Penal Code,[8] providing that stealing water from a canal, ditch, flume, pipe, reservoir or other conduit is a misdemeanor.

Disturbing any gate or other apparatus for the control or measurement of water, without authority of the owner or manager and with intent to defraud is usually, by statute, a misdemeanor.[9] In practice, convictions under these sections are difficult to obtain. The Modesto irrigation district in California, during the year 1909, brought several prosecutions against landowners who were accused by the officials of taking water out of their turn when ordered not to do so by the ditch-tender of the district. It took long to get a jury, as the ranchers seemed to sympathize with the defendants; charges of unfairness were made against the officials; and the verdicts finally resulted in acquittals.

Some other crimes under the California statutes peculiar to this subject are poisoning water of any spring, well or reservoir.[10] An example of this is herding a band of sheep daily to a stream which they defile.[11] Maintaining appliances injurious

[7] Pothier, Droit de Proprieté, opp. tom. 8, p. 149.

[8] Secs. 499 and 502. See, also, Neb. Comp. Stats. 1903, sec. 6458.

[9] Cal. Pen. Code, secs. 592, 607.

[10] A state's prison offense. Cal. Pen. Code, sec. 347; Stats. 1907, c. 492; Stats. 1911, c. 339.

[11] People v. Borda, 105 Cal. 636, 38 Pac. 1110.

to fish is a misdemeanor.[12] Wasting artesian well water is a crime.[13]

These crimes do not exclude the equitable jurisdiction to restrain the same acts as nuisances in a civil suit.[14]

Under the recent water codes of the arid States there are many criminal provisions in the nature of police regulations; such as diverting water without a permit from the State Engineer, waste of water, interference with headgates or measuring devices, or obstruction of officials in their work.[15] A common provision is that "the possession or use of water when the same shall have been lawfully denied by the water commissioner or other competent authority shall be *prima facie* evidence of the guilt of the person using it."[16] Pollution of water to the danger of health is also usually a crime.[17] In Colorado, for a public-service water company to exact a bonus is a crime.[18]

[12] Pen. Code, 629.

[13] Cal. Stats. 1907, p. 122, sec. 5.

[14] People v. Truckee Lumber Co., 116 Cal. 397, 58 Am. St. Rep. 183, 48 Pac. 374, 39 L. R. A. 581; Spring Valley etc. Works v. Fifield, 136 Cal. 14, 68 Pac. 108; Arizona Copper Co. v. Gillespie (Ariz.), 100 Pac. 465.

[15] For example:

Colorado.—Rev. Stats. 1908, secs. 1817, 3178, 3179, 3239, 3240, 3495 et seq., 3497 et seq., and the following sections of the Revised Statutes of 1908: Water commissioner (section 1723); Failure to cover ditch (section 3243); Polluting stream (section 1817); Allowing water to waste (section 3240); Trees which conserve the snow (section 2626).

Idaho.—Stats. 1903, p. 223, sec. 26; Stats. 1907, p. 237.

Nebraska.—Comp. Laws 1903, secs. 6407, 6443, 6445, 6458.

Nevada.—Comp. Laws 1900, secs. 430–434, 4879, 4881; Stats. 1903, p. 214; Stats. 1903, p. 18, sec. 20; Stats. 1907, p. 30, secs. 16, 26, 27, 30; Stats. 1907, p. 104; Stats. 1909, p. 48. Failure of claimant to file statement for adjudication of rights is declared a crime. Stats. 1907, p. 30, sec. 16.

New Mexico.—Stats. 1907, p. 71, secs. 46–48, 50, 67.

North Dakota.—Stats. 1905, p. 274, secs. 28, 43, 52–54, 57.

Oregon.—Laws 1909, c. 216, secs. 43–45, 66.

South Dakota.—Stats. 1905, p. 201, secs. 28, 49, 54; Stats. 1907, c. 180.

Utah.—Stats. 1907, p. 57, secs. 55, 64.

Washington.—Pierce's Code, secs. 1908, 5834, 5837, 5872, 5901; Stats. 1907, p. 285. It is a crime in Washington to cause any aperture in a structure erected to conduct waters for agricultural purposes. State v. Tiffany (Wash.), 87 Pac. 932.

Wyoming.—Rev. Stats., secs. 917, 918, 924 et seq., 971; Stats. 1901, c. 86, pp. 95, 99; Stats. 1907, p. 138, secs. 13–15; Stats. 1907, c. 86.

This list is not complete. See statutes *infra*, Part VIII.

[16] E. g., *Colorado.*—Rev. Stats. 1908, sec. 3497; Laws 1901, p. 196. *Oregon.*—Laws 1909, c. 216, sec. 66. *Wyoming.*—Laws 1901, c. 66. *California.*—Laws 1911, c. 406, sec. 6.

In Lindsley v. Natural Carbonic etc. Co. (1911), 31 U. S. Sup. Ct. Rep. 337, such clause is held constitutional.

[17] E. g., Colo. Rev. Stats. 1908, sec. 1817.

[18] Colo. Stats. *infra*, sec. 1433. See Northern Irr. Co. v. Richards, 22 Colo. 456, 45 Pac. 423, and cases cited *infra*, sec. 1280.

§§ *659–665. (Blank numbers.)*

PART IV.

THE COMMON LAW OF RIPARIAN RIGHTS.

CHAPTER 28.

INTRODUCTORY.

§ 666. Appropriation and the common law.
§ 667. Ancient possession—The maxim *"Aqua currit."*
§ 668. Prior possession even if not ancient.
§ 669. Priority of appropriation enforced.
§ 670. Priority finally displaced by equality.
§ 671. Same.
§ 672. Same.
§ 673. Riparian rights under the California doctrine.
§ 674. Conclusion.
§§ 675–683. (Blank numbers.)

(3d ed.)

§ 666. Appropriation and the Common Law.—Up to recent times, the English decisions were devoted consistently to protection of long-standing enjoyment of the water of a stream. The earliest cases usually presented a condition where one had from time immemorial used the water for a mill or for watering cattle, or for irrigating a meadow in time of drought,[1] and another wholly stopped the stream or diverted it elsewhere and left plaintiff's mill or land dry and helpless, whereupon the courts acted to protect the former's ancient enjoyment. In the Year Books several such cases appear,[2] giving only the results of the assizes, however (that the diversion from plaintiff was allowed or denied, being usually denied), but without any discussion.

1 E. g., Year Book XII, Edward III (A. D. 1331, Horwood's edition, p. 464), where James diverted the course of a certain stream of water from T., the latter complains that water was wont to flow from a spring to his meadow "with which water he was wont to water his cattle, namely, horses, sheep and cows, and also to fish therein and brew therewith, *and irrigate* [*adaquare*] *the aforesaid meadow in time of drought*, and do other needful things therewith," and that after the diversion he specifies heavy damage, and it was ordered "that the said nuisance be abated and that the said water be turned into its former course at the expense of the said J."

2 See Woolrych on Waters, p. 177.

(3d ed.)

§ 667. **Ancient Possession—The Maxim "Aqua Currit."**—This principle of protecting ancient enjoyment is expressly taken as the ground of decision in the earliest cases containing actual discussion. These cases representing the second stage of the common law, discussed the matter from the view of proper pleading by the plaintiff in such a case. The plaintiff, relying upon an immemorial custom, usually declared, in the words of pleading a custom, that the water "*currere solebat*" to his mill or land, and that he had made use of it there from time out of mind. Such pleading was upheld because it properly alleged an ancient custom. The most important of these is Shury v. Piggott, decided in 1625. The case seems to have excited a good deal of attention at the time, being given in six different reports,[3] and has been said to have discussed collaterally many things which were not necessary to the decision.[4] Lord Blackburn declares the stream in question appears to have been in reality an artificial one; though the maxim, "*Aqua currit et debet currere ut currere solebat,*" as a rule of natural streams, probably rests upon this case. The fact that it was an artificial stream shows that this maxim really arose as a statement that the right to running water rests on prescription; and there is enough in the reports of other cases to show that such is the real origin of the maxim. The point is worth following up a little.

The case discussed the matter from the view of formal pleading, as was usually the way cases were treated at the time. The plaintiff declared, in the words of pleading on ancient "custom," that the water "*currere solebat et consuevit*" to his land, and one of the judges rested his decision on the ground that, as he said, "'*consuevit*' is a good word for a custom."[5] That the words of the maxim arose from this idea of resting the right to watercourses upon prescription or custom from time out of mind, appears in numerous other of the older authorities succeeding this case. In one it was held, "By reason of the words '*consuevit et debuit,*' it must be intended that a prescription was given in evidence."[6] In another

[3] Palm. 444; Poph. 169, 81 Eng. Reprint, 1163; 3 Buls. 339; Noy, 84; Latch, 153; W. Jones, 145, 81 Eng. Reprint, 280.

[4] Lord Blackburn in Dalton v. Angus, 6 App. Cas. 825.

[5] As reported in Palm. 444, 81 Eng. Reprint, 1163, Doderidge, J., in Shury v. Piggott, said. "Ici sont sufficient parols d'expresser un prescription, de temps d'ont, etc., consuevit currere," adding that, "serra entend ancient."

[6] Rosewell v. Prior, 1 Ld. Raym. 392, 91 Eng. Reprint, 1160, a case of lights.

it was said. "*Currere consuevit* had been held well enough in case of a watercourse, because that must be time immemorial."[7] In another, "If I have a right from usage as *currere solebat*, I have the right in such manner as the usage has been."[8] There is another instructive case reported in several reports.[9] In this case plaintiff declared, among other words, that the water "*currere consuevit et debuit* to a mill of the plaintiff,"[10] which was held a sufficient pleading both below and on appeal. The watercourse was an artificial one.[11] In support of the pleading, plaintiff's counsel (Pollexfen, at one time Chief Justice) argued, among other things, that "The words '*ab antiquo et solito cursu*' amount to as much as if it had been said *de jure currere debuisset et consuevit*," and the report says:[12] "The judgment was affirmed, but Holt, Chief Justice, said, that if the cause had been tried before him, the plaintiff should have proved his mill to be an ancient mill, otherwise he should have been nonsuit," showing that the words "*consuevit et debuit*" were taken by Holt as referring to prescription. In another report of the same appeal[13] plaintiff's counsel speaks of certain cases as "those cases are wherein the plaintiff declared that the water *currere consuevit et debuisset* to the plaintiff's mill time out of mind; which words are of the same significance as if he had showed it to be an ancient mill. . . . . The word '*solet*' implies antiquity, ... and it was the opinion of a learned judge[14] that the words '*currere consuevit et solebat*' did supply a prescription or custom." The report says: "The word '*solet*' implies antiquity and will amount to a prescription," adding the expression of Holt, C. J., given above, to this effect, whereby he must have meant that, since the pleading was based on prescription, it could only be supported on the trial by proof that the use was in fact ancient as the

[7] Powell, J., in Tenant v. Goldwin, 2 Ld. Raym. 1089, at 1094, 92 Eng. Reprint, 222.

[8] Brown v. Best, 1 Wils. 174, 95 Eng. Reprint, 557.

[9] Palmer v. Keblethwaite, 1 Show. 64, 89 Eng. Reprint, 451; Skin. 65, 90 Eng. Reprint, 31. In Mason v. Hill, 5 Barn. & Adol. 1, 110 Eng. Reprint, 692, Lord Denman speaks of these two reports of the case, and says: "The final result of the case does not appear in the books, and the roll has been searched for it in vain," but the report of it on appeal appears in four different reports, viz.: Skin. 175, 90 Eng. Reprint, 81; Carth. 85, 90 Eng. Reprint, 653; 87 Eng. Reprint, 30, 3 Mod. 48, 90 Eng. Reprint, 901, and Holt, 5. See, also, 3 Lev. 133, 83 Eng. Reprint, 615.

[10] 1 Show. 64, 89 Eng. Reprint, 451.

[11] Carth. 85, 90 Eng. Reprint, 31.

[12] Carth. 85, 90 Eng. Reprint, 31.

[13] 3 Mod. 48, 90 Eng. Reprint, 301.

[14] Citing Doderidge, J., in Shury v. Piggott, Poph. 171, 81 Eng. Reprint, 1163, above quoted.

words *"currere consuevit," "debuit"* or *"solebat"* must be taken as having alleged.[15]

These cases show that the common law of watercourses was at one time based on an analogy to prescription or ancient custom, and that the maxim, *"Aqua currit et debet currere ut currere solebat"* is merely a survival of this stage of the law; a stage now, of course, long discarded, though the maxim has survived.[16]

(3d ed.)

§ 668. **Prior Possession Even if not Ancient.**—As part of this second stage of the English law a modification of the foregoing appeared in some of the cases just considered. From regarding the right as resting upon ancient enjoyment, it was questioned in some of these cases whether the enjoyment had to be ancient, and whether actual possession, however short, was not alone enough against one

[15] A declaration that plaintiff had a mill *"ab antiquo"* and defendant did certain acts *"per quod cursus aquae praedict coarctutus est,"* and the declaration was held good. Russell v. Handford, 1 Leon. 273, 74 Eng. Reprint, 248 (about A. D. 1650). *"Ad malendinum illud currere consuevit."* Diverted, prevented milling. See Viner's Abridgment, "Watercourses," B, sec. 2. In another it was held a good pleading to allege *"quod quidam fluxus aquae currere consuevit et debuit usque ad quendam fontem."* Prickman v. Tripp, Skin. 389, 90 Eng. Reprint, 173. A man's right to a watercourse for a mill regarded as resting on prescription. Luttrel's Case, 4 Coke, 86a, 76 Eng. Reprint, 1065; Russell v. Handford, 1 Leon. 273, 74 Eng. Reprint, 248; The King v. Directors of Bristol Co., 12 East, 429, 104 Eng. Reprint, 167. Manle, J., in Smith v. Kenrick (1849), 7 Com. B. 546; Acton v. Blundell, 12 Mees. & W. 324.

[16] "We may consider, therefore, that this proposition is indisputable; that the right of the proprietor to the enjoyment of a watercourse on the surface is a natural right, and not acquired by occupation of the stream itself, *or presumed grant.*" Lord Wensleydale, in Chasemore v. Richards, 7 H. L. Cas. 349, 11 Eng. Reprint, 140. See, also, Dickinson v. Canal Co., 7 Ex. 299; Magistrates v. Elphinstone, 3 Kames Dec. (Scotch) 332, saying, "This right he has from the law of nature, *without the aid of prescription.*" See, also, Countess of Rutland v. Bowler, Palm. 290, 81 Eng. Reprint, 1087; Prickman v. Tripp, Skin. 389; Comb. 231, 90 Eng. Reprint, 173, 447; Acton v. Blundell, 12 Mees. & W. 324; Cox v. Matthews, 1 Vent. 237, 86 Eng. Reprint, 159; The King v. Directors of Bristol etc. Co., 12 East, 429, 104 Eng. Reprint, 167.

The idea nevertheless found expression to a comparatively late date. In The King v. Directors of Bristol Dock Co., 12 East, 429, 104 Eng. Reprint, 167, Lord Ellenborough said the instances of actions maintained against those who disturbed plaintiff in enjoyment of the water of a river "were cases where the owners of the property, *by long enjoyment*, had acquired special rights to the use of the water in its natural state." It was also suggested by Tyndall, C. J., in Acton v. Blundell (1843), 12 Mees. & W. 324, and in another case it was said: "As to surface flows [watercourses], parties acquire rights to them because there is the acquiescence of everybody who has any interest in the matter." Maule, J., in Smith v. Kenrick (1849), 7 Com. B. 546. Both of these last are expressly disapproved in Chasemore v. Richards, *supra.*

See, also, *infra*, sec. 1434.

who had never before possessed it. The principle applied was that possession is sufficient title against a mere wrongdoer showing no better right (the better right being by prescription). In a case above referred to,[17] where the declaration was treated as stating a prescription, counsel (Pollexfen) argued also that "This action is of the same nature with an action of trespass, and therefore good upon the possession only," even if not ancient (but then proceeding to show that the words in the declaration also amounted to saying it was ancient), and one of the judges (Hoyle) said: "Where the declaration is upon the possession against a wrongdoer, there we need not say that it was time out of mind." Numerous cases were rested upon this idea.[18]

The principle is an underlying one still true to-day; but the importance of these early cases is in that they allowed it to be the controlling principle of rights in watercourses, whereas the controlling principle at common law is now that a title to the flow and use of the stream is an incident to the land by which it flows, and the consideration of possession without *title* has been entirely subordinated.[19]

(3d ed.)

§ **669. Priority of Appropriation Enforced.**—The third stage of the English decisions presents the first real attempt to consider the matter on principle about the beginning of the last century. The desire still was to protect the long-standing enjoyment; but now treating the matter aside from formal pleading, the judges went to the civil law for their principles, as later herein set forth. Still wishing to protect the old enjoyment, they understood these

[17] Palmer v. Heblethwait, 1 Show. 64, 89 Eng. Reprint, 451.

[18] It is in part taken as the ground of the judgment of Whitlock, J., in Shury v. Piggott, *supra*. See, also, Aldred's Case, 9 Coke, 86, 77 Eng. Reprint, 816; Moore v. Browne (15 Eliz.), 3 Dyer, 319, 73 Eng. Reprint, 723. And it was actually decided in some cases that the use need not be ancient to entitle it to protection against one not himself claiming a prescription; e. g., Sands v. Trefuses, Cro. Car. 575, 79 Eng. Reprint, 1094, holding that it need not be an ancient mill. Possession is enough against a tort-feasor. (15 Charles I.) In another case trespass for diverting a watercourse was upheld on this ground of possession against a wrongdoer, without alleging title. Glyn v. Nichols, Comberback, 43, 90 Eng. Reprint, 333, 2 Show. 507, 89 Eng. Reprint, 1069. In another, "Action for disturbing a watercourse, with a *currere debuit* only, and says not '*solebat*.' *Quaere*, if not good." Jackson v. Salway, 1 Show. 350, 89 Eng. Reprint, 142. In S. C., Skin. 316, 90 Eng. Reprint, 619, held good, as his possession was sufficient. That plaintiff's mill need not be an ancient one was also held upon this ground in Cox v. Matthews, 1 Vent. 237, 86 Eng. Reprint, 159, 3 Keble, 133.

[19] *Supra*, secs. 83, 246, 628.

civil-law principles as affirming the doctrine of prior appropriation, and protected the long-standing use against the innovation of a recent diversion, on the ground of priority of use. One of the chief cases to this effect is Liggins v. Inge,[20] referring to the civil law, and saying, "By the law of England, the person who first appropriates any part of the water flowing through his own land to his own use has the right to the use of so much as he thus appropriates against any other."[21] And the same was laid down in early New England.[22]

(3d ed.)

§ 670. **Priority Finally Displaced by Equality.**—The modern law, or fourth stage, rests upon a re-examination of the civil-law principles in Mason v. Hill,[23] and the more correct application of them made by Lord Denman in that case, a matter already elsewhere considered at much length.[24] It is our object here only to show that the modern common law repudiates both the former ideas that the right to a watercourse rests either on an analogy to custom or prescription, such as influenced the earliest cases, or on the theory of prior appropriation. A recent note-writer[25] gives the following regarding this change of view: "There was a strong tendency on the part of some of the judges in the earlier times to recognize a right to obtain title to water by prior appropriation or occupancy, and at one time, it seemed as though that doctrine would be established, but the later cases have all, with one possible exception, been the other way, so that now no such right is recognized.[1] But in some of

20 [1831] 7 Bing. 682.

21 See, also, II Blackstone's Commentaries, 402. In Bealey v. Shaw (1805), 2 Smith, 321, 6 East, 208, 102 Eng. Reprint, 1266, Lawrence, J., said: "It all depends upon the priority of occupancy." Le Blanc, J., said that the first to erect a mill might take all. In Canham v. Fisk (1831), 2 Cromp. & J. 126 (also 2 Tyrw. 155), Bayley, B., said: "There is a fourth mode of acquiring such a right, viz., by appropriation. If a man finds water running through his land, he may appropriate it and thus acquire a title to the water."

22 Weston v. Allen, 8 Mass. 136, 8 Morr. Min. Rep. 82 (1811). Priority of appropriation is still in force to a small extent under the "mill acts." See Cary v. Daniels, 8 Met. (Mass.) 466, 41 Am. Dec. 532; Fuller v. Chicopee etc. Co. (Mass. 1860), 16 Gray, 43; Elliott v. Fitchburg Ry. (Mass.), 10 Cush. 191, 57 Am. Dec. 85; Blackstone Mfg. Co. v. Town of Blackstone (1908), 200 Mass. 82, 85 N. E. 880, 18 L. R. A., N. S., 755; Van Bergen v. Van Bergen (1818), 3 Johns. Ch. 282.

23 5 Barn. & Adol. 1, 110 Eng. Reprint, 692.

24 *Supra*, c. I.

25 30 L. R. A. 665, note.

1 Saying that in the earlier cases the following decisions and *dicta* appear: Liggins v. Inge, 7 Bing. 682; 5 Moore & P. 712; Williams v. Moreland, 2 Barn. & C. 913, 107 Eng. Reprint, 620; 4 Dowl. & R. 583; Canham v. Fisk, 2 Cromp. & J. 126, 2 Tyrw. 155; Saunders v. Newman, 1 Barn. & Ald. 258, 106 Eng. Reprint, 95.

those early cases rulings which are apparently in favor of the doctrine of appropriation are in fact merely in favor of protecting what is known as riparian rights.[2] When the question came squarely before the court for decision, however, the doctrine of prior appropriation was repudiated."[3] Goddard, in his Law of Easements,[4] declares: "That all riparian owners of natural streams have a riparian right to the use of water as it flows past their lands, as long as they do not interfere with the natural rights of other riparian owners, and to sue for disturbance is now an established doctrine of the law." He adds: "The doctrine was not established until comparatively modern times," etc. He says, after referring to some of the earlier decisions, that the theory of appropriation was much modified by various decisions "as the nature of riparian rights was brought more fully under consideration."[5] He concludes: "Appropriation of the water of flowing streams has thus gradually fallen from being considered the means of acquiring important rights to being deemed of no importance whatever." In Chasemore v. Richards,[6] Lord Wensleydale declares: "We may consider, therefore, that this proposition is indisputable, that the right of the proprietor to the enjoyment of a watercourse is a natural right, and is not acquired by occupation *or presumed grant.*"[7] Lux v. Haggin,[8] says: "In examining the numerous cases which establish that the doctrine of 'appropriation' is not the doctrine of the common law, we meet an embarrassment of abundance."

Mason v. Hill,[9] which is considered to have placed the common law of riparian rights on its present foundation, was decided in 1833. An elaborate opinion was rendered by Lord Denman, with the intention "to discuss, and, so far as we are able, to settle the

[2] Stating, Rutland v. Bowler, Palm. 290, 81 Eng. Reprint, 1087; Bealey v. Shaw, 6 East, 208, 102 Eng. Reprint, 1266, 2 Smith, 321; Holker v. Poritt, L. R. 10 Ex. 59, 44 L. J. Ex. 52; Frankum v. Falmouth, 6 Car. & P. 529.

[3] Stating Mason v. Hill, 5 Barn. & Adol. 1, 110 Eng. Reprint, 692; Wood v. Waud, 3 Ex. 748, 18 L. J. Ex. 305; Embrey v. Owen, 6 Ex. 355, 20 L. J. Ex. 212; Sampson v. Hoddinott, 1 Com. B., N. S., 611; Wright v. Howard, 1 Sim. & St. 190, 57 Eng. Reprint, 76.

[4] Page 251. Also, 7th ed. (1910), p. 348.

[5] Citing in this connection, Mason v. Hill, 3 Barn. & Adol. 304, 110 Eng. Reprint, 114, and Cocker v. Cowper, 5 Tyrw. 103.

[6] 7 H. L. Cas. 384, 11 Eng. Reprint, 140.

[7] "The court of exchequer, indeed, in the case of Dickinson v. Grand Junction Canal Co., 7 Ex. 282, expressly repudiates the notion that such a right as that in question can be founded on a presumed grant, but declares that with respect to running water it is *jure naturae.*" Chasemore v. Richards, 7 H. L. Cas. 349, 11 Eng. Reprint, 140, Wightman, J.

[8] 69 Cal. 255, 10 Pac. 674.

[9] 5 Barn. & Adol. 1, 110 Eng. Reprint, 692.

principle upon which rights of this nature depend," and this case has been generally accepted as accomplishing this result, settling the common law of watercourses in its present form.[10] The older authorities were held, in that case, to be devoted to an elucidation of the principle borrowed from the civil law that the water itself as a *corpus* or substance is not property until taken into possession, but do not define the rules governing *who* may have the right to take it into possession or to what extent a person having the right may exercise it; and that they are misconceived if thought to recognize the right to take the water into possession by anyone but a landowner on its banks, or by such landowner, to the extent of entirely depriving another landowner on its bank of the advantage of that stream. Lord Denman, in giving the decision, said: "But it is

[10] Lord Blackburn in Orr Ewing v. Colquhoun, 2 App. Cas. 854, says the modern law of riparian rights "can hardly be considered as settled law in England before the case of Mason v. Hill, in 1833." In another case it is said: "Upon the second trial of Mason v. Hill a special verdict was found, on the argument on which Lord Denman delivered an elaborate judgment which has always been considered as settling the law as to the nature of the right." McGlone v. Smith, 22 L. R. Ir. 568. Accord as to the effect of Mason v. Hill, see Cocker v. Cowper, 5 Tyrw. 103; Embrey v. Owen, 6 Ex. 353, 20 L. J. Ex. 212; Stockport W. W. Co. v. Potter, 3 H. & C. 323, 10 Jur., N. S., 1005; Chasemore v. Richards, 7 H. L. Cas. 349, 11 Eng. Reprint, 140; Wightman, J.; Pugh v. Wheeler, 19 N. C. (2 Dev. & B.) 50 Ruffin, C. J.; Gale on Easements, 8th (1908) ed., p. 258; Angell on Watercourses, 7th ed., sec. 133; Salmond on Torts, p. 254.

It should be noted, however, that there were one or two earlier definitions of the right which resembled the present law. See Magistrates v. Elphinstone, quoted *supra*, sec. 17. In Countess of Rutland v. Bowler, Palm. 290, 81 Eng. Reprint, 1087, plaintiff alleged that a watercourse "*soloit currere per modestum et incessantem cursum*" to a parcel of plaintiff's land where she had a mill. Defendant claimed that the declaration was bad for not alleging that it was an "ancient" mill, so as to found a prescriptive right to the watercourse. But it was held that it was the same whether the mill was new or old; it was enough that the water "used *sequer cest course. . . . . Car ne poet user son terre, ou le water, qui passe par son terre, al damage d'auter*," and judgment was entered for the plaintiff. In 1805 Lord Ellenborough had said: "The general rule of law as applied to this subject is that, independent of any particular enjoyment used to be had by another, every man has a right to have *the advantage* of a flow of water in his own land without diminution or alteration," and refers later on to this as his "natural right." Bealey v. Shaw (1805), 6 East, 208, 102 Eng. Reprint, 1266. Likewise Justice Story had in 1827 rendered the judgment in Tyler v. Wilkinson (4 Mason, 397, Fed. Cas. No. 14,312, six years before Mason v. Hill), and Story's opinion has been more frequently quoted in American cases but was itself based on English cases; while the second of Story's famous decisions (Webb v. Portland Cement Co., 3 Sum. 189, Fed. Cas. No. 17,322), expressly relied upon Mason v. Hill. Regarding the history of Story's opinion, see *infra*, sec. 696. So, also, Kent's Commentaries had been issued before Mason v. Hill. Kent, *inter alia*, referred to the Code Napoleon, which had been proclaimed in 1804, and contained an enactment of the law of riparian rights for France.

a very different question whether he can take from the land below one of its natural advantages, which is capable of being applied to valuable purposes, and generally increases the fertility of the soil even when unapplied, and deprive him of it altogether by anticipating him in its application to a useful purpose. . . . . We think that this proposition has originated in a mistaken view of the principles laid down in the decided cases." The decision limited the right to use the water to one by whose land it flows, or, as he is now called, a riparian owner; and by him, regardless of the time of use, not to be used to the exclusion of other riparian owners. This is the foundation of the present common law of riparian rights. (The term "riparian proprietor" does not appear in the older cases at all, nor even in Mason v. Hill.) The English decisions since Mason v. Hill have firmly established the principles laid down in that case.[11]

(3d ed.)

§ 671. **Same.**—The result of Mason v. Hill was that the use of running water was confined to those by whose land the stream flows, as a common benefit, to be enjoyed by all of them equally, with priority to none. The chief proposition laid down was that "It appears to us that there is no authority in our law, nor as far as we know, in the Roman law (which, however, is no authority in ours), that the first occupant (though he may be the proprietor of the land above) has any right, by diverting the stream, to deprive the owner of the land below of the special benefit and advantage of the natural flow of water therein."[12] So, likewise, in the well-known decision of Justice Story in Tyler v. Wilkinson, some few years before, the law was laid down that between the landowners through whose land the stream flows there is a "perfect equality of right," and "there may be, and must be allowed to all, of that which is common, a reasonable use"; but an exclusive right is given to none, except by prescription or the grant or consent of all the riparian proprietors, for the water is common to them all. "Mere priority of occupation of running water, without such consent or grant, confers no *exclusive* right. It is not like the case of mere

11 See Wilts etc. Canal Co. v. Swindon W. W. etc. Co., L. R. 9 Ch. 451; Swindon Waterworks Co. v. Wilts etc. Co., L. R. 7 H. L. 697; McCartney v. Londonderry Ry., [1904] App. Cas. 301; Miner v. Gilmour, 12 Moore P. C. 131, 14 Eng. Reprint, 861; Lyon v. Fishmongers' Co., L. R. 1 App. Cas. 673; Sandwich v. Ry., 10 Ch. D. 707; Kensit v. Great Eastern Ry. Co., 27 Ch. D. 122; White v. White, [1906] App. Cas. 81.

12 Mason v. Hill, 5 Barn. & Adol. 1, 110 Eng. Reprint, 692.

occupancy, where the first occupant takes by force of his priority of occupancy. That supposes no ownership already existing, and no right to the use already acquired. But our law awards to the riparian proprietors the right to *the use in common,* as one incident to the land; and whoever seeks to found an *exclusive* use must establish a rightful appropriation in some manner known and admitted by the law"[13] (meaning by grant, condemnation or prescription).

(3d ed.)

§ 672. **Same.**—The contention that the doctrine of exclusive rights by priority of appropriation is to-day recognized by the common law is disposed of by Judge Cooley[14] in the following words: " . . . . We may dismiss from the mind the fact that the plaintiff had first put the waters of the stream to practical use, since that fact gave him no superiority in right over the defendant. The settled doctrine now is that priority of appropriation gives to one proprietor no superior right to that of the others, unless it has been continued for a period of time, and under such circumstances as would be requisite to establish rights by prescription."[15] And so also it is declared for private lands at the present day in those parts of the West where the common law is in force: "There is no such thing as prior riparian ownership, so far as distribution of water for irrigation purposes between riparian owners is concerned."[16]

(3d ed.)

§ 673. **Riparian Rights Under the California Doctrine.**—Under the California doctrine the system of appropriation applies to diversions made while streams flowed over public lands, where there are no riparian proprietors;[17] that of riparian rights applies to waters whose bordering lands became private before diversion;[18] as already set forth in the second part of this book.

[13] Tyler v. Wilkinson, 4 Mason, 397, Fed. Cas. No. 14,312.

[14] Dumont v. Kellogg, 29 Mich. 420, 18 Am. Rep. 102.

[15] Citing cases.

[16] Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728; Williams v. Altnow, 51 Or. 275, 95 Pac. 200, 97 Pac. 539; Lone Tree Co. v. Cyclone Co. (S. D.), 128 N. W. 596, speaking of rights between riparian proprietors between themselves, as such, under the common law. As to cases outside the common law where diversions are made *on the public domain* before riparian settlements have been made by other riparian owners, see *supra,* sec. 257.

[17] *Supra,* secs. 155, 198, 257.

[18] *Supra,* secs. 221 et seq., 257 et seq.; *infra,* sec. 814 et seq.

It is sometimes said that in applying the common law to irrigation with respect to such private-land streams, the California court (and similar courts) modified or changed the common law. Rights acquired while the stream flowed over public land are, it is true, not governed by the common law; and so, in fact, most irrigation in California is not done under the riparian system, being done under such early public-land rights, or by grant or prescription, which to-day cover the normal flow of nearly all streams in Southern California and in the San Joaquin Valley. But as to streams now upon private land, so far as their waters have not hitherto been covered by such rights, and as to the hundreds of little streams that have not been made the basis of any extensive project, there is little foundation for the statement that the common law is modified.

That the most essential feature of the common law, the exclusion of *nonriparian* owners or lands from rights in streams on private land, is not changed or modified in California, but is in force there as in England, is fairly settled by the decision on rehearing in Miller et al. v. Madera etc. Co.[19]

It has, however, sometimes been said that as *between the riparian owners themselves* for their own lands, the California court, in permitting a reasonable use by each for irrigation, modified or changed the common law; that permitting irrigation even *between riparian owners* is peculiar to the West.[20] If this were in truth a change, it would be a minor one compared with the exclusion of nonriparian owners. But it is not a change, for between the riparian owners themselves, the common law everywhere permits a reasonable use for irrigation, and did not have to be modified. In Lux v. Haggin,[21] the question is thoroughly examined, and it is shown that there is nothing in this peculiar to the West, and the frequency with which Lux v. Haggin has been cited for the "modification" statement simply shows that the case has met the fate of all over-long opinions, and has not been read.[22] In later sections, where the authorities are quoted,[23] it becomes fully apparent that the allowance in California of a reasonable use for irrigation by the riparian proprietors among themselves (excluding nonriparian

[19] (1909), 155 Cal. 59, 99 Pac. 502, 22 L. R. A., N. S., 391, Sloss, J., rendering the opinion. Nor is this statement impaired by the later decision in San Joaquin Co. v. Fresno Flume Co. (Cal.), 112 Pac. 182. See *infra*, sec. 825 et seq.

[20] *Infra*, sec. 749a.

[21] 69 Cal. 255; at 398 et seq., 10 Pac. 674.

[22] The basis of Lux v. Haggin was that the court *had no power to modify the common law at all.*

[23] *Infra*, secs. 745 to 749a, and sec. 799.

owners or lands) is no modification of the common law, and is no basis for the statement, so often improperly made, that the law of riparian rights has been modified in California. Appropriation of waters while they still flow over public lands, where there are no riparian proprietors, is the only exception in California to the usual rules of riparian rights.[24]

(3d ed.)

§ 674. **Conclusion.**—Upon the entire subject of riparian rights the case of Lux v. Haggin is the leading case in California, though the actual decision did not determine the rights of riparian proprietors *inter se* in that case.[25]

The law of riparian rights is almost wholly nonstatutory in the West. The statutes of Washington mention them more than elsewhere; in Oregon the statutes up to 1909 (chiefly the code) recognized them but did not attempt to define nor establish any rule respecting them;[26] while in California, since the repeal in 1887 of section 1422 of the Civil Code, no statute even mentions riparian rights except occasional wholly incidental code sections, which do little more than mention them.[27]

The California law has had to thread its way through a mass of difficulties. The high state of irrigation, and the variety of power and mining problems, presented, in a State of such varied natural conditions, difficulties of adjustment as unparalleled as the resources of the State itself. The prosperity of the State owes much to the foresight and yet conservatism which the supreme court has always shown in dealing with this subject; and while many problems remain yet unsolved, they may be confidently left to the court.

There are several matters common to the use of water under both the systems of appropriation and riparian rights. Such, for example, are the general fundamental conceptions regarding running water,[28] which are the same under both systems, which have diverged only in the superstructure where the common law aims

[24] See *supra*, secs. 174, 228; *infra*, sec. 815 et seq.

[25] The court said: "It will be noted (since the defendant is not a riparian proprietor, unless made such by the mere fact of its appropriation) that the exigencies of the present case do not imperatively demand that we shall here determine the respective rights of riparian owners as between themselves." Lux v. Haggin, 69 Cal. 255, 10 Pac. 674.

[26] Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

[27] See Pol. Code, sec. 4043; Civ. Code, sec. 1416, as amended in 1907; Code Civ. Proc., sec. 1248.

[28] *Supra*, Part I.

at equality and the law of appropriation at exclusive rights by priority. Such also, to a great extent, are the questions of prescription, eminent domain and procedure. Having already considered these matters in previous chapters, little more is said in the following ones other than in such instances where there may be a difference. As a general thing, however, cases decided under the law of riparian rights have been excluded from the foregoing part of this book, and the converse is true of what follows, even though, in some respects, the rule be the same under both systems.

§§ *675–683. (Blank numbers.)*

CHAPTER 29.

FOUNDATIONS OF THE SYSTEM OF RIPARIAN RIGHTS.

§ 684. Introductory.

A. GENERAL.

§ 685. The civil law.
§ 686. The common law borrowed from the civil law.
§ 687. The *corpus* of naturally running water is not property.
§ 688. Same—*Publici juris*, etc.
§ 689. But one may own a right to its flow and use—The law recognizes a usufructuary right.
§ 690. When taken into possession, the substance becomes private property.
§ 691. Systems of water law are but a development of these three "first principles."

B. ACCESS TO THE STREAM.

§ 692. None but riparian proprietors have access to the stream.
§ 693. Same.
§ 694. Same.
§ 695. Same.

C. THE RIPARIAN RIGHT DOES NOT REST UPON THE MAXIM "CUJUS EST SOLUM."

§ 696. The *cujus est solum* doctrine.
§ 697. Same.
§ 698. Same.
§ 699. Results.
§§ 700–708. (Blank numbers.)

(3d ed.)

§ 684. Certain of the following matters have been more fully considered in the opening chapters of this book, and are here given in more condensed form in order to present as a whole the foundations of the common law of riparian rights.

A. GENERAL.

(3d ed.)

§ 685. **The Civil Law.**—The first principle of the civil law is that stated in the Justinian Institutes: "By natural law these things are common to all: air, *running water*, the sea, and as a consequence, the shores of the sea." This classification is to denote things adaptable to general use in common, the "*res communes*" or "things common" of which, in their natural condition,

no person has control or ownership; things without an owner in their natural situation; or, as they have been called, "the negative community," or "things the property of which belongs to no person." Among them were also the fish and wild beasts, the light and heat of the sun, and the like. Running water was so classed because at one instant it is in one place in the river, then it is gone and some other water has succeeded it, without anyone having been able to say that he had it as his own; a thing of continual motion and ceaseless change, not susceptible of exclusive possession nor, hence, of ownership.[1]

But the civil law distinguished the *use* of the water from the water itself. While the naturally flowing water thus was without an owner and nobody's property, the civil law recognized a right of property in its *use*, which was called a "usufruct."[2]

This usufruct belonged to those who had access to the water, and only those who had access to it by virtue of ownership of riparian land could take and use it. Eschriche[3] says that waters of fountains and springs as they go out from thence "become running waters, *aqua profluens*, and pertain like common things (*cosas comunes*) to the first who occupies them, so far as he has need of them. *The first who can occupy them are the owners of the estates which they bathe or cross.*" He then treats of the rights of riparian proprietors to the use of the waters as between themselves.[4] So it is said: "No one may enter private property in search of waters or make use of them without permission from its owner."[5] Under the Mexican law "the waters of innavigable rivers, while they continued such, were subject to the common use of all *who could legally gain access to them* for purposes necessary to the support of life."[6]

The riparian proprietors (having the sole right of use because of the sole right of access given by their inclosing land, excepting

1 *Supra*, c. 1.
2 *Supra*, c. 2.
3 Eschriche, "Aguas."
4 Quoted *infra*, sec. 1026.
5 Spanish Civil Code, sec. 414, given in Walton's Civil Law of Spain and Spanish America, p. 204. "If the acequia shall cross the land of another, or the crown lands, or the land common to the inhabitants of the pueblo, a license from the private owner, or the king, or from the town council is indispensable." Eschriche, "Acequia."
6 Lux v. Haggin, 69 Cal. 255, 10 Pac. 674. That the right to take and use the waters at civil law was, as at common law, in the riparian proprietors because of their right of access, see Lord Kingsdown in Miner v. Gilmour, 12 Moore P. C. 131, 14 Eng. Reprint, 861, concerning French law; Van Breda v. Silberbauer, L. R. 3 P. C. 94; Commissioners of Hoek v. Hugo, L. R. 10 App. 345, the latter two concerning Roman-Dutch law of Cape of Good Hope. We cite these on the authority of Lux v. Haggin, wherein they are given.

streams on the public domain) could not any one of them make exclusive use of the stream. The Code Napoleon provides:[7] *"He whose property borders on a running water,* other than that which is declared a dependency on the public domain by article 538, may employ it in its passage for the watering of his property. He whose estate is intersected by such water, is at liberty to make use of it within the space through which it runs, *but on condition of restoring it, at the boundaries of his field, to its ordinary course."* The Louisiana Code likewise says:[8] *"He whose estate borders on running water,* may use it as it runs, for the purpose of watering his estate, or for other purposes. He through whose estate water runs, whether it originates there or passes from lands above, may make use of it while it runs over his land; but he *cannot stop or give it another direction, and is bound to return it in its ordinary channel where it leaves his estate."*[9] Commenting upon the above passage in the Code Napoleon, a French writer says: "The rights of use mentioned in article 644 are given *only to the riparian proprietors;* that is, to the proprietors of the estates contiguous to the flow of the water."[10] This right of use was called, in the civil law, a "usufruct."[11]

Speaking of the civil law regarding the use of waters, Mr. Yale[12] says: "These rights do not, as has been seen, differ substantially, so far as private property is concerned, from the common law."

(3d ed.)

§ 686. The Common Law Borrowed These Civil-law Ideas.— The early common-law cases already referred to[13] seeming to uphold the right of appropriation did so by accepting the civil-law idea that the *corpus* of the water was not, while flowing naturally, the property of anyone. They erroneously considered that an *exclusive flow and use* could be acquired by the first appropriator on that account,[14] this last being rejected in Mason v. Hill, but not

7 Code Napoleon, art. 644. Italics ours.

8 *Louisiana Code,* art. 657. Italics ours.

9 *Par Autorite, New Orleans,* 1838.

10 "Les droits d'usage mentionnés én l'art 644 ne sont accordés qu'aux riverains, c'est-á-dire, aux propriétaires de fonds contigus au cours d'eau." Droit Civile Francais, by Aubrey & Rau, 4th ed., vol. III, p. 47.

11 An extended note upon the civil law of waters is given *infra,* sec. 1025, et seq.

12 Yale on Mining Claims and Water Rights, p. 153.

13 *Supra,* sec. 669.

14 "The expressions used by Mr. Justice Bayley in Williams v. Moreland, 2 Barn. & C. 910, 107 Eng. Reprint, 620, and by Lord Chief Justice Tindal in Liggins v. Inge, 7 Bing. 682, that water flowing in a stream

changing the first principle. In Mason v. Hill, Lord Denman sets forth the civil law in the passage already quoted, and in Embrey v. Owen, Baron Parke takes that civil-law statement (that the *corpus* of the water was not property while flowing naturally), and accepts it as stating the common law also.[15]

In this the common law, as in most branches of the law of waters, is founded on the civil law. The connection we have already traced at much length.[16] We merely repeat here a few of the authorities. The passage in the Institutes above quoted classing running water, as a substance, with the air, is transcribed by Bracton as the law of England, saying:[17] "Naturali vero jure communia sunt omnium haec—*aqua profluens*, aer, et mare, et littora maris, quasi maris accessoria," and similar passages appear in the works of other ancient English writers.[18] From these partly, but probably more from the civil-law writers directly, this passed into Blackstone[19] and the early English cases,[20] and from Blackstone and Mason v. Hill into modern law. It is the same direct connection as that shown in the law of accretion, as to which it has been said:[21] "Our law may be traced back through Blackstone,[22] Hale,[23] Britton,[24] Fleta,[25] and Bracton,[26] to the Institutes of Justinian,[1] from which Bracton evidently took his exposition of the subject." The common law of fishing is likewise based upon the civil law.[2] The name "riparian proprietor" is itself borrowed from the civil law. "The owners of watercourses are denominated by the civilians riparian proprietors, and the use of the same significant and convenient term is now fully introduced into the common law."[3] And the writer has had occasion to examine recent French cases where it will be found the courts discuss the right of the "*pro-*

is *publici juris, and the property of the first occupier*, are founded on a mistake between the property in the water itself and the right to have its continual flow." Chasemore v. Richards, 7 H. L. Cas. 349, 11 Eng. Reprint, 140, Lord Wensleydale.

15 Quoted *infra*, sec. 694.

16 *Supra*, sec. 3.

17 Bracton, lib. 2, f. 7, sec. 5.

18 *Supra*, sec. 3 et seq.

19 II Blackstone, 14, 395, quoted below.

20 Liggins v. Inge (1831), 7 Bing. 692, and Williams v. Moreland (1824), 2 Barn. & C. 910, 107 Eng. Reprint, 620, both quoted in the second section following; Wright v. Howard (1823), 1 Sim. & S. 203, 57 Eng. Reprint, 81. See, also, Bealey v. Shaw (1805), 6 East, 208, 102 Eng. Reprint, 1266.

21 Lindley, L. J., says in Foster v. Wright, 4 C. P. D. 438, speaking of the law of accretion.

22 Vol. II, c. 16, pp. 261, 262.

23 De Jure Maris, cc. i, 6.

24 Bk. II, c. 2.

25 Bk. III, c. 2, sec. 6, etc.

26 Bk. II, c. 2.

1 Just. II, 1, 20.

2 Schultes' Aquatic Rights, p. 1.

3 Angell on Watercourses, 6th ed., sec. 10.

prietaire riverain." In Miner v. Gilmour,[4] Lord Kingsdown said the French law and the common law are not materially different.[5]

The passages above given from the civil law show the resemblance of the common law to it, and an examination of the first principles of the common law shows them to be borrowed from the civil law, as briefly noted in the following sections.[6]

(3d ed.)

§ 687. The Corpus of Naturally Running Water is not Property.—The law distinguishes between the *corpus* or particles of liquid, and the usufructuary right with respect to it.

While in the natural stream, the law says the particles are not the subject of private ownership. The California court says: "This court has never departed from the doctrine that running water, so long as it continues to flow in its natural course, is not, and cannot be made, the subject of private ownership."[7] A claim to the *corpus* of water of a river was said in the House of Lords to be "so repugnant to the general law of rivers that it is surprising."[8] Another case says: "No one, therefore, can have an exclusive right to the aggregate drops of water that compose the mass thus flowing, without contravening one of the most peremptory laws of nature."[9] In the old case of Shury v. Piggott,[10] *aqua profluens* was compared to light and air, which "*aut invenit aut facit viam.*" Says Blackstone, speaking of the very elements of fire or light, of air and of water: "A man can have no absolute permanent property in these, as he may in the earth and land since these are of a vague and

[4] 12 Moore P. C. 156, 14 Eng. Reprint, 861.

[5] "There is no material difference between the common-law rule and that of the Roman and French law." Fleming v. Davis, 37 Tex. 199 (though adding that irrigation works are usually constructed at public expense and under public control in Europe). In Irwin v. Phillips, 5 Cal. 140, 63 Am. Dec. 113, 15 Morr. Min. Rep. 178, the California court said the common law and the civil law are the same. On the argument in Lux v. Haggin, Mr. Hall McAllister read passages of the Spanish law from Eschriche, and the following colloquy occurred between him and Mr. Justice McKee: McKee, J.: "What is the difference between that and the common law?" McAllister: "There does not seem to be any material difference so far as I can understand." An extended note on the modern civil law of waters will be found below, sec. 1025 et seq.

[6] See the author's article in 22 Harvard Law Review, 190. See *supra*, cc. 1, 2, 3.

[7] Kidd v. Laird, 15 Cal. 161, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571.

[8] White v. White [1906], App. Cas. 84.

[9] Gibson, C. J., in Mayor v. Commissioners, 7 Pa. 363.

[10] Poph. 169.

fugitive nature"; [11] and it has been said: [12] "The water which they claim a right to take [from a spring] is not the produce of the plaintiff's close; it is not his property; it is not the subject of property. Blackstone, following other elementary writers, classes water with the elements of light and air." This is the classification of the Institutes above quoted.

(3d ed.)

§ 688. **Same—Publici Juris, etc.**—Confusion appears in the authorities upon the use of the terms that waters are *"publici juris," "res communes," "bonum vacans."* [13]

The proposition that water is *"publici juris"* is borrowed from the civil law, says Lord Denman in Mason v. Hill.[14] The leading authority for this statement is the case of Liggins v. Inge,[15] saying: "Water flowing in a stream, it is well settled by the law of England, is *publici juris.* By the Roman law, running water, light and air were considered as some of those things which had the name of *res communes,* and which were defined 'things, the property of which belong to no person,' etc." In the case of Williams v. Moreland,[16] the expressions are used, "Flowing water is originally *publici juris,*" and "running water is not in its nature private property." In another case: "Flowing water, as well as light and air, are, in one sense, *'publici juris.'* They are a boon from Providence to all, and differ only in their mode of enjoyment. Light and air are diffused in all directions, flowing water in some." [17]

It will be noted that in one of these quotations it is said that running water is among the *"res communes,"* and Blackstone (below) says, "water is common," while Liggins v. Inge uses this as synonymous with *"publici juris."* [1] But whether called *"publici*

11 Blackstone, Bk. II, c. XXV, p. 395.

12 Race v. Ward, 4 El. & Bl. 702.

13 See, for example, Mason v. Hill, 5 Barn. & Adol. 1, 110 Eng. Reprint, 692; Embrey v. Owen, 6 Ex. 352, 20 L. J. Ex. 212; Van Sickle v. Haines, 7 Nev. 249, 15 Morr. Min. Rep. 503. See *supra,* secs. 5, 6.

14 5 Barn. & Adol. 1, 110 Eng. Reprint, 692.

15 [1831] 7 Bing. 692.

16 [1824] 2 Barn. & C. 910, 107 Eng. Reprint. 620.

17 Wood v. Waud, 3 Ex. 748. See, also, Manning v. Wasdale, 5 Ad. & E., 758, at 762.

1 In an old annotation to the Pandects of Justinian (Pand. 1, lib. tit. 8, cited in Schultes' Aquatic Rights, p. 65) the word "public" is expressly declared synonymous with "common." Sir Matthew Hale uses the terms *"publici juris"* and "common" as synonymous, saying (in his Analysis of the Civil Part of the Law): "Those things that are *publici juris* are such as, at least in their own use, are common to all the king's subjects."

juris" or *"res communes,"* it is now settled that either form of expression means only that the *corpus* of naturally flowing water is not the subject of private ownership, and is not property in any sense of the word. After setting this forth Lord Denman said in Mason v. Hill: "We think that no other interpretation ought to be put upon the passage in Blackstone, and that the *dicta* of the learned judges above referred to, in which water is said to be *publici juris,* are not to be understood in any other than this sense."

In American cases, the phrase *"publici juris"* is also used. In a leading case Shaw, C. J., said: "The right to the use of flowing water is *publici juris,* and common to all the riparian proprietors."[2] Justice Story also said in Tyler v. Wilkinson[3] that the water is common to all.

All these phrases are primarily nothing more than expressions of the rule that the water itself is not in its nature private property while flowing naturally, but is in a class with the air. This principle, borrowed from the Institutes, is likewise fundamental in the common law.[4]

(3d ed.)

§ 689. But One may Own a Right to Its Flow and Use—The Law Recognizes a Usufructuary Right.—While the law does not regard the liquid itself as property while flowing naturally, any more than the air, it recognizes, nevertheless, a very substantial right in its flow and use; the right to have the liquid flow and to use and take of it; which the law calls "the usufructuary right," or "the water-right." In California it has been said: "A right may be acquired to its use which will be regarded and protected as property, but it has been distinctly declared in several cases that this right carries with it no specific property in the water itself."[5] And says Blackstone:[6] "For water is a movable, wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary transient *usufructuary* property therein." And says Story:[7] "But, strictly speaking, he has no

[2] 10 Cush. (Mass.) 191, 57 Am. Dec. 85. See, also, Carey v. Daniels, 8 Met. (Mass.) 466, 41 Am. Dec. 532 (Shaw, C. J.); United States v. Conrad Inv. Co. (Or.), 156 Fed. 127. See *supra,* secs. 4–6.

[3] 4 Mason, 397, Fed. Cas. No. 14,312.

[4] Likewise under the law of appropriation, borrowing from the common law. *Supra,* Part I, and *supra,* secs. 276, 277.

[5] Kidd v. Laird, 15 Cal. 161, 76 Am. Dec. 742, 4 Morr. Min. Rep. 571.

[6] 2 Blackstone's Commentaries, 18.

[7] Tyler v. Wilkinson, 4 Mass. 397, Fed. Cas. No. 14,312.

property in the water itself, but a simple use of it while it passes along." And Kent:[8] "He has no property in the water itself but a simple usufruct as it passes along." In a Nebraska case it is said: "The law does not recognize a riparian property right in the *corpus* of the water. The riparian proprietor does not own the water. He has the right only to enjoy the advantage of a reasonable use of the stream as it flows by his land, subject to a like right belonging to all other riparian proprietors."[9] And a California case says: "The rights of a riparian owner . . . . do not include a proprietorship in the *corpus* of the water. His right to the water is limited to its use," etc.[10]

This usufructuary right, or "water-right," is the substantial right with regard to flowing waters; is the right which is almost invariably the subject matter over which contracts are made and litigation arises. It is not an ownership in the water itself; it is merely a privilege to use the water, and hence purely *incorporeal*.[11]

The term "*usufruct*" is taken from the civil law.[12]

(3d ed.)

§ 690. When Taken into Possession, the Substance Becomes Private Property.—The law of watercourses (borrowing from the civil law) is but a development of the transition from nobody's property to private property, by capture and severance from the natural stream. While naturally flowing the substance is in the "negative community" and *not* property. The right may exist to have its flow and use, and to take of it (called usufructuary). Any part taken is the private property of the taker while in his possession.

Following the particles of the liquid from the stream into a ditch, or other artificial structure, there then has come a change in the "wandering" (as Blackstone says) of the liquid that has been taken into the ditch. It is like the change regarding wild birds caught in a snare, wild animals caged, fish caught in nets. Before capture, none of these is regarded as property, real or personal; being wandering, ownerless things; while wandering at large

8 3 Com. Marg., p. 439.

9 Crawford v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647, 93 N. W. 781, 60 L. R. A. 889.

10 Gould v. Eaton, 117 Cal. 542, 49 Pac. 577, 38 L. R. A. 181. Compare the Mexican law (Hall's Mexican Law, sec. 1392), speaking of a riparian proprietor owning both banks: "It is not his own as to property, but only as to the use which he can make of it in its passage." Authorities are given fully *supra*, c. 2.

11 Swift v. Goodrich, 70 Cal. 103, 11 Pac. 561.

12 *Supra*, sec. 17.

they are nobody's property; but after capture, they become the private property of the taker. So with the particles of water that have passed into private control in a reservoir, ditch or other artificial structure or appliance. The particles have been taken from their natural haunts, so to speak, and passed into private possession and control, and become private property.[13]

This is well recognized in the civil law,[14] and the common law is stated in identical terms. "None can have any property in the water itself, *except in the particular portion which he may choose to abstract from the stream,* and take into his possession, and that during the time of his possession only."[15] And Blackstone[16] classes naturally running water with "the very elements" of fire, light, and air, and with "the generality of those animals which are said to be *ferae naturae,* or of a wild and untamable disposition," which may become a man's property by capture. As to water, a man takes it into his possession, Blackstone says, by his mills or other conveniences. The comparison to animals *ferae naturae* is also made by Judge Field in a passage elsewhere quoted,[17] and the supreme court of the United States terms running water a "mineral *ferae naturae.*"[18] Chancellor Kent says:[19] "The elements of air, light, and water are the subjects of qualified property by occupancy," and then, in the same paragraph, proceeds to the law of wild animals, as based on the same principle. Many more authorities are elsewhere given.[20]

The rights one can have in naturally *running water* are thus that of having it flow to him, and of using it and taking it into his possession, thereby making private property of a part of it, during the time he holds it in his possession. The theory is clearly put by the California court, saying: "He does not own the *corpus* of the water, but incident to his riparian right is the right to appropriate a certain portion of it. It is only, I think, by some species of appropriation that one can ever be said to have title to the *corpus* of the water. The right of the riparian owner is to the continuous flow with a usufructuary right to the water, provided he returns it to the stream above his lower boundary, and the right, as I have said, to make a complete appropriation of some of it."[1]

13 Authorities are cited *supra,* c. 3.
14 *Supra,* sec. 31.
15 Baron Parke in Embrey v. Owen, 6 Ex. 352, 20 L. J. Ex. 212.
16 Bk. II, pp. 14, 395.
17 *Supra,* sec. 33.
18 *Supra,* sec. 33.
19 Pt. V, c. XXXV, p. 347.
20 *Supra,* c. 3.
1 Vernon Irr. Co. v. Los Angeles, 106 Cal. 237, 256, 39 Pac. 762.

It remains only to be said that this private property in the *corpus* of the water severed from the stream is based entirely on possession and control of the particles, and ceases when the possession and control cease. It is lost by escape of the water or its abandonment; whereupon the particles again cease to be his property, and are again nobody's property.[2] The complete "life history" of any specific particle of the water as distinguished from a usufruct in the stream is hence contained in the following passage in Blackstone:[3]

"But, after all, there are some few things, which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common; being such wherein nothing but a *usufructuary* property is capable of being had; and, therefore, they belong to the first occupant, during the time he holds possession of them, and no longer. Such (among others) are the elements of light, air and water; which a man may occupy by means of his windows, his gardens, his mills, and other conveniences; such also, are the generality of those animals which are said to be *ferae naturae,* or of a wild and untamable disposition, which any man may seize upon and keep for his own use or pleasure. All these things, so long as they remain in possession, every man has a right to enjoy without disturbance; but if once they escape from his custody, or he voluntarily abandons the use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them afterward."

To avoid misunderstanding, it must be well noted that this passage distinguishes the *corpus* of water from the usufructuary right in the stream, and that when Blackstone here says that every man has an equal right to seize and enjoy, he is referring to the particles or drops, which no man can trace or identify as having been formerly in his possession, and which consequently, he can lay no claim to because of such former possession. Instead, anyone to whom the abandoned particles come may seize and use them in the same manner as any other particles, and under the same considerations as govern his right to such other. The escaped or abandoned particles pass under any usufruct that may exist in the stream they have mixed with, be the owners of that usufruct who they may and without, for the present purpose, specifying who the owners of the usufruct may be. The statement applies only to the *corpus*

[2] *Supra,* sec. 37.

[3] Bk. II, p. 14.

of the water (the ownership of the usufruct we shall deal with shortly), and shows how the *corpus* is not property while flowing naturally, is private property during capture, and again ceases to be property when possession ceases.

(3d ed.)

§ 691. Systems of Water Law are but a Development of These Three "First Principles":

a. The running water of natural streams is, as a *corpus*, the property of no one.

b. The substantial property right recognized by the law is the *usufruct* of the stream—the right to the flow and use of the natural resource.

c. Any specific portion of the water severed from the stream and reduced to possession is private property as a *corpus* (while so held in possession only).[4]

A much fuller statement of these principles will be found in the first three chapters of this book.[5]

Systems of water laws are but a development of the questions, who may thus take of the water and make it his own, and subject to what limitations. There are several possible answers, with one of which we have already dealt. It is the most obvious answer, namely, that the substance being without an owner, the first to take it shall have the exclusive right to *continue* taking it; that is, shall have not only a property in the *corpus* actually taken, but also an exclusive property in the usufruct of the stream; being the answer of the old English cases and of the modern Western law of appropriation. A second answer, that of the common law since Mason v. Hill, we proceed to set forth.

B. ACCESS TO THE STREAM.

(3d ed.)

§ 692. None but Riparian Proprietors have Access to the Stream.—At the time the riparian right came up for its real settlement in Mason v. Hill, the situation was presented of this substance, said to be without an owner, flowing entirely through private estates. In England land has been in private ownership for centuries. All streams, though not themselves a thing that could be owned, were absolutely inclosed on all sides by privately

4 When possession is again lost by abandonment or escape, see sec. 37, *supra*.
5 Especially sec. 63, *supra*.

owned land. The owners of the inclosing land hence alone had access to the water.

(3d ed.)

§ 693. **Same.**—Having alone the access, the riparian proprietors alone have the right to take of the water. The stream being absolutely inclosed between private estates, the common law in this, as in all its branches, is zealous to protect those estates. It is in the protection of landed proprietors that the common law had its birth. Land has always been a subject upon which the English common law looked as of primary importance, one of the attributes of which is the fundamental right to protection against trespass. All but riparian proprietors were thus shut out from the stream, for all others would have to trespass on the riparian estates to reach it; and the law prohibited the trespass for this or any other purpose. "It is quite impossible to contend that a man can obtain a title by entering the close of another, tapping a spring there, and conveying the water away to his own premises by a drain."[6] The law of riparian rights grows out of this exclusion of nonriparian owners because they have no access to the water. The right of access is, in the end, a determinative factor in all systems of water law.[7]

Lawful access was given by the ownership of riparian land, and being so given, was equally afforded to all the riparian owners, since all have an equal right to access.[8] They all consequently have the same and equal right to take and use the water. There is a perfect equality of right among all the proprietors, says Justice Story.[9] Any damage which one may occasion to the equal privilege of another must be excused, if at all, only by the reasonable use of his own (the riparian) land which gives the access, and this prohibits nonriparian use even by a riparian proprietor or his grantee.

[6] Baron Parke, in Cocker v. Cowper, 5 Tyrw. 103. See Mr. Justice Henshaw's opinion in Bolsa etc. Club v. Burdick, 151 Cal. 254, 90 Pac. 532, 12 L. R. A., N. S., 275, quoted *supra*, sec. 225.

[7] Cf., *supra*, sec. 221; *infra*, sec. 1102 et seq. "All streams are *publici juris*, and all the water flowing down any stream is for the common use of mankind *who live on the banks of the stream.*" James, L. J., in Wilts & Berks Canal Co. v. Swindon W. W. Co., L. R. 9 Ch., at p. 457. "Should any other person attempt to exercise the same right without permission of the owner, he would be a trespasser." Gould v. Hudson etc. Co., 6 N. Y. 542.

[8] *Infra*, sec. 739.

[9] Tyler v. Wilkinson, 4 Mason, 397, Fed. Cas. No. 14,312.

By contrast to the landed situation in England at the time of Mason v. Hill, the vast unoccupied vacancy of the public domain in the Pacific States at the time the pioneers came to California is striking. The streams, instead of being absolutely inclosed between private estates, were absolutely open and uninclosed, for private proprietors did not exist. Hence it was that the California court felt free to depart from the common law as concerned streams on the public domain, saying in the original precedent:[10] "It must be premised that it is admitted on all sides that the mining claims in controversy, and the lands through which the stream runs, and through which the canal passes, are a part of the public domain, to which there is no claim of private proprietorship." There was free access to the streams to all.[11] And as the inclosing land has become private in California, restricting this free access, the common law of riparian rights has there returned. (And even under the Colorado doctrine, as the bordering lands are withdrawn under the policy of conservation, or by patent to private settlers, time will inevitably produce a marked effect upon the law of appropriation there, for access to the streams is a determining factor in all systems of water law.[12])

(3d ed.)

§ **694. Same.**—No higher authority concerning the nature of the riparian right can be quoted than Baron Parke in Embrey v. Owen[13] (he had also taken part in the judgment in Mason v. Hill), in a passage classical upon the subject, placing the riparian right as the right to enjoy the fruits of the privilege (the usufruct) which his right of access gives to the riparian proprietor, and thereby to take into his own possession and make his private property a portion of what is to be taken by all having equally the right of access.[14]

"The law as to flowing water is now put on its right footing by a series of cases, beginning with that of Wright v. Howard,[15] followed by Mason v. Hill,[16] and ending with that of Wood v.

10 Irwin v. Phillips, 5 Cal. 140, 63 Am. Dec. 113, 15 Morr. Min. Rep. 178.

11 Note, also, that the Code Napoleon (quoted *supra*) likewise excepts streams on the public domain. "The waters mentioned in articles 644 and 645 [of the Code Napoleon] are, to the exclusion of all others, the natural streams *that do not form dependences of the public domain.*" Droit Civile Francais, by Aubrey & Rau, 4th ed., vol. III, p. 46.

12 *Supra*, sec. 221 et seq.

13 6 Ex. 352, 20 L. J. Ex. 212.

14 Italics ours.

15 1 Sim. & S. 190.

16 3 Barn. & Adol. 304, 110 Eng. Reprint, 114; 5 Barn. & Adol. 1, 110 Eng. Reprint, 692.

Waud,[17] and is fully settled in the American courts.[18] The right to have the stream flow in its natural state, without diminution or alteration, is an incident to the property in the land through which it passes; but flowing water is *publici juris,* not in the sense that it is a *bonum vacans,* to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only; *that all may reasonably use it who have a right of access to it;* that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only.[19] But each proprietor of the *adjacent* land has the right to the *usufruct* of the stream which flows through it. This right to the benefit and advantage of the water flowing *past* his land is not an absolute and exclusive right to the flow of all the water in its natural state. If it were, the argument of the learned counsel, that every abstraction of it would give a cause of action, would be irrefragable; but it is a right only to the flow of the water, and the enjoyment of it, subject to the similar rights, of all the proprietors *of the bank* on each side to the reasonable enjoyment of the same gift of Providence. It is only, therefore, for an unreasonable and unauthorized use of this common benefit that an action will lie; for such a use it will."

Likewise it is said in another leading case that in the case of a grant of land on a stream, "the grantee obtains a right of access to the river, and *it is by virtue of that right of access that he obtains his water-rights.*"[20] And in Lyon v. Fishmongers' Company[21] Lord Selborne said the water "can only be *appropriated by severance,* and which may be lawfully so appropriated by everyone *having a right of access to it.*"[22]

This is the same as the civil law above quoted.

(3d ed.)

§ **695. Same.**—Since the foregoing appeared in the second edition of this book it has been explicitly adopted in California cases. For example, "All parties *having access to it* would have the right to reasonably use it"; and again, in the same case: "This right arises from the fact that the water is then in his land, so

17 3 Ex. 748.

18 Citing 3 Kent's Commentaries, 439, 445.

19 Citing Mason v. Hill, 5 Barn. & Adol. 24, 110 Eng. Reprint, 692.

20 Stockport W. W. Co. v. Potter, 3 Hurl. & C. 300, 10 Jur., N. S., 1005.

21 L. R. 1 App. Cas. 673.

22 Quoted at length, *infra,* sec. 698.

that he may take it without trespassing upon his neighbor. His ownership of the land carries with it all the natural advantages of its situation, and the right to a reasonable use of the land and everything it contains, limited only by the operation of the maxim *'Sic utere tuo ut alienum non laedas.'* It is upon this principle that the law of riparian rights is founded," etc. Adding that such waters "should be considered a common supply, in which *all who by their natural situation have access to it* have a common right," etc.[23]

It is a matter stated in many authorities.[24]

[23] Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748, per Mr. Justice Shaw.

[24] That the riparian right to the use of a watercourse arises out of the exclusion of nonriparian owners because their lands have no access to the stream is more or less involved in the following authorities: Lyon v. Fishmongers' Co., L. R. 1 App. Cas. 673; Embrey v. Owen, 6 Ex. 352, 20 L. J. Ex. 212; Cocker v. Cowper, 5 Tyrw. 103; Race v. Ward, 4 El. & Bl. 710; Stockport W. W. v. Potter, 3 Hurl. & C. 300, 10 Jur., N. S., 1005; Lord v. Commissioners, 12 Moore P. C. 473, 14 Eng. Reprint, 991; North Shore Ry. Co. v. Pion, L. R. 14 App. Cas. 612; McCartney v. Londonderry etc. Ry. Co. [1904], App. Cas. 301 (per Lord Macnaughten); Nelson, J., in Howard v. Ingersoll, 13 How. (U. S.) 426, 14 L. Ed. 209; Haupt's Appeal, 125 Pa. 211, 17 Atl. 436, 3 L. R. A. 536; Gould v. Hudson etc. Co., 6 N. Y. 542; Lux v. Haggin, 69 Cal. 255, at 333 and 413, 10 Pac. 674; Heilbron v. Fowler etc. Co., 75 Cal. 426, 7 Am. St. Rep. 183, 17 Pac. 535; Lembeck v. Nye, 47 Ohio St. 336, 21 Am. St. Rep. 828, at 836, 24 N. E. 686, 8 L. R. A. 578; City of Paterson v. East Jersey W. Co., 74 N. J. Eq. 49, 70 Atl. 472; Bingham Bros. v. Port Arthur etc. Co. (Tex. Civ. App.), 91 S. W. 848, 100 Tex. 192, 97 S. W. 686, 13 L. R. A., N. S., 656; Lewis on Eminent Domain, secs. 78–82; and especially sec. 83; Burr v. Maclay Rancho, 154 Cal. 428, 98 Pac. 260; Turner v. James Canal Co., 155 Cal. 82, 132 Am. St. Rep. 59, 99 Pac. 520, 22 L. R. A., N. S., 401, 17 Ann. Cas. 823; Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748; Bolsa etc. Club v. Burdick, 151 Cal. 254, 90 Pac. 532, 12 L. R. A., N. S., 275.

In Haupt's Appeal, 125 Pa. 211, 17 Atl. 436, it is said: "In the case of a river or public highway, all the people of the State have access to it, may ride over it, and use the water. Not so a private river. In such a case no one can use it or take the water except at a public crossing. There the traveler may stop, refresh himself, and water his horse. *The water has no owner, and he impairs no man's right.* But except at public crossings, such as a road or a street, no one but a riparian owner can use the water, *not because the latter has any ownership in it, but because the stranger has no right of access to it.* There can be no such thing as ownership in flowing water. The riparian owner may use it as it flows. He may dip it up and become the owner by confining it in barrels or tanks; but so long as it flows it is as free to all as the light and the air. It follows from what has been said that dwellers in towns and villages watered by a stream may use the water as well as the riparian owner, provided they have access to the stream by means of a public highway" (and it seems proper to add, do no present or prospective damage to the riparian proprietor).

After discussing the meaning of *"publici juris,"* one well-known case says: "Its use, for instance, in propelling machinery, cannot be obtained by any person, but one who owns the land which the water covers, or which forms its banks, or by one to whom such proprietor grants it; *because it is physically impossible to get the water in any other way.*" Pugh v.

C. THE RIPARIAN RIGHT DOES NOT REST UPON THE MAXIM CUJUS EST SOLUM.

(3d ed.)

§ 696. The Cujus est Solum Doctrine.—Resting on high authority, as the foregoing basis of the doctrine does, and harmonizing with the decisions historically considered, there is yet a different basis frequently ascribed to the doctrine. This other founds the doctrine not on the principle that flowing waters as a substance belong to no one until actually taken by those having the right of access, but on the contrary principle, that the riparian proprietor has actual ownership in the stream as part of his estate under the maxim, "*Cujus est solum ejus est usque ad caelum.*" The term "land" does not include *running water* under the former doctrine; whereas, under the latter, the stream is an owned *corpus* as part of the land.

A rule of the common law long established that "land" comprehends all that rests upon it, including the trees and stones and waters. The classical statement of this is the following passage from Lord Coke: "Land in legal signification comprehendeth any ground, soil or earth whatsoever, as meadows, pastures, woods,

Wheelef, 2 Dev. & B. (N. C.) 50 (citing Mason v. Hill), Ruffin, C. J.

Another important case says: "While it remains in the field where it issues forth, in the absence of any servitude or custom giving a right to others, the owner of the field, and he only, has a right to appropriate it; *for no one else can do so without committing a trespass upon the field;* but when it has left his field, he has no more power over it, or interest in it, than any other stranger." Lord Campbell, C. J., in Race v. Ward, 4 El. & Bl. 710.

"No proprietor has a right to use the water to the prejudice of other proprietors, above or below, unless he has acquired a prior right to divert it. [Evidently referring to prescription.] *He has no property in the water itself but a simple usufruct while it passes along. Anyone may reasonably use it who has a right of access to it;* but no one can set up a claim to an exclusive right to the flow of all the water in its natural state, and that what he may not wish to use himself shall flow on till lost in the ocean." Nelson, J., in Howard v. Ingersoll, 13 How. 426, 14 L. Ed. 209.

"It comes from the situation of the land with respect to the water, the opportunity afforded thereby to divert and use the water upon the land, the natural advantages and benefits resulting from the *relative positions,* and the presumption that the owner of the land acquired it with a view to the use and enjoyment of these opportunities, advantages and benefits." Turner v. James Canal Co., 155 Cal. 82, 132 Am. St. Rep. 59, 99 Pac. 520, 22 L. R. A., N. S., 401, 17 Ann. Cas. 823.

Under the Scotch law, "The rights of parties in private streams of water depend upon their relative situations." Ferguson on the Law of Water in Scotland, p. 199. Under the Mexican law, "the waters of innavigable rivers, while they continued such, were subject to the common use of all *who could legally gain access to them* for purposes necessary to the support of life." Lux v. Haggin, 69 Cal. 255, 10 Pac. 674.

As to navigable streams a California case says: "But as these so-called navigable waters are wholly surrounded by the lands of plaintiff, and as it is not asserted, and indeed

moors, *waters*, marshes, furses and heath,"[25] discussing the meaning of "land," adding in the same note: "Also the waters that yield fish for the food and sustenance of man are not by that name demandable in a praecipe; but the land whereupon the water floweth or standeth is demandable, as, for example, *viginti acras terrae aqua coöpertas.* And lastly the earth hath in law a great extent upward, not only of water, as hath been said, but of aere and all things even up to heaven; for *cujus est solum ejus est usque ad caelum*, as is holden in 14 Hen. 8, fo. 12; 22 Hen. 6, 59; 10 Edw. 4, 14."[1]

But this is all that can be found upon the subject of waters in Lord Coke, and nothing applying it to the *use* of waters or at all touching riparian rights can be found. The application of that principle to the rights of riparian proprietors is usually, though erroneously, ascribed to Justice Story in Tyler v. Wilkinson, saying: "*Prima facie* every proprietor upon each bank of a river is entitled to the land, covered with water, in front of his bank, to the middle thread of the stream, or, as it is commonly expressed, *usque ad medium filum aquae.* In virtue of this ownership he has a right to the use of the water flowing over it in its natural current, without diminution or obstruction. *But, strictly speaking, he has no property in the water itself, but a simple use of it while it passes along.*"[2]

This statement by Story, it is pointed out by Mr. Yale,[3] is but a restatement of the then recent English case of Wright v. Howard,[4] where the words used were, "*Prima facie*, the proprietor of each bank of a stream is the proprietor of half the land covered by the stream, but there is no property in the water." This, instead of identifying ownership of the bed and of the water, is, on the contrary, put for the purpose of denying such doctrine; meaning that one cannot claim ownership in the substance merely because he owns the bed; that the right is independent of title to the bed of

it would require much rashness and temerity to assert, that the public has a right to invade and cross private lands to reach navigable waters, a lawful mode of ingress and approach to these navigable waters became necessary." Mr. Justice Henshaw, in Bolsa etc. Co. v. Burdick, 151 Cal. 254, 90 Pac. 532.

25 Coke on Littleton, lib. cap. 1, secs. 1, 4a. Italics ours.

1 See Blackstone's comments on this passage in 2 Blackstone's Commentaries, 18.

2 Tyler v. Wilkinson, 4 Mason, 397, Fed. Cas. No. 14,312. Italics ours.

3 Yale on Mining Claims and Water Rights, p. 217.

4 1 Sim. & S. 203, 57 Eng. Reprint, 76.

the stream and not concerned therewith; and a denial that the right to the water rested on ownership of the bed. In Mason v. Hill, holding the water not to be property at all, this case is referred to as "a luminous judgment." In Webb v. Portland Cement Co.[5] Justice Story himself says that his remarks in Tyler v. Wilkinson were taken from Wright v. Howard, and says "the right of a riparian proprietor arises by mere operation of law, as an incident to his ownership *of the bank.*" From this history of Story's words, as well as the intrinsic evidence of his passage itself, it has clearly been misinterpreted when taken as the foundation of the doctrine that the riparian right arises from ownership of the land *over* which the water flows, by an application of the "*cujus est solum*" doctrine. Story's words were quoted on argument in an early English Privy Council case. The following is the comment thereon in the decision: "The argument in opposition to this [claim as riparian proprietor], was, that in respect to water-rights. a riparian owner was only one who was also the owner of the soil *ad medium filum aquae.* Their Lordships do not think it necessary to express any opinion on the first step in this argument [holding that title in the case did extend to the middle of the stream on the facts]. They desire only that it may not be taken for granted that they accede to it. It is a question of some nicety, and it so constantly happens that the owner of the bank is also the owner of the land *ad medium filum,* that it is dangerous to attribute too much importance to the language either of judicial decisions or text-books, which seem to define the right where the foundation of it has not been specifically in question."[6]

[5] 3 Sum. 189, Fed. Cas. No. 17,322.

[6] Lord v. Commissioners of Sydney, 12 Moore P. C. 473, 14 Eng. Reprint, 991. In Angell on Watercourses, 7th ed., section 5 (italics ours), it is said: "The right of private property in a watercourse is derived as a corporeal right or hereditament, from, or is embraced by, the ownership of the soil *over* which it naturally passes. . . . . A stream of water is therefore as much the property of the owner of the soil over which it passes as the stones scattered over it." And in a note it is said: "That a river, of common right, belongs to the proprietors of the land between which it runs, to each that part nearest his land. [Expressly denied by Justice Story in Webb v. Portland Cement Co., *supra.* See, also, Moulton v. Newburyport Co., 137 Mass. 163, holding that riparian owners do *not* own one-half each, of the water, by sides.] This has been frequently, if not uniformly, adopted as the established rule. It is derived mainly from the rule that the riparian proprietor is owner of the soil under the water, and by the general law of property becomes entitled as of right to all accessions." (Id. 8.) The *corpus* of the water is here regarded as property, the particles being regarded as *accessions,* in conflict with the usufructuary principle, which denies that the naturally flowing particles are property in any sense of the word. See, also, Woolrych on Waters, 146:

The application of the *cujus est solum* doctrine to running waters and natural streams is frequently made in cases to-day; for example, "Such water [flowing water] in its natural state, so far as respects private ownership thereof, is not personal but real property, being as much a part of the land itself as the soil and rocks. In this aspect it is viewed by the common law, which holds that he who owns the soil owns all above it and all beneath it."[7]

(3d ed.)

§ 697. This idea that the right arises from ownership of the water as a part of the land beneath the water is engrafted upon the principle that the right to flowing water is only usufructuary, a principle resulting only from the view taken, not from the common-law maxim, but from the civil law (as first set forth), that running waters are not property at all while flowing naturally—a civil-law principle so pervading all the modern authorities that it was, at the same time, regarded as one to be accepted without examination, as a matter of course. A compromise between these incompatible statements that the substance is property and not property at one and the same time, is attempted by some writers, but has never been widely accepted. For example, Vinnius, a civil-law writer: "And he (Vinnius) proceeds to distinguish between a river and its water—the former being, as it were, a perpetual body, and under the dominion of those in whose territories it is contained; the latter being continually changing, and incapable, while it is there, of becoming the subject of property, like the air and sea."[8] In an old case[9] this idea of the watercourse as an entity distinguished from its waters, seems to appear in the ex-

"If the water flow over the party's own land, although indeed it cannot be claimed as water, yet it is in effect identified with the realty, *because it passes over the soil, and cujus est solum ejus est usque ad caelum,"* openly resting riparian rights upon the *percolating water* maxim.

[7] McCarter v. Hudson etc. Co., 70 N. J. Eq. 685, 118 Am. St. Rep. 754, 65 Atl. 489, 10 Ann. Cas. 116. (See, also, Stanislaus W. Co. v. Bachman (1908), 152 Cal. 716, 93 Pac. 858, 15 L. R. A., N. S., 359.)

The error is manifest, assuming that it *must* be real *or* personal, when the law says it is *neither*, and not property in any sense of the word. On appeal of the New Jersey case to the supreme court of the United States in affirming the decision on other grounds (Hudson W. Co. v. McCarter, 209 U. S. 349, 28 Sup. Ct. Rep 529, 52 L. Ed. 828, 12 Ann. Cas. 560), Mr. Justice Holmes spoke disparagingly of the reasoning of the State court. As to the California case, see Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. 404.

[8] Lord Denman in Mason v. Hill, 5 Barn. & Adol. 1, 110 Eng. Reprint, 692.

[9] Shury v. Pigott, Poph. 169, 79 Eng. Reprint, 1263.

pressions used: "The watercourse is a thing natural" (as distinguished from the right of way, which rests on the agreement of men) and "hath its being from creation." One writer says:[10] "The stream, viewed in this light, *apart from the water which constitutes it*,[11] is simultaneously a feature of every man's land through which it passes." But the river as distinguished from its waters is but a form or mental picture, and not, taking away its waters, a substance at all; hence it affords nothing on which to apply the "*cujus est solum*" doctrine, nor have the courts attempted to rest the *cujus est solum* doctrine as applied to flowing streams, upon this metaphysical compromise. They rest it on the assertion that the water itself is property as a part of the soil over which it flows, like the trees and stones.

(3d ed.)

§ 698. **Same.**—This principle now under consideration, that the riparian right is deduced from the maxim "*cujus est solum*," is contrary to the history of the subject, and is, upon the leading authority following, not the law. And on principle it seems that it could not be the law, for in one breath it asserts ownership in the water as part of the land, and in the next denies that naturally flowing water can be owned, or that the riparian proprietor has more than a merely usufructuary right. The *cujus est solum* statement rests on ownership of a substance, tangible, ownership of matter, a *corpus* lying upon the land; the usufruct statement denies ownership of the water as a substance; the two are contradictory. It is "founded on a mistake between the property in the water itself and the right to have its continual flow."[12]

That the *cujus est solum* doctrine is not the foundation of the riparian right is recognized by the recently reopened discussion over percolating water, which has hitherto rested on that *cujus est solum* maxim. The wide difference in watercourses on the one hand and the old law of percolating waters on the other is that which results from applying the *cujus est solum* doctrine to percolating water and not to running streams. The application of the *cujus est solum* doctrine even to percolating water is now being cut down.[13] At all events, the application of the *cujus est solum* doc-

10 Phear's Rights of Waters, p. 22.

11 Italics ours.

12 Lord Wensleydale (Baron Parke), in Chasemore v. Richards, 7 H. L. Cas. 349, 11 Eng. Reprint, 140.

13 Katz v. Walkinshaw, 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236. *Infra*, sec. 1041 et seq.

trine to percolating water in Acton v. Blundell [14] is not only to-day recognized as a departure from the rule regarding watercourses, but that departure was avowedly and consciously made; and that it was a departure has never been denied.[15] "There is only one case in law in which water in its natural state is the subject of ownership, and that is the case of percolating water. A man is regarded as owning the percolating water while it is in his land. But other water in its natural state is subject only to the use of the man through whose land it flows. He has a right to its use, but is not regarded as having the title." [16]

Moreover, the passage in Lord Coke mentions air as part of the land as much as water; yet no man to-day would deduce a right to the wind from ownership of the air as part of the land over which the air lies.[17] Also, with regard to the same passage, it is common knowledge to-day that a riparian proprietor does *not* sue to recover so much land covered with water that is running (in contrast to standing water). Justice Story said the riparian right "is *not* a distinct right to the water as *terra aqua coöperta.*" [18]

That on high authority the view under consideration is erroneous, appears from the decision of the House of Lords in Lyon v. Fishmongers' Company.[19] The case is a direct decision upon the question. Whether the riparian right of use is based on ownership of

[14] 12 Mees. & W. 324.

[15] See quotation *infra*, sec. 1039.

[16] Goodwin on Real Property, p. 2.

[17] "So, though no one will pretend to fix a property in the wind, yet we may appoint a service or duty of not intercepting the wind to the prejudice of our mills." Puffendorf, lib. IV, c. V, sec. II.

The absurdity of pressing the *cujus est solum* doctrine *ad extremos* is shown in this regard; and it has been in this connection cleverly exploited in fiction, as, for example: "*Cujus est solum, ejus est usque ad caelum,* is the maxim on which we stand, the meaning of which has been decided in hundreds of cases, and, strange to say, is still clear—he who owns land owns to the sky. He has as much moral right to the sky as to the surface. The man with a deed to a square mile of the surface of this planet owns a great pyramid, apexing at the earth's center and extending out into space, in diverging lines, infinitely; so that if he could show that these lines of boundary take in Mars and her canals, he would have a perfect case against the Martians for rent of fields and toll of waterways, if he could get service and bring the defendants into court." However, in view of the holding of Lord Ellenborough in Pickering v. Rudd, 4 Camp, 219, 1 Stark, 56 (see, also, 44 Am. Law Rev. 108), that trespass *quaere clausum* will not lie for flying in the air over one's field in a balloon, it is safe to say that there are *some* limits to the *cujus est solum* doctrine this side of Mars. It is a curious thing that while as to percolating water the maxim resulted in permitting *all* diversion, its advocates as to the streams held that it just as absolutely prohibited *any* diversion, even by a riparian owner for his own riparian use.

[18] Slack v. Walcott, 3 Mason, 508, Fed. Cas. No. 12,932.

[19] L. R. 1 App. Cas. 673.

the soil upon which the water rests or over which it flows was the very point at issue. The river in suit being a navigable one, title to the bed was in the crown, and if the riparian right of use depended on the *cujus est solum* doctrine, the riparian proprietor, who owned none of the bed, would have no riparian right of use. The following passages are taken from the opinions of the lords in that case.[20]

Lord Cairns, Chancellor: "The Lord Justice suggests that the right of a riparian owner in a non-navigable river arises from his being the owner of the land to the center of the stream, whereas in a navigable river the soil is in the Crown. As to this, it may be observed that the soil of a navigable river may, as Lord Hale observes, be private property. But putting this aside, I cannot admit that the right of a riparian owner to the use of the stream depends on the ownership of the soil of the stream."

Lord Selborne: "With respect to the ownership of the bed of the river, this cannot be the natural foundation of riparian rights properly so-called, because the word 'riparian' is relative to the bank, and not the bed, of the stream. . . . . The title to the soil constituting the bed of a river *does not carry with it any exclusive right of property in the running water* of the stream, which can only be appropriated by severance, and which may be lawfully so appropriated by everyone *having a right of access to it.* It is, of course, necessary to the existence of a riparian right that the land should be *in contact with the flow* of the stream; but lateral contact is as good, *jure naturae*, as vertical; and not only the word 'riparian' but the best authorities, such as Miner v. Gilmour,[21] and the passage which one of your Lordships has read from Lord Wensleydale's judgment in Chasemore v. Richards,[22] state the doctrine in terms which point to lateral contact *rather than* vertical."[23] In another case (in the Privy Council) holding that there is no distinction between riparian rights on navigable and non-navigable rivers,[24] referring to the distinction "that in the case of a non-navigable river the riparian owner is proprietor of the bed of the

20 Italics ours.

21 12 Moore P. C. 131, 14 Eng. Reprint, 861.

22 7 H. L. Cas. 349, 11 Eng. Reprint, 140.

23 A decree to the contrary *held* reversed and defendant was enjoined from maintaining an embankment entirely diverting the river from the back of plaintiff's building, where plaintiff moored barges for handling goods.

24 North Shore Ry. v. Pion, L. R. 14 App. Cas. 612, at 621.

river *ad medium filum aquae*, which, in the case of a navigable river such as the St. Charles, belongs to the Crown," it was said: "The same distinction was contended for in Lyon v. Fishmongers' Company, but the House of Lords, on grounds with which their Lordships concur, thought it immaterial. Lord Cairns rejected the proposition that the right of a riparian owner to the use of the stream depends on the ownership of the soil of the stream."

The Lyon case is accepted in Lux v. Haggin.[25]

In a recent case in the House of Lords, a claim was made to ownership of all the water of a river as a substance, and it was said: "This proposition is, of course, opposed to elementary ideas about the water of a river, for *the water would not be the property even of the exclusive owner of the solum and of both banks at the place in question.*"[1]

That the riparian right does not depend on ownership of the bed on the *cujus est solum* principle was held in Texas[2] and in California,[3] both holding that riparian rights to have the water for use for irrigation exist on navigable streams where title to the bed is in the State.

And finally Lux v. Haggin expressly holds (relying on the Lyon case) that ownership of bed alone gives no riparian right.[4]

[25] 69 Cal. 255, at 415, 10 Pac. 674. "The ownership of land under water is not the foundation of riparian rights, properly so called, because the word 'riparian' is relative to the bank and not to the bed of the water." 24 Am. & Eng. Ency. of Law, 981. "A watercourse is quite a distinct thing from the land." Brown v. Best, 1 Wils. K. B. 174, 95 Eng. Reprint, 557. A right to the use of flowing water does not necessarily depend on the ownership of the soil covered by the water. City of Paterson v. East Jersey W. Co., 74 N. J. Eq. 49, 70 Atl. 479. Riparian rights do not depend on ownership of the bed, and exist where title to the bed is in the Crown, or wholly in the opposite owner. Salmond on Torts, p. 252. Riparian rights do not depend on the bed. 19 H. L. R. 216n. "Riparian rights proper are held to rest upon title to the bank of the water, and not upon title to the soil under the water; riparian rights proper being the same, whether the riparian owner owns the soil under the water or not." Diedrich v. Northwestern etc. Co., 42 Wis. 262, 24 Am. Rep. 386. "Ownership of the land does not include ownership of the water which flows over or past it." Rice, P. J., in Wilkes Bare Co. v. Lehigh Co., 3 Kulp. (Pa.) 389.

[1] Lord Robertson in White v. White, [1906] App. Cas. 83, House of Lords.

[2] Bingham Bros. v. Port Arthur etc. Co. (Tex. Civ. App.), 91 S. W. 848, being affirmed, so far as this point is concerned, in 100 Tex. 192, 97 S. W. 686, 13 L. R. A., N. S., 656, though reversed on other grounds. See cases cited regarding riparian rights on navigable streams, sec. 726.

[3] Heilbron v. Fowler etc. Co., 75 Cal. 426, 7 Am. St. Rep. 183, 17 Pac. 535.

[4] Lux v. Haggin, 69 Cal. 255, at 413, 10 Pac. 674, saying: "The plaintiffs, being owners only of swamp lands (even conceding the water in the swamp might constitute a stream), were owners only of the bed of the

To conclude, the *"cujus est solum"* doctrine has no application to natural streams of running water. The word "land" includes standing or percolating water, but does not include naturally *running water,* because *aqua profluens* is governed by a civil-law rule. The riparian right of use is merely one of the numerous incidents attached to the riparian land, because it affords access to the stream.[5]

(3d ed.)

§ 699. **Results.**—The application of the *"cujus est solum"* doctrine to running waters gives rise to most of the matter so harshly commented upon to-day by opponents of the common law of riparian rights in the West. We state here, citing the authorities later, some of the most important results of this view:

The riparian right would not exist without ownership of the bed of the stream. It would not exist in navigable streams, where title to the bed is in the State. A loss of title to the bed (by grant for example), though retaining land on the banks, would lose the riparian right. Title to the bed alone would confer the right. None of these propositions is law.

Any taking from the stream even by a riparian owner is *prima facie* wrongful under the *cujus est solum* doctrine, as a destruction and annihilation *pro tanto* of the estates of other proprietors, whereas on the former view any taking by a riparian proprietor for

stream, and were not riparian proprietors."

If the bed lies in one county and the riparian land in another, the water-right is not taxable as part of the bed in the former, but must be taxed only in the latter county. See In re Hall, 116 App. Div. 729, 102 N. Y. Supp. 5. See cases cited in 8 Harvard Law Review, 141.

Action to quiet title must be brought in county where riparian land lies, not where bed of stream lies. Miller v. Madera etc. Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A., N. S., 391.

If a riparian owner dies, his right to the water passes by probate in the State where the riparian land lies, not where the bed of the stream lies (the State boundary separating the two). Slack v. Walcott (Story, J.), 3 Mason, 508, Fed. Cas. No. 12,932.

[5] There is a large body of law concerning the riparian owner's right to wharf out, which right is admittedly based upon his right of access. It is simply one of the various riparian rights, as per Lewis's enumeration (as to navigable waters) as follows: "First. The right to be and remain a riparian proprietor and to enjoy the natural advantages thereby conferred upon the land by its adjacency to the water. Second. The right of access to the water, including a right of way to and from the navigable part. Third. The right to build a pier or wharf out to navigable water, subject to any regulations by the State. Fourth. The right to accretions or alluvium. Fifth. *The right to make a reasonable use of the water as it flows past or leaves the land.*" Lewis on Eminent Domain, 83. In sections 78 to 82 he elaborately sets out the Lyon case as establishing the proper law.

use of his own land is *prima facie* rightful until shown to unreasonably damage other riparian proprietors; and solely an injury (if at all) to the right of use, present or future, of the complaining riparian proprietor or to the value of his estate. In the discussion in a Nebraska case [6] it was seen that the decisions were not in accord with the statement that the riparian proprietor had a property right in the stream as a body as nature placed it upon, and made it a part of his estate, saying: "The nature and extent of a riparian proprietor's pecuniary interest or property in a stream cannot be measured by such a rule, nor can the rule now be said to be full and accurate statement of the law." [7]

[6] Crawford v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647, 93 N. W. 781, 60 L. R. A. 889.

[7] A recent California case, as between riparian proprietors, calls it "the alleged common-law rule"; "this supposed rule"; "the so-called common-law right." Turner v. James Canal Co., 155 Cal. 82, 132 Am. St. Rep. 59, 99 Pac. 520, 22 L. R. A., N. S., 401, 17 Ann. Cas. 823. And Lux v. Haggin, 69 Cal. 255, 10 Pac. 674, calls it "what has *been said* to be the common law," and holds it a misrepresentation as to the rights of riparian owners among themselves.

§§ *700–708. (Blank numbers.)*

CHAPTER 30.

NATURE OF RIPARIAN RIGHT.

§ 709. Natural right.
§ 710. Same.
§ 711. Part and parcel of riparian land.
§ 712. The right is usufructuary.
§ 713. As subject of grant or contract.
§§ 714–722. (Blank numbers.)

(3d ed.)

§ 709. **Natural Right.**—The riparian right has long been called a "natural right."

The explanation usually given to this term indicates the soundness of the doctrine that the right arises out of the access which the riparian land naturally, by the facts of nature, gives. Thus: "It has been well said that the rights of a riparian proprietor, so far as they relate to any natural stream, exist *jure naturae,* because his land has by nature the advantage of *being washed by the stream;* and, as the facts of nature constitute the foundation of the right, the law should recognize and follow the course of nature in every part of the same stream."[1] And another case says: "The right exists because the stream runs *by* the land, and thus gives the natural advantages resulting from the *relative situation.*"[2] And in Chasemore v. Richards,[3] Lord Wensleydale (Baron Parke) says the right *ex jure naturae* belongs to the proprietor of the adjoining lands as a natural advantage belonging to the land upon the same principle that he is entitled to support from his neighbor's soil for his own in its natural state, thereby explaining "natural right" on the ground of being contiguous to or adjoining the stream in its natural situation. Professor Pomeroy said: "The laws of nature certainly give a natural right and advantage, from their *superiority of position,* to those who own land lying *on the banks* of natural streams. It is an undeniable fact that such proprietors have a natural right as compared with those who own land at a distance from streams."[4]

[1] Baker, J., in Indianapolis W. Co. v. American etc. Co., 53 Fed. 970. The expression was first used by Lord Selborne in Lyon v. Fishmongers' Co., L. R. 1 App. Cas. 673, as to which case see, also, *supra,* sec. 698.

[2] Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. 338, per Mr. Justice Shaw.

[3] 7 H. L. Cas. 349, 11 Eng. Reprint, 140.

[4] Pomeroy on Riparian Rights, sec. 152.

As a result of the favorable situation with access to the stream, while the riparian owner's right is negative as to the *corpus* of the water and not an ownership thereof, it is a positive right in respect to *the use of his land.* His riparian estate is made up of many elements, not alone the actual soil, but other natural advantages of situation without which the soil would not have its character and potentialities of use. Pure air, the right of support, benefits from flowing water, all such intangible ingredients, mixing together with the soil itself, join to form the value or quality of the estate owing to its natural position; their preservation maintains *the use of the land.* They are all "natural rights" in the sense that they are an essential part of the value of the estate in its natural condition.[5] Nor do they depend upon use. The right to build a house on one's own land is also in this sense a "natural right"—in the sense that the right to do so goes with ownership of the land, whether a house is actually built or not.[6] And so, likewise, the right to use the water flowing by one's land and to receive its benefits remains inherent in the riparian land whether it is actually put to use by erecting irrigation or other works or not.

The term "natural right" is further used as indicating natural origin in contradistinction to rights in artificial conditions resting upon grant or prescription.[7] An old case distinguishes a watercourse from an easement by saying, that "a watercourse is a thing natural."[8]

[5] "These rights are, in simple truth, merely fractions of that complex bundle of rights which we call *ownership,* and which are recognized by the law as existing independently of special grant or contract, express or implied." Jenks on Modern Land Law, p. 166.

[6] "The right of the owner of the soil to the free use and enjoyment of the same is held to exist anterior to any erection that may be made by an adjoining proprietor." Tenney v. Miners' D. Co., 7 Cal. 340, 11 Morr. Min. Rep. 31, and hence the doctrine of "coming to a nuisance" does not apply.

[7] *Supra,* sec. 51 et seq.

[8] Shury v. Pigott, Poph. 168, 79 Eng. Reprint, 1263.

Another says, "The right to the natural flow of water is not an easement, but a natural right." Earl, J., in Stokoe v. Singer, 8 El. & Bl. 31. A natural right is said to be one which is necessary to preserve the *status quo,* adding that it is "a right of the owner to the enjoyment of his property, as distinguished from an easement supposed to be gained by grant" (Lord Selborne, C., in Dalton v. Angus, 6 App. Cas. 791, adding), "The right, therefore [of support] in my opinion is properly called an easement; though when the land is in its natural state the easement is natural and not conventional. The same distinction exists as to rights in respect of running water; the easement of the riparian landowner is natural, that of the mill owner on the stream, so far as it exceeds that of an ordinary riparian proprietor, is conventional; i. e., it must be established by prescription or grant." Again, natural rights are said to be such as are given by

The riparian right has been compared to the right a landowner has to the free passage of unpolluted air,[9] and has often been compared to the right of support.[10] They are not servitudes upon another's property, but are rights to the enjoyment of one's own property.[11]

The term "natural right" hence contemplates a natural advantage or privilege of the land inherent in its favorable position with respect to the stream as a natural resource, the preservation of which advantage is, to the extent that it is or may be beneficial to the land, necessary to the preservation of the use and value of the land, whether actually exercised or not. It could not be better put than in a recent California case, in which Mr. Justice Shaw said: "It comes from the situation of the land with respect to the water, the opportunity afforded thereby to divert and use the water upon the land, the natural advantages and benefits resulting from the relative positions, and the presumption that the owner of the land acquired it with a view to the use and enjoyment of these opportunities, advantages and benefits." [12] And this idea that the right is a "natural" one in the sense of being made up of these intangible natural advantages and benefits runs through all the better opinions upon the subject.[13]

law, because without them there would be no security in the enjoyment *of the land* by its owner; benefits provided in the course of nature for the common good of all, which shall not be wrested from one by the act of another. Gray v. McWilliams, 98 Cal. 161, 35 Am. St. Rep. 163, 32 Pac. 976, 21 L. R. A. 593. See Backhouse v. Bonomi, 9 H. L. Cas. 513; 11 Eng. Reprint, 825; Dalton v. Angus, L. R. 6 App. 740.

[9] Embrey v. Owen, 6 Ex. 353, 20 L. J. Ex. 212; Chasemore v. Richards, 7 H. L. Cas. 349, 11 Eng. Reprint, 140. Lord Cranworth; Dalton v. Angus, 6 App. Cas. 752, Field, J.; Ramsbotham v. Wilson, 8 El. & Bl. 123, Willes, J.; Shury v. Pigott, Poph. 169, 79 Eng. Reprint, 1263. "The right to running water has always been properly described as a natural right, just like the right to the air we breathe; they are the gifts of nature, and no one has a right to appropriate them." Lord Cranworth in Chasemore v. Richards, 7 H. L. Cas. 349, 11 Eng. Reprint, 140.

[10] Dalton v. Angus, 6 App. Cas. 791, Selborne, C., and Field, J.; Chasemore v. Richards, Lord Wensleydale; Dickinson v. Canal Co., 7 Ex. 299; Ramsbotham v. Wilson, 8 El. & Bl. 123, Willes, J.; Washburn on Easements. In Dalton v. Angus, Field, J., said these rights and burdens come into existence by implication of law at the very moment of severance of an estate into parcels, and require no age to ripen them.

[11] Lord Wensleydale in Backhouse v. Bonomi, 9 H. L. Cas. 503, 11 Eng. Reprint, 825. The riparian right is properly a right of property in itself and not a servitude. III Droit Civile Francais, par Aubrey & Rau, 4th ed., p. 34, note 1.

[12] Turner v. James Canal Co., 155 Cal. 82, 132 Am. St. Rep. 59, 99 Pac. 520, 22 L. R. A., N. S., 401, 17 Ann. Cas. 823.

[13] Lord Ellenborough says (Bealey v. Shaw, 6 East, 208, 102 Eng. Reprint, 1266): "The general rule of law as applied to this subject is that, independent of any particular enjoy-

or appurtenance, but as part and parcel of it. Use does not create the right, and disuse cannot destroy or suspend it." Said Chancellor Kent: "A right to a stream of water is as sacred as a right to the soil over which it flows. It is a part of the freehold of which no man can be disseized but by lawful judgment of his peers, or by due process of law."[21] Another authority says: "The right of enjoying this flow without disturbance or interruption by any other proprietor is one *jure naturae,* and is an incident of property in the land, not an appurtenance to it; like the right he has to enjoy the soil itself, in its natural state, unaffected by the tortious acts of a neighboring landowner. It is an inseparable incident to the ownership of land, made by an inflexible rule of law an absolute and fixed right, and can only be lost by grant or . . . . adverse possession."[22] In another case it is said: "His rights are not easements or appurtenances to his holdings. They are not the rights acquired by appropriation or by prescriptive use. They are attached to the soil and pass with it."[23] And another: "The right or title to the stream as it passed was a part and parcel of his land, a part of the realty."[24]

The right was compared by Lord Wensleydale (Baron Parke) in Chasemore v. Richards to the right of the land to the support of adjoining land, a natural attribute of the land in its natural situation, and this comparison to the right of support has passed into the authorities generally. One authority compares the right to a right of common or pasturage appurtenant to the land,[25] but as the above authorities show, the law does not consider it an easement or appurtenance.[1] The right is part and parcel of the land, acquired by virtue of ownership of the land, without any special

21 Gardner v. Newburgh, 2 Johns. Ch. 166.

22 Washburn on Easements, 4th ed., pp. 316, 317.

23 Hargrave v. Cook, 108 Cal. 72, 41 Pac. 18, 30 L. R. A. 390, and Anderson v. Bassman, 140 Fed. 22.

24 Mr. Justice Shaw, in Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. 338.

Also Southern California Co. v. Wilshire, 144 Cal. 68, 77 Pac. 767; Huffner v. Sawday (1908), 153 Cal. 86, 94 Pac. 424; Miller v. Madera etc. Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A., N. S., 391; Union Min. Co. v. Dangberg, 81 Fed. 73; Wadsworth v. Tillottson, 15 Conn. 366, 39 Am. Dec. 391; Carey v. Daniels, 49 Mass. (8 Met.) 466, 41 Am. Dec. 532.

25 Ormerod v. Todmorden Co., 11 Q. B. 172, Bowen, L. J.

1 See, also, Lux v. Haggin, 69 Cal. 255, at 293, 10 Pac. 674; Vernon v. Los Angeles, 106 Cal. 237, 39 Pac. 762; Pomeroy on Riparian Rights, sec. 9. The riparian right is spoken of as an "appurtenance" in Rianda v. Watsonville etc. Co. (1907), 152 Cal. 523, 93 Pac. 79.

formalities of any kind.[2] It passes *ipso facto* with the land on a sale, as part and parcel thereof.[3] The riparian right may, on a partition of riparian land, be partitioned with the land; the subdivided rights of the partitioned parcels still retain their character of a riparian right as between the parties to the partition.[4] A deed of land with general warranty includes, without more, a warranty of riparian rights, but does not necessarily include a warranty of a right by appropriation.[5] It is subject to taxation as realty,[6] and is property and may be condemned under a statute mentioning "land."[7]

The right is held to be incorporeal—a privilege of use and not an ownership of a tangible substance—so that, being incorporeal, contracts concerning it cannot create the relation of landlord and tenant, since tenancy can exist only in things corporeal;[8] nor will ejectment lie to recover a watercourse diverted from a riparian owner;[9] nor is it corporeal property taxable as part of the stream bed; it is taxable only as an incorporeal incident to the riparian land.[10] Justice Story[11] said that the riparian right "is not a distinct right to the water, as *terra aqua coöperta,*" and is not a corporeal hereditament, but is an *incorporeal* hereditament annexed

[2] Lux v. Haggin, 69 Cal. 255, at 390, 10 Pac. 674; Bathgate v. Irvine, 126 Cal. 135, 77 Am. St. Rep. 158, 58 Pac. 442.

[3] Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Hargrave v. Cook, 108 Cal. 72, 41 Pac. 18, 30 L. R. A. 390; Benton v. Johncox, 17 Wash. 277, 61 Am. St. Rep. 912, 49 Pac. 496, 39 L. R. A. 107; Rianda v. Watsonville etc. Co. (1907), 152 Cal. 523, 93 Pac. 79. That the riparian right passes *ipso facto* on a sale of the land, Shamleffer v. Council etc. Co., 18 Kan. 24, 26 Am. Dec. 765; as part and parcel of it, Cline v. Stock, 71 Neb. 70, 98 N. W. 454, 102 N. W. 265; Conham v. Fisk (1831), 2 Comp. J. 126; 2 Tyrw. 155.

[4] Verdugo Canyon W. Co. v. Verdugo (1908), 152 Cal. 655, 93 Pac. 1021. See, also, Rose v. Mesmer, 142 Cal. 322, 75 Pac. 905.

[5] Dalton v. Bowker, 8 Nev. 190. (But cf. Mitchell v. Warner, 5 Conn. 519, which seems in error on this point by confusing the *corpus* and the usufruct.)

[6] Penobscot Co. v. Inhabitants of Bradley, 99 Me. 263, 59 Atl. 83.

[7] Northern Cal. etc. Co. v. Stacher, 13 Cal. App. 404, 109 Pac. 896.

[8] Swift v. Goodrich, 70 Cal. 103, 11 Pac. 561.

[9] *Ibid.*, and Shury v. Piggott, Latch, 153, Noy. 84.

[10] See In re Hall, 116 App. Div. 729, 102 N. Y. Supp. 5.

"Incorporales (autem) sunt quae tangi non possunt, qualia sunt ea quae jure consistunt, sicut hereditas, *usufructus*, obligationes, quoquo mode contractae," etc. ("Things incorporeal are intangible; rights, for instance, such as inheritance, usufruct, obligation, however contracted.") Institutes of Gaius, sec. 12; identical in Institutes of Justinian, V. That the riparian *right of use* is incorporeal, see, also, Washburn on Easements, 307.

[11] Slack v. Walcott, 3 Mason, 508, Fed. Cas. No. 12,932.

to the freehold. The right is "an *incorporeal* hereditament appertaining to the freehold." [12]

(3d ed.)

§ 712. **The Right is Usufructuary.**—That the riparian right, like the right by appropriation, is solely usufructuary, has already been set forth at length,[13] and need not be again considered further than to say that the riparian proprietor "has no property in the water itself, but a simple use of it while it passes along." [14] The right is to a flow and use merely, a right now or in the future or at any time he sees fit, to use the water as naturally following ownership of the bordering lands, but involving no ownership in the *corpus* of the water; just as riparian owners have a right to fish in the stream, but do not own the fish swimming there.[15] In Lux v. Haggin [16] the California court elaborately reviewed the entire law of waters, and this is there laid down: "As to the nature of the right of the riparian owner in the water, by all the modern as well as ancient authorities the right in the water is *usufructuary*, and consists not so much in the fluid itself as in its uses." [17] As stated

[12] St. Helena W. Co. v. Forbes, 62 Cal. 182, 45 Am. Dec. 659. We here use the word "incorporeal" in its accepted sense to-day, as denoting the distinction between things tangible and intangible. In its old common-law sense, distinguishing only things which "lay in livery" and those which "lay in grant," the riparian right is corporeal because it passes only with the land, is not the subject of separate grant, and hence lay only in livery. In this sense it is an intangible, yet corporeal, hereditament; but in the present-day sense no intangible things are considered corporeal hereditaments, just as in the civil law above quoted.

[13] *Supra*, cc. 1, 2, 29.

[14] Justice Story, in Tyler v. Wilkinson, 4 Mason, 397, Fed. Cas. No. 14,312.

[15] People v. Truckee etc. Co., 116 Cal. 397, 58 Am. St. Rep. 183, 48 Pac. 374, 39 L. R. A. 581.

The following puts it so admirably that the writer cannot forbear finding a place for it: "Besides this ordinary right of property [in the bed] which is precisely the same when the river is there, as if it were to disappear and the channel become dry, they have a common interest arising from another right, as they have each a right in the *water*—not of property, for certainly *aqua profluens* is not the subject of property as long as it is running. When you get it into your pitcher or pipe it becomes your property, just as game and fish when they are caught become the property of the person who catches them; but while it is flowing and in its channel, no portion of the water, either on one side of the *alveus* [bed] or the other, belongs to one party or the other. It is as much the property of no one as the air that we breathe or the sunlight that shines upon us. But each heritor, as it passes, has a right of an incorporeal kind to the *usufruct* of that stream for domestic purposes and for agricultural purposes, and it may be also for other purposes, subject to certain restrictions." Lord Neaves in Morris v. Bicket (1864), 2 M. 1082, 4 M. H. L. 44 (Scotch); Ferguson on The Law of Water in Scotland, p. 199.

[16] 69 Cal. 255, 10 Pac. 674.

[17] In the French law it is said that riparian owners have the rights of use mentioned in article 644 [of

by Mr. Justice Henshaw:[18] "The right of a riparian proprietor in or to the waters of a stream flowing through or along his land is not the right of ownership in or to those waters, but is a usufructuary right—a right, amongst others, to make a reasonable use of a reasonable quantity for irrigation, returning the surplus to the natural channel, that it may flow on in the accustomed mode to the lands below."[19]

This usufruct is perpetually annexed to the riparian land whether availed of by irrigation or other works or not at all; just as the right of the landowner to build a house on the land remains though no house is ever actually built. The *right* of use remains part of the value of the estate whether the estate is put to use or not, for the common law does not force a man on pain of forfeiture to use his land or other property if he does not want to. "The use to which one is entitled is not that which he happens to get before another, but it is that which, by reason of his ownership of the land on the stream, he can enjoy on his land and as appurtenant to it."[20]

The riparian owner usually owns the bed to the middle of the stream, but the right is independent of that fact,[21] and exists also in navigable streams, where the title to the bed of the stream is in the State,[22] and, on the other hand, does not exist in favor of one owning only the bed, and no bank-lands.[23]

(3d ed.)

§ 713. **As Subject of Grant or Contract.**—We shall, in a later chapter, discuss grants or contracts by riparian owners,[24] and here but mention the subject as an illustration of the nature of the riparian right.

Any riparian owner may make, with other riparian owners or even with nonriparian owners, such arrangement as he may choose

the Code Napoleon], also the right to fish, and the right to islands formed there. "Sauf ces *avantages* accordés aux riverains, les cours d'eau naturels, non navigable, ni flottable, ne se trouvent dans le patrimoine de personne." Droit Civile Francais, by Aubrey & Rau, Vol. II, p. 36, and in a note, "Ils ne sont pas susceptibles d'etre acquis par voie d'occupation."

18 Hargrave v. Cook, 108 Cal. 72, 11 Pac. 18, 13 L. R. A. 390.

19 The statement of the limitation in regard to riparian owners among themselves. The opinion then proceeds to state that against nonriparian owners the riparian proprietor's right to a perpetual usufruct is unlimited.

20 Ruffin, C. J., in Pugh v. Wheeler, 19 N. C. (2 Dev. & B.) 55.

21 *Supra*, sec. 696 et seq.

22 *Infra*, sec. 726.

23 Lux v. Haggin, 69 Cal. 255, at 413, 10 Pac. 674.

24 *Infra*, sec. 844 et seq.

as against himself. He has power to bind himself in the matter, although it is not clear whether this is because the effect is to transfer, as against himself, such interest as he may have, or only to estop him to deny his grant, and thus to extinguish his own right as against his grantee. As to the latter explanation it is not clear how it can be reconciled with the settled doctrine that such grants or contracts are within the statute of frauds, and it presents other difficulties.

But, as a general principle, against noncontracting riparian owners, he can make no grant for any purpose or to any extent for use off his own riparian land. The right is naturally bound up in the riparian owner's land as an element of the use of his own land, and exists only because of the value and character which it gives to that very land. Separating it from that land separates it from its foundation. It is in reference to the riparian owner's own land that his right is correlated to the right of other riparian owners, and not with reference to some other land to which he may like to carry, or sell the right to carry, the water. Other riparian owners in regard to their own land are required to figure only on the use of their neighbors' own land; for the reasonable use thereof they must make due allowance in considering their own correlative right; but are called upon to make no allowance in favor of any riparian owner or his grantee as to any land other than the riparian owner's own, nor even any use on his own land which the riparian owner may license to others, greater than he could be allowed to make himself. Hence the grant by a riparian owner for use off the grantor's land is ineffectual against other riparian owners.

Possibly an exception may exist in extreme cases where the nonriparian use granted is such that it cannot possibly impair the use of the land, nor lessen its value, of the complaining riparian owner at any time even in the future. On any but very large streams such supposable cases are remote, but may possibly exist; as where, for example, the grant is to a nonriparian owner who uses the water only for cooling off machinery and returns it undiminished and unpolluted to the stream;[25] or where the land of the complaining riparian owner is worthless, unproductive, and the use of water could never become an element of value of his estate. In such extreme cases, where there is no detraction from the possible present

[25] Kensit v. Great Eastern Ry. Co., 27 Ch. D. 122.

or future benefits and advantages to the complaining proprietor's riparian land or its use or value, it is a question on principle whether he is suffering any wrong. But such cases are, on the whole, extreme; usually the grant is of sufficient water or for such purpose of use as to diminish the value or potentialities of the complaining riparian estate; and as a general rule the statement must be made (though reluctantly, as the readers of previous editions of this book will know) that noncontracting riparian owners are not in any way bound by or required to recognize a grant made by other riparian owners.

Further discussion will be found in later chapters.[1]

1 *Infra*, secs. 795, 814, 844.

§§ *714–722. (Blank numbers.)*

CHAPTER 31.

WHAT PERSONS AND UPON WHAT WATERS.

§ 723. Who are riparian proprietors.
§ 724. Landholders less than in fee.
§ 725. Upon what waters—Watercourses.
§ 726. Navigable streams.
§ 727. Interstate streams.
§ 728. Standing water—Lakes—Ponds.
§ 729. Percolating water.
§§ 730–738. (Blank numbers.)

(3d ed.)

§ 723. Who are Riparian Proprietors.—Only those who own land touching the stream and in contact with its flow are riparian proprietors.[1] One having title only to the bed is not a riparian proprietor.[2] When the bed is dry its bank owners are not riparian proprietors to other parts of the stream where it may still flow.[3] "When the stream ceased and the channel became dry, he, for the time being, ceased to be a riparian owner, so far as a present use of the water was concerned. His land did not, at those times, border upon any stream,"[4] but a subsurface flow being proved, the fact that there is no surface flow does not make a case within this rule; he is still a riparian owner.[5] The rights of one owning land abutting upon an inlet or slough, connecting with a stream, to take water are equal to those of riparian proprietors on the stream itself.[6]

1 Lyon v. Fishmongers' Co., quoted *supra*, sec. 698; Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Hayden v. Long, 8 Or. 244. "All riparian rights depend upon the ownership of land which is contiguous to and touches upon the water." Sullivan Timber Co. v. City of Mobile, 110 Fed. 196.

2 Lux v. Haggin, 69 Cal. 255, at 413, 10 Pac. 674; Page v. Mayor, 10 App. Div. 294, 41 N. Y. Supp. 938. But see Anaheim W. Co. v. Fuller, 150 Cal. 329, 88 Pac. 978; McCarter v. Hudson W. Co., 70 N. J. Eq. 695, 118 Am. St. Rep. 754, 65 Atl. 489, 10 Ann. Cas. 116.

3 Stacy v. Delery (Tex. Civ. App (1909), 122 S. W. 300.

4 Gutierrez v. Wege, 145 Cal. 730, 79 Pac. 449; Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. 338. See *infra*, sec. 768, riparian land.

5 *Infra*, sec. 1078 et seq.; Huffner v. Sawday, 153 Cal. 86, 94 Pac. 424 (valley dry in summer, flowing only in November to June; sandy soil and changing bed; abutting owners held to be riparian proprietors).

6 Turner v. James Canal Co., 155 Cal. 82, 132 Am. St. Rep. 59, 99 Pac. 520, 22 L. R. A., N. S., 401, 17 Ann. Cas. 823.

If a stream flows through a city, there are authorities that the city as a whole is a riparian proprietor.[7] But the writer's impression is that the better decisions hold only the lot owners touching the stream as the riparian proprietors.[8]

(3d ed.)

§ 724. Landholders Less Than in Fee.—The owners of possessory rights on riparian public land, constituting equitable claims, such as initiatory homestead claimants, have the rights of riparian owners from the first necessary proceedings.[9] But forfeiture of title to the land occurring, he is no longer a riparian proprietor, as where a pre-emption or mining claim is abandoned.[10] Where an Indian reservation is thrown open to settlement, it becomes vacant public land, and the settler cannot claim successorship to the Indians as riparian proprietors.[11] The owner of a mining location may be a riparian proprietor.[12]

In the pioneer days before the Federal statutes for acquiring land titles it remained unsettled whether a mere squatter on riparian public land could claim as a riparian proprietor as against later appropriators. Crandall v. Woods[13] held that he could; that only the United States could raise the point that settlers were trespassers;

[7] City held to be a riparian proprietor and may as such take water for domestic use of its inhabitants but not to supply outside lands. Canton v. Shock, 66 Ohio, 19, 90 Am. St. Rep. 557, 63 N. E. 600, 58 L. R. A. 637.

Compare Haupt's Appeal, 125 Pa. 211, 17 Atl. 436, 3 L. R. A. 536; Barre W. Co. v. Carnes, 65 Vt. 626, 36 Am. St. Rep. 891, 27 Atl. 609, 21 L. R. A. 769; Rigney v. Tacoma Co., 9 Wash. 245, 37 Pac. 297, 26 L. R. A. 425; Tampa W. W. Co. v. Cline, 37 Fla. 586, 53 Am. St. Rep. 262, 20 South. 780, 33 L. R. A. 376; New Whatcom v. Fairhaven Co., 24 Wash. 493, 64 Pac. 735, 54 L. R. A. 190; Stauffer v. East Stroudsburg Borough, 215 Pa. 144, 64 Atl. 411; Los Angeles v. Los Angeles W. Co., 124 Cal. 368, 57 Pac. 210, 571; City of Schenectady v. Furman, 61 Hun, 171, 15 N. Y. Supp. 724.

[8] The State has been said to be a riparian proprietor, by reason of its ownership of the foreshore at tide-water on an innavigable stream. McCarter v. Hudson etc. Co., 76 N. J. Eq. 695, 118 Am. St. Rep. 754, 65 Atl. 489, an anomalous statement made only *arguendo* in a generally poor opinion. See 19 Harvard Law Review, 216 note; City of Paterson v. East Jersey W. Co., 74 N. J. Eq. 49, 70 Atl. 472. *Quaere*, how far a railroad is a riparian proprietor where it owns the fee of its roadbed crossing or paralleling a stream. This is discussed in McCartney v. Londonderry etc. Ry. Co., [1904] App. Cas. 301, 311.

[9] *Supra*, sec. 261.

[10] Conkling v. Pacific Imp. Co., 87 Cal. 296, 25 Pac. 399.

[11] Morris v. Bean (Mont.), 146 Fed. 432 (*dictum*), affirmed in 159 Fed. 651, 86 C. C. A. 519. See *supra* sec. 153, note 19.

[12] Crandall v. Woods, 8 Cal. 136, 1 Morr. Min. Rep. 607; Leigh v. Ditch Co., 8 Cal. 323, 12 Morr. Min. Rep. 97.

[13] 8 Cal. 136, 1 Morr. Min. Rep. 604.

while in Nevada it was held that he could not.[14] But now, since the systematization of the Federal system for acquiring land titles, a mere squatter on public land cannot claim as riparian proprietor by virtue of his naked possession without having made or intending to make such filings or declarations in the land office as the Federal statutes may require.[15] A trespasser on public land is for some purposes deemed the owner, but when one asserts riparian rights as against an upper appropriator of water he must show some right, inchoate or otherwise, to the land.[16] And especially has he to-day no right which he can assert against the United States on unsurveyed land when it withdraws the land for the Reclamation Service.[17]

How far a trespasser on *private* land may be regarded as a riparian owner we have already mentioned.[18] On principle it would seem that the rule of Crandall v. Woods, *supra,* should still apply as to private land; that against strangers to the landowner the trespasser's possession of the riparian land is alone title enough to entitle him to the rights of a riparian owner against all but the owner of that land.[19] It would, as already said, still also apply as to public land if it were not that it is expressly or impliedly contrary to the policy of the Federal statutes and the Federal land system, as to squatters who have made no filings on the land.

(3d ed.)

§ 725. Upon What Waters—Watercourses.—The right attaches to the whole natural stream, including its subflow[20] and storm waters[21] and tributaries.[22]

A slough or branch emptying into the main stream may be a part thereof so as to entitle an owner on such slough or branch to go off his land and, with consent of a riparian owner on the main stream (or on public land), take water from the main stream for use on his land riparian to the slough or branch. While he is not a riparian owner on the main stream, it does not preclude him from

14 See *supra*, sec. 261.

15 *Supra*, sec. 261.

16 Silver Creek & Panoche Land & Water Co. v. Hayes, 113 Cal. 142, 45 Pac. 191.

17 United States v. Hanson (Wash.), 167 Fed. 881. Cf. Messenger v. Kingsbury, 158 Cal. 611 (1910), 112 Pac. 65.

18 *Supra*, secs. 221, 246, 319.

19 See Salmond on Torts, sec. ——

20 *Infra*, sec. 1078.

21 *Infra*, sec. 828.

22 *Supra*, sec. 337; Barneich v. Mercy, 136 Cal. 205, 68 Pac. 589; Hollett v. Davis (1909), 54 Wash. 326, 103 Pac. 423; Chauvet v. Hill, 93 Cal. 107, 28 Pac. 1066; Washburn on Easements, 4th ed., p. 396, star p. 275, sec. 324.

claiming as riparian owner on the upper branch even though the branch flows into the main stream only at times of unusually high water or floods.[23] And in another case [24] it was held that a slough owner could, as riparian proprietor on the slough, take water from the main stream.[25]

What constitutes a watercourse depends on the same principles as those already discussed.[1]

Riparian rights exist in definite known underground streams.[2]

Riparian rights do not appertain to artificial streams except by lapse of time.[3]

(3d ed.)

§ 726. **Navigable Streams.**—Riparian rights exist in navigable streams,[4] though the State owns the bed, and the riparian proprietor owns none of the soil under the water; for the right depends upon bordering on the stream and owning land on its banks, not the bed. The leading case is Lyon v. Fishmongers' Company,[5] already quoted,[6] wherein it is further said by Lord Chelmsford: "Upon this second question the Lords Justices said they were 'unable to find any authority for holding that a riparian proprietor where the tide flows and reflows has any rights or natural easements vested in him similar to those which have been held in numerous cases to belong to a riparian proprietor on the banks of a natural stream above the flow of the tide.' But with great respect, I find

23 Strong v. Baldwin (1908), 154 Cal. 150, 129 Am. St. Rep. 149, 97 Pac. 178.

24 Turner v. James Canal Co., 155 Cal. 82, 132 Am. St. Rep. 59, 99 Pac. 520, 22 L. R. A., N. S., 401, 17 Ann. Cas. 823.

25 The court said: "The court finds, however, that Fresno Slough is always connected with the San Joaquin River, so that water will flow from the river into the slough, or into the river from the slough, as one may be higher than the other at the particular time. Under the circumstances, we think that a person owning land abutting upon the slough has an equal right to take water therefrom, and an equal right to a reasonable share of the water, with another person who owns land abutting upon the main stream. . . . . No line could be fixed beyond which it could be declared that the water could not extend so as to carry riparian rights in the stream to the land along its borders. The only reasonable conclusion is that no such distinction exists, and that the rights of all persons owning land adjoining upon the stream, or upon any bay, inlet or slough connecting therewith, are equal and coextensive with those of persons owning land bordering upon the main current or channel," etc.

1 *Supra*, sec. 333 et seq.

2 *Infra*, sec. 1077.

3 *Supra*, sec. 51 et seq.

4 Smith v. City of Rochester, 92 N. Y. 463, 44 Am. Dec. 393, and cases *infra*.

5 L. R. 1. App. Cas. 673, affirmed in North Shore Ry. v. Pion, L. R. 14 App. Cas. 612.

6 *Supra*, sec. 698.

no authority for the contrary proposition, and I see no sound principle upon which the distinction between the two descriptions of natural streams can be supported. And it seems to me that cases have been decided which are strongly opposed to it. Why a riparian proprietor on a tidal river should not possess all the peculiar advantages which the position of his property with relation to the river affords him, provided they occasion no obstruction to the navigation, I am unable to comprehend." Lord Cairns, Chancellor, said: "But the doctrine would be a serious and alarming one, that a riparian owner on a public river, and even on a tidal public river, had none of the ordinary rights of a riparian owner, as such, to preserve the stream in its natural condition for all the usual purposes of the land."

The California court has said: "We see no occasion to discuss the question as to whether the river is navigable or not. In either event the result would be the same. The riparian owner on a nontidal, navigable stream has all the rights of a riparian owner not inconsistent with the public easement."[7] And has also upheld an appropriation upon a navigable stream.[8] In a Texas case: "As to all streams, whether navigable or otherwise, the right exists to the use of the water for domestic purposes, etc." "The riparian rights of the owner of lands on a navigable stream do not depend upon his ownership of the soil to the center of the stream.[9] It is therefore immaterial to the existence of the right in this State that the State has refused to extend grants across streams thirty feet in width, and has required the grant to stop at the margin of such streams." Adding that the right is subordinate to the public easement of navigation.[10] The Texas case went to the Texas supreme court [11] where the proprietor's right was not only upheld, but the former case was reversed for holding that his use could be destroyed without compensation in the improvement of navigation.

[7] Heilbron v. Fowler etc. Co., 75 Cal. 426, 7 Am. St. Rep. 185, 17 Pac. 535.

[8] *Supra*, sec. 339.

[9] Citing Scranton v. Wheeler, 179 U. S. 141, 21 Sup. Ct. Rep. 48, 45 L. Ed. 126; Gould on Waters, p. 275.

[10] Bingham Bros. v. Port Arthur etc. Co. (Tex. Civ. App.), 91 S. W. 848, 100 Tex. 192, 97 S. W. 686, 13 L. R. A., N. S., 656. See, also, Kalama Co. v. Kalama Co., 48 Wash. 672, 125 Am. St. Rep. 948, 94 Pac. 469, 22 L. R. A., N. S., 641; Spokane Co. v. Arthur Jones Co., 53 Wash. 37, 101 Pac. 515; Lux v. Haggin, 69 Cal. 255, at 387, 10 Pac. 674; Williams v. Fulmer, 151 Pa. 405, 31 Am. St. Rep. 767, 25 Atl. 103. In Nebraska it has been doubted whether the riparian right of use exists on navigable streams. Crawford v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647, 93 N. W. 781, 60 L. R. A. 889.

[11] 100 Tex. 192, 97 S. W. 686, 13 L. R. A., N. S., 656.

Some further presentation of the law of navigable streams is given elsewhere.[12]

(3d ed.)

§ 727. **Interstate Streams.**—Upon streams flowing from a State recognizing riparian rights into one denying them, the riparian right has been upheld in favor of proprietors in the former State.[13]

(3d ed.)

§ 728. **Standing Water—Lakes—Ponds.**[14]—In the House of Lords [15] the Chancellor [16] recently said of a dam built about a rock in a river: "The right to maintain that artificial addition to the rock may be assumed; but it does not follow that the addition to the rock has in any respect altered the legal relations of the parties and made what has been part of a running stream hitherto, less a running stream, or turned it into a pond, so that the water inclosed within that pond should become, not *publici juris*, but water with somewhat of a proprietary right."

We refer to this because it implies that water in a pond is water with somewhat of a proprietary right, depending upon different considerations than watercourses, for, as already discussed, the law of watercourses is based on the fundamental consideration that the *corpus* of the running water is not the subject of private ownership. If, then, the *corpus* of water in a pond (not running, but standing water) is property, the basis of the riparian right is gone, and the analogy is rather to the law of percolating water.

However this may be, where the pond or lake has an inlet or outlet in a running stream, the lake is regarded as but a part of the watercourse, and governed by the law of watercourses and the riparian right of use exists thereon.[17] And it has now been settled in California that the rights of riparian owners on a lake do not differ from those on streams so far as concerns use of the water. In Turner v. James Canal Co.[18] it was said and held, per

12 *Supra*, sec. 339; *infra*, sec. 898.

13 See *supra*, sec. 340 et seq.

14 See, also, *supra*, sec. 346.

15 White v. White, [1906] App. Cas. 27.

16 Lord Halsbury.

17 Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. 338, *dictum* only; City of Syracuse v. Stacey, 169 N. Y. 231, 62 N. E. 354. Such, also, seems the point of view of the English case, *supra*, which case, further, so far as it speaks of a pond, probably contemplated an artificial pond; as to which see *supra*, secs. 32, 51 et seq.

18 155 Cal. 82, 132 Am. St. Rep. 59, 99 Pac. 520, 22 L. R. A., N. S., 401, 17 Ann. Cas. 823.

Mr. Justice Shaw: "No authority is cited in favor of the proposition that riparian rights exist only in flowing streams. After a somewhat exhaustive search we have not succeeded in finding any decision to that effect. That such rights exist in any body of water, whether flowing or not, is shown by the following quotations from decisions of other States.[19] . . . . Many of these decisions relate to rights in the water other than the use of it for irrigation, but the context shows that the principle was considered a general one applicable to riparian rights of every description. The plaintiffs seek to found a distinction upon the assumed fact that the waters of a pond or lake have no source of supply, and that if the riparian owner takes water therefrom, the water of such lake or pond will ultimately become exhausted. It is a mistake to suppose that a permanent pond or lake has no source of supply. There is a constant drain upon such a body of water by evaporation into the air and sometimes by seepage into the surrounding soil. If there were no supply, the lake or pond would soon cease to exist. But even in a case of a pond or lake caused by an overflow, which has no other source of supply, and which by reason of seepage and evaporation will soon disappear, we think it must be conceded that the riparian owners have a right to the reasonable use of the water both for domestic purposes and for irrigation of the adjacent land. If such right does not exist, the water would disappear without advantage to anyone, whereas by the use thereof it might be made of great benefit to the adjoining owners. We can see no reason why the law should declare that in such a case all of the adjacent

[19] Citing 1 Farnham on Waters, sec. 62, p. 278; sec. 63, pp. 280, 282; Turner v. Holland, 65 Mich. 466, 33 N. W. 283; Lamprey v. State, 52 Minn. 181, 38 Am. St. Rep. 541, 53 N. W. 1139, 18 L. R. A. 670; Hardin v. Jardin, 140 U. S. 371, 11 Sup. Ct. Rep. 808, 838, 35 L. Ed. 428; Finley v. Hershey, 41 Iowa, 393; Robinson v. Davis, 47 App. Div. 405, 62 N. Y. Supp. 444; Lembeck v. Nye, 47 Ohio St. 354, 21 Am. St. Rep. 828, 24 N. E. 686, 8 L. R. A. 578 (domestic and agricultural uses); Priewe v. Wisconsin, 93 Wis. 546, 67 N. W. 918, 33 L. R. A. 645; Cedar Lake H. Co. v. Cedar C. etc. Co., 79 Wis. 302, 48 N. W. 371; Valparaiso etc. Co. v. Dickover, 17 Ind. App. 233, 46 N. E. 591; Fernald v. Knox Woolen Co., 82 Me. 56, 19 Atl. 93, 7 L. R. A. 459; Draper v. Brown, 115 Wis. 366, 91 N. W. 1001; Delaplaine v. Chicago etc. Co., 42 Wis. 214, 24 Am. Rep. 399; Bassett v. Salisbury Co., 43 N. H. 578, 82 Am. Dec. 179. In addition to these, reference may be made also to Auburn v. Water Co., 90 Me. 586, 587, 38 Atl. 561, 38 L. R. A. 188; Madson v. Spokane Valley L. & W. Co., 40 Wash. 414, 82 Pac. 719, 6 L. R. A., N. S., 257; Kalez v. Spokane etc. Co., 42 Wash. 43, 84 Pac. 395; People v. Hulbert, 131 Mich. 156, 91 N. W. 211, 64 L. R. A. 265; 18 Am. & Eng. Ency. of Law, 135, 139. "The rights of riparian owners upon lakes and ponds are the same as upon other waters." Lewis on Eminent Domain, 2d ed., sec. 84c.

owners of land must abstain from taking any of the water and thus allow it to remain uselessly in its position until the forces of nature remove it." And also in the same case: "There is no decision in this State upon the subject of the riparian rights of the owner of land upon a body of water not flowing. Nor is there anything in any of our decisions intimating that such rights do not exist." And held that, with the limitation of reasonable use, "the right to use water upon adjoining land, applies as well to the water of a lake, pond, slough or any natural body of water, by whatever name it may be called, as to a running stream."

(3d ed.)

§ 729. **Percolating Water.**—The law of riparian rights does strictly not apply to percolating water, since there can be no riparian proprietors where there is no watercourse or lake or pond or other body of water having banks.[20] Rights in percolating water are separately considered later. The word "riparian" has, however, been recently used with reference to lands bearing diffused percolating water.[21] and the new California law of percolating water is very similar to the law of riparian rights on streams.[22]

[20] Morrison v. Officer, 48 Or. 569, 87 Pac. 896.

[21] Cohen v. La Canada W. Co., 151 Cal. 680, 91 Pac. 584, 11 L. R. A., N. S., 752.

[22] *Infra*, secs. 1090, 1104. "The conditions in all cases are analogous as far as the natural supply of waters is available for use upon the lands concerned, whether the lands be riparian to the stream or overlying a common subterranean stratum, or whether the underlying strata are connected and supplied directly from the flow of the stream itself. In either case there is a natural supply of water of which the lands by reason of their location . . . . have a natural advantage to the use of the waters. Lands are invariably purchased in view of the benefits which they may derive from being riparian to a stream or overlying well-supplied strata of water, the right to the flow or extraction of which is a part and parcel of the land." Miller v. Bay Cities W. Co., 157 Cal. 256, 107 Pac. 115.

§§ *730–738. (Blank numbers.)*

CHAPTER 32.

LIMITATIONS ON USE BETWEEN RIPARIAN PROPRIETORS THEMSELVES FOR THEIR OWN LANDS.

REASONABLE USE.

A. CLASSIFICATION OF USES.

§ 739. Equality of riparian owners.
§ 740. Natural uses—(Use to support life).
§ 741. Origin of the term "natural uses."
§ 742. Irrigation not within this class.
§ 743. Artificial uses—(Business uses).
§ 744. Same.

B. REASONABLE USE.

§ 745. Reasonable use generally.
§ 746. Reasonable use for power purposes.
§ 747. Same—In California.
§ 748. Reasonable use for irrigation.
§ 749. Same—Turner v. James Canal Co.
§ 749a. Same.
§ 750. Reasonable use (Concluded).

C. APPORTIONMENT.

§ 751. Apportionment.
§ 752. Apportionment is an equitable remedy.
§ 753. Confined to the parties litigant.

D. MISCELLANEOUS.

§ 754. Manner of use.
§ 755. Return of surplus.
§ 756. Possibility for a Riparian Administrative System.
§§ 757–764. (Blank numbers.)

A. CLASSIFICATION OF USES.

(3d ed.)

§ 739. **Equality of Riparian Owners.**—Since nonriparian lands have no access to the stream, they are, so far as concerns the present chapter, excluded from the natural resource, and the present chapter refers only to riparian owners as between themselves; physical conditions exclude all other lands from access to the stream in its natural position.

The water in the stream belongs to no one—it is not, and cannot be, while flowing in its natural course, the subject of ownership by anyone.[1] But each riparian owner has a right to the use of his own

[1] *Supra*, sec. 2 et seq.

land, and since all riparian proprietors, by their natural situation in contact with the stream, have an equal right of access to the water, they have an equal right of use for their own lands, which no one of them may unreasonably violate. The waters of a stream are "a common supply, to which all who, by their natural situation, have access to it have a common right, and of which they may make a reasonable use upon the land so situated," and "all the parties having access to it would have the right to share reasonably in its use."[2] In a reasonable use of one's own land the damage to the other is *damnum absque injuria,* but in excess, the damage is wrongful. There is a perfect equality of right among all the proprietors, said Justice Story.[3]

It is a "common right" in the sense that the *corpus* of the water is the property of no one, and therefore "common" in the purely negative sense that all riparian owners are equally entitled to the benefits which it does or may give their own land; as it has been said, "There is a linement out of which every man shall have a benefit."[4] A riparian proprietor on whose land a stream rises has no greater right than other riparian proprietors.[5] Nor has one who first used the water.[6] The rights of the riparian proprietors are correlative, as contrasted with the exclusive right obtained by appropriation. "The property interest in the water is usufructuary, and his right thereto is subject to many limitations and restrictions, and always depends upon its reasonableness when considered in connection with a like right as belonging to all other

[2] Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748.

[3] Tyler v. Wilkinson, 4 Mason, 397, Fed. Cas. No. 14,312. See, also, Thornton, J., in Anaheim W. Co. v. Semi-Tropic W. Co., 64 Cal. 185, 196, 30 Pac. 623; Lone Tree Co. v. Cyclone Co. (S. D.), 128 N. W. 596; Pugh v. Wheeler, 19 N. C. (2 Dev. & B.) 50 (Ruffin, C. J.). "The theory of the law of riparian rights in this State is that the water of a stream belongs by a sort of common right, to the several riparian owners along the stream, each being entitled to sever his share for use on his riparian land." Mr. Justice Shaw in Anaheim W. Co. v. Fuller, 150 Cal. 327, 88 Pac. 978.

[4] Crew, C. J., in Shury v. Pigott, Poph. 169, 79 Eng. Reprint, 1263. It is erroneous to say that the riparian proprietors are tenants in common, for the law of tenancy in common has no application. Senior v. Anderson, 138 Cal. 716, at 723, 72 Pac. 349. See, however, Charnock v. Higuerra, 111 Cal. 473, 52 Am. St. Rep. 195, 44 Pac. 171, 32 L. R. A. 190; Pratt v. Lamson, 2 Allen (Mass.), 289; Roberts v. Claremont Co., 74 N. H. 217, 24 Am. St. Rep. 962, 66 Atl. 485.

[5] Barneich v. Mercy, 136 Cal. 206, 68 Pac. 589; Geddish v. Parrish, 1 Wash. St. 587, 21 Pac. 314; Nielson v. Sponer, 46 Wash. 14, 123 Am. St. Rep. 910, 89 Pac. 155; Dudden v. Clutton Union (1857), 1 H. & N. 627; Bunting v. Hicks (1894), 70 L. T. 455; Mostyn v. Atherton (1899), 2 Ch. 361.

[6] *Supra,* sec. 670.

riparian proprietors. His use must be reasonable, whatever may be its purpose; and he may not, under any circumstances, by his use, materially damage other proprietors, either above or below him."[7]

The classical statement of this equality of right among riparian owners is that made by Justice Story in Tyler v. Wilkinson.[8] Each proprietor, he says, has an equal right to the advantage of the flow of the stream. "But, strictly speaking, he has no property in the water itself, but a simple use of it while it passes along. The consequence of this principle is, that no proprietor has a right to use the water to the prejudice of another. . . . . This is the necessary result of the perfect equality of right among all the proprietors of that which is common to all. The natural stream existing by the bounty of Providence for the benefit of the land through which it flows is an incident annexed by operation of law to the land itself. *When I speak of this common right, I do not mean to be understood as holding the doctrine that there can be no diminution whatsoever by a riparian proprietor* in the use of the water as it flows, for that would be to deny any valuable use of it. *There may be, and there must be, allowed to all, of that which is common, a reasonable use.* The true test of the principle and extent of the use is, whether it is to the injury of the other proprietors or not. There may be a diminution in quantity, or a retardation or acceleration of the natural current indispensable for the general and valuable use of the water, *perfectly consistent with the common right.* The diminution, retardation, or acceleration, not positively and sensibly injurious, *by diminishing the value of the common right,* is an implied element in the right of using the stream at all.[9] The law here, as in many other cases, acts with reasonable reference to the public convenience and general good, and is not betrayed into narrow strictures subversive of common sense, nor into an extravagant looseness which would destroy private rights. The maxim is applied, *sic utere tuo ut alienum non laedas.*"

The attitude of the passage is summed up in the closing sentences.

[7] Crawford v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647, 93 N. W. 781, 60 L. R. A. 889. Citing Union Mill & Mining Co. v. Dangberg (C. C.), 81 Fed. 73; Williamson v. Lock's Creek Canal Co., 78 N. C. 156.

[8] 4 Mason, 397, Fed. Cas. No. 14,312. Italics ours.

[9] Note that he does not say "sensibly diminishing the *flow*"; he is expressly denying that, and says "sensibly *diminishing the value of the common right.*"

What is such unreasonable interference has become defined by repeated decision of particular cases, crystallizing into some rules. The chief classification is between natural uses and artificial uses.[10]

(3d ed.)

§ 740. Natural Uses—(Use to Support Life).—Natural uses are those arising out of the necessities of life on the riparian land, such as household use, drinking, watering domestic animals. For these purposes the riparian owner may take the whole stream if necessary, leaving none to go down to lower riparian proprietors.[11]

[10] Wiggins v. Muscupiabe etc. Co., 113 Cal. 182, 54 Am. St. Rep. 337, 45 Pac. 160, 32 L. R. A. 667; Lux v. Haggin, 69 Cal. 255, at 408, 10 Pac. 674; Lone Tree Co. v. Cyclone Co. (S. D.), 128 N. W. 596; Lawrie v. Silsby, 82 Vt. 505, 74 Atl. 94.

Lord Macnaghten, in McCartney v. Londonderry Railway, [1904] App. Cas. 301, said: "There are, it seems to me, three ways in which a person whose lands are intersected or bounded by a running stream may use the water *to which the situation of his property gives him access.*" These ways, he says, are: First, primary uses for which he may take the whole stream; second, other uses connected with or incident to his land with regard to which his use is limited; and third, uses foreign to his land as to which he has no right at all.

[11] *California.*—Lux v. Haggin, 69 Cal. 255, at 395 and 407, 10 Pac. 674; Crandall v. Woods, 8 Cal. 138, 1 Morr. Min. Rep. 604; Bear River Co. v. York Co., 8 Cal. 333, 68 Am. Dec. 325, 4 Morr. Min. Rep. 526; Ferrea v. Knipe, 28 Cal. 340, 87 Am. Dec. 128; Hale v. McLea, 53 Cal. 578; Swift v. Goodrich, 70 Cal. 103, 11 Pac. 561; Stanford v. Felt, 71 Cal. 249, 16 Pac. 900; Gould v. Stafford, 77 Cal. 66, 18 Pac. 879; Alta etc. Co. v. Hancock, 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. 645; Chauvet v. Hill, 93 Cal. 407, 28 Pac. 1066; Wiggins v. Muscupiabe etc. Co., 113 Cal. 182, 54 Am. St. Rep. 337, 45 Pac. 160, 32 L. R. A. 667; Smith v. Corbit, 116 Cal. 587, 48 Pac. 725; Temple, J., in Katz v. Walkinshaw, 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 986; Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. 338.

Colorado.—Broadmoor etc. Co. v. Brookside etc. Co., 24 Colo. 541, 52 Pac. 792 (*dictum* only, as the law of riparian rights is not enforced in this State. *Supra*, sec. 118).

Nebraska—Crawford Co. v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647, 93 N. W. 781, 60 L. R. A. 889.

Oregon.—Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

Texas.—Rhodes v. Whitehead, 27 Tex. 304, 310, 84 Am. Dec. 631; Baker v. Brown, 55 Tex. 377; Barrett v. Metcalfe, 12 Tex. Civ. App. 247, 33 S. W. 759.

Washington.—Nielson v. Sponer, 46 Wash. 14, 123 Am. St. Rep. 910, 89 Pac. 155; McEvoy v. Taylor (1909), 56 Wash. 357, 105 Pac. 851.

Miscellaneous.—Union Min. Co. v. Dangberg, 81 Fed. 73; Evans v. Merriweather, 3 Scam. (Ill.), 496, 38 Am. Dec. 106; Wadsworth v. Tillotson, 15 Conn. 366, 39 Am. Dec. 391; Pennsylvania Ry. Co. v. Miller, 112 Pa. 41, 3 Atl. 780; Clark v. Pennsylvania Ry., 145 Pa. 438, 27 Am. St. Rep. 710, 22 Atl. 990; Anderson v. Cincinnati L. Ry., 86 Ky. 44, 9 Am. St. Rep. 263, 5 S. W. 49; Young v. Barnkier etc. Co. (H. of L.), [1893] App. Cas. 691; Slack v. Marsh, 11 Phila. 543; Hopper v. Hopper, 146 Pa. 365; 23 Atl. 321; Lawrie v. Silsby (1909), 82 Vt. 505, 74 Atl. 94; Spence v. McDonough, 77 Iowa, 460, 42 N. W. 371; Anderson v. Cincinnati Ry., 86 Ky. 44, 9 Am. St. Rep. 263, 5 S. W. 49; Blanchard v. Baker, 8 Me. 253, 23 Am. Dec. 504; Chatfield v. Wilson, 31 Vt. 358; McElvoy v. Goble, 6 Ohio St. 187; Union etc. Co. v. Ferris, 2 Saw. 176, Fed. Cas. No. 14,371,

Some quotations may be given to this effect. In a very early California case [12] it was said: "The use of the water of a stream for domestic purposes and for watering cattle necessarily diminishes the volume of the stream. This is unavoidable, and though, by reason of such diminution, a proprietor on the stream below fails to receive a supply commensurate with his wants, he is without remedy." [13] In Lux v. Haggin it is said: "So far as the question may be supposed to imply that an upper proprietor may not 'essentially' diminish the water by using it for domestic purposes, and for watering cattle, the weight of authority is that he may, if necessary, consume all the water of the stream for those purposes. Such is the California rule. Indeed, in case of a small rivulet, the necessary consequences of using it at all, by one or more upper owners, for these 'natural' or 'primary' purposes, must often be to exhaust the water." [14] In another California case: "It appears to be law that where all the water of a stream is needed for domestic purposes and for watering cattle and is thus consumed by one proprietor, the law allows such use." [15] In a Texas case: "A lower proprietor cannot complain that one above uses the water of a stream for ordinary purposes, even though the water is thus exhausted." [16] The leading expression is in a well-known English case: "By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle,

8 Morr. Min. Rep. 90; People v. Hulbert, 131 Mich. 156, 100 Am. St. Rep. 588, 91 N. W. 211, 64 L. R. A. 265; Hazeltine v. Case, 46 Wis. 391, 32 Am. Rep. 715, 1 N. W. 66; Pomeroy on Riparian Rights, secs. 129, 134; 30 Am. & Eng. Ency. of Law, 2d ed., (b) pp. 358, 359, note 1.

12 It was laid down also in still earlier cases cited *supra*.

13 Ferrea v. Knipe, 28 Cal. 341, 87 Am. Dec. 128.

14 Lux v. Haggin, 69 Cal. 255, 10 Pac. 674.

15 Stanford v. Felt, 71 Cal. 249, at 251, 16 Pac. 900. As to this opinion, see Wiggins v. Muscupiabe Co., 113 Cal. 189, 54 Am. St. Rep. 337, 45 Pac. 160, 32 L. R. A. 667.

16 Barrett v. Metcalf, 12 Tex. Civ. App. 247, 33 S. W. 759. In a Washington case (McEvoy v. Taylor (1909), 56 Wash. 357, 105 Pac. 851), the following passage from a Maryland decision is quoted with approval: "We must confess that the right of a man to cultivate his own fields, and to pasture his cattle on his own land, is of an original and primary character, and that it would be oppressive to interfere with the free exercise of it, except under a necessity caused by grave public considerations. The washings from cultivated fields might, and probably would, carry soil and manure into streams of water, and make them muddy and impure; and so the habits of cattle, according to their natural instincts, would lead them to stand in the water and befoul the stream; but, nevertheless, the owners of the land must not lose the beneficial use of it." Helfrich v. Cantonsville etc. Co., 74 Md. 269, 28 Am. St. Rep. 245, 22 Atl. 72, 13 L. R. A. 117 (adding

and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream." [17]

The civil law also gave a preference to domestic uses.[18]

Where a stream is small and does not furnish water more than sufficient to supply the natural wants of the different proprietors living on it, it has been held that *none* of the proprietors is entitled to use the water for manufacturing purposes,[19] nor for irrigation.[20] Nevertheless it may be a question whether the preference of "natural uses" can be invoked by a lower against an upper use for "artificial" purposes, such as irrigation, or whether it is one which only upper owners can invoke against those below; in other words, whether it is an advantage of natural position enabling the physical taking of the water for these uses against those below, or whether it will be enforced also by injunction against those above.[21]

that he must not wantonly or recklessly harass lower users).

[17] Miner v. Gilmour (1858), 12 Moore P. C. 131, 14 Eng. Reprint, 861, approved recently in White v. White, [1906] App. Cas. 72. In another English case it is said: "As to riparian proprietors there is no question, I think, about the law upon the subject . . . . that a riparian proprietor has the paramount right to take what water he likes from the river for usual domestic purposes. I do not say how widely the term 'domestic purposes' may extend. Unquestionably it would extend to culinary purposes and to purposes of cleansing, washing, the feeding and supplying of an ordinary quantity of cattle, and so on." Lord Romilly, in Attorney General v. Great Eastern Ry. Co., 23 L. T., N. S., 344, affirmed L. R. 6 Ch. 572.

It could not be said to have taken actual shape in the English common law until Miner v. Gilmour, *supra*, decided in 1858, concerning which it has been said: "This distinction between the ordinary and extraordinary use of water appears for the first time in the judgment of Lord Kingsdown in the above-cited case of Miner v. Gilmour, and no authority is there cited for it. It seems never to have been acted upon in any reported case, but it has been so consistently approved in subsequent judicial *dicta* that it may be taken to have obtained a secure place in the law." Salmond on Torts, p. 259. In America, however, it had been recognized earlier. Thus it is given by Gibson, C. J., in an early Pennsylvania case (Mayor v. Commissioners of Spring Garden, quoted *supra*, sec. 4), where it is expressly based on civil-law authorities. Angell on Watercourses, section 121, says the distinction of natural uses originated in the Illinois case of Evans v. Merriweather, 3 Scam. 496, 38 Am. Dec. 106, decided in 1842; but it seems more probable that Lord Kingsdown took it from the civil law and certain early common-law expressions below noted. See Lux v. Haggin, 69 Cal. 406, 10 Pac. 674, regarding the Illinois case.

[18] Vinnius says, "Aqua profluens ad lavandum et potandum unicuique jure naturali concessa"; and Grotius says, "At idem flumen, qua aqua profluens vocatur, commune mansit, nimirum ut bibi hauririque possit." Grotius, lib. II, cap. II, sec. XII.

[19] Evans v. Merriweather, 4 Ill. (3 Scam.) 492, 38 Am. Dec. 106; Lawrie v. Silsby (1909), 82 Vt. 505, 74 Atl. 94.

[20] Baker v. Brown (1881), 55 Tex. 377; Gould on Waters, sec. 205; Black's Pomeroy on Water Rights, sec. 140; Union Min. Co. v. Dangberg, 81 Fed. 73; Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

[21] Consider, for example, the opinion in Lone Tree Co. v. Cyclone Co. (S. D.), 128 N. W. 596.

Instances of what have been held within the term "domestic uses" are given in the note.[22] The term is not confined to uses known when riparian rights began.[23]

The preference has strong application in the law of pollution—any pollution for an "artificial" use, such as mining, which impairs domestic use, is absolutely prohibited.[24]

(3d ed.)

§ 741. Origin of the Term "Natural Uses."—The term "natural uses" is probably based on the idea running through other branches of the common law, that there is such a thing as an "ordinary" or "natural" or elemental use of land; a use, so to speak, for which nature intended it, in contrast with other uses to which land is put. If, in using the land in the natural or ordinary way, damage follows to a neighbor, it is not wrongful at law; it is *damnum absque injuria*. The damage lies where nature makes it

22 See Kimball v. Northeast Harbor Co. (Me.), 78 Atl. 865. The English cases below cited were usually decided in reference to the construction of the term "domestic use" in certain English statutes, and not specifically in the present connection.

Watering a garden, and irrigation on a small extent to supply produce for family consumption on the land. Bristol W. Co. v. Uren, 15 Q. B. D. 637, 52 L. T. 655; Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728 (but not, to-day, irrigation on a commercial scale. Hough v. Porter, *supra*. See, also, *infra*, sec. 742).

Brewing for family use; washing of carriages (Wilts etc. Canal v. Swindon W. Co., El., Bl. & El. 176; Holmes' Notes to 3 Kent's Commentaries, 14th ed., p. 688); or washing a motor car. (Harrogate Corporation v. Mackay (1907), 2 K. B. 611.)

Supply for a boarding-school (Frederick v. Bognor W. Co. (1908), 78 L. J. Ch. 40, 72 J. P. 501, 25 T. L. R. 31); but not for large asylums (*infra*, sec. 743 et seq.).

Keeping hogs in a yard upon a small running stream, though the hogs so befoul the water that the lower proprietor could not use the water for culinary purposes. Hazeltine v. Case, 46 Wis. 391, 32 Am. Rep. 715, 1 N. W. 66. *Sed qu.*

The purposes for which natural uses may be claimed have been extended in Scotch cases to include "the supplying a cistern for malting eight bolls of barley in a barn"; that is to say, to include brewing for domestic use (Johnstone v. Ritchie (1822), 1 S. 327 (304) Scotch), but the attempt to stretch them to legitimize a pipe for the supply of a distillery received no countenance and was abandoned. (Ogilvy v. Kincaid (1791), Baron Hume's Report (Scotch), Dec. 508.) It would appear that they do not include the supply of water-closets, but in a Scotch case where views to this effect were indicated, the circumstances were special, says Ferguson on The Law of Water in Scotland, p. 239.

23 "The meaning of the rule is this—if the stream be shrunk to so slender a thread, that there is only a glass of water, the riparian proprietor may take it all. . . . . This water is used for domestic purposes. The moment you come to using anything for trade, you are on new ground. But assuming objects of domestic use, you are not confined to those which were known at the time when riparian rights commenced." Lord Norbury v. Kitchin, 9 Jur., N. S., 132. See, also, Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

24 *Supra*, sec. 523, pollution.

fall. What is such a natural use of land was examined in the well-known case of Rylands v. Fletcher,[25] arriving at the conclusion that building a reservoir on it was not a natural use, and damage to another resulting from a break and escape of the water cannot be defended, it was held. Lord Cairns, Chancellor, said that "if, in what I may term the natural user of that land," damage had "by the operation of the laws of nature" happened to a neighbor, the neighbor could not have complained that that result had taken place. "On the other hand, if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use," then the neighbor could complain of the damage.[1] The same seems the origin of the term "natural uses" in the use of waters. Living upon the land is a "natural" use of it, and a use of the water for the necessities of life of those living there is a taking for a natural use of the land in which case damage following to lower proprietors will not be regarded. "Besides, everything, as it serveth more immediately or more merely for the food and use of man (as shall be said hereafter) hath the precedent dignity before any others," says Lord Coke[2] with regard to waters. And another old authority says: "It is also a thing of necessity for the watering of cattle."[3] So, though the whole stream be consumed for drinking or household use or watering domestic animals, it is *damnum absque injuria* because done in the natural use of the land. It is the same idea as that in Mr. Justice Temple's opinion in Katz v. Walkinshaw,[4] concerning percolating water, limiting the cases where the percolating water may be taken to the damage of a neighbor to those cases where the taking is for the purpose of the ordinary use of the land of the taker. It deals with the fitness of purpose of the party causing the damage, and regards proper purpose in justification or excuse for the damage so that it becomes *damnum absque injuria*.[5]

[25] L. R. 3 H. L. 330.

[1] This classification of uses (and Lord Cairns' opinion) is disapproved in Brown v. Collins, 53 N. H. 442, 16 Am. Rep. 372, saying that there are no uses that can be called "natural" any more than others. "Natural rights are, in general, legal rights." See, also, Hurdman v. Railway (1878), 3 C. P. D. 174; Ballard v. Tomlinson (1885), 29 Ch. D. 115.

See *supra*, sec. 709, natural right.

[2] Coke on Littleton, lib. 1, cap. 1, secs. 1, 4a.

[3] Shury v. Piggott, 3 Bulst. 339, 81 Eng. Reprint, 280.

[4] 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236.

[5] See Fisher v. Feige (1902), 137 Cal. 42, 92 Am. St. Rep. 77, 69 Pac. 618, 59 L. R. A. 333. See *infra*, sec. 1119.

Whether or not this is the true *origin* of the classification into natural and artificial uses, it is coming now to be regarded that the distinction is a rule as to what is reasonable, not alone in its purpose (as the foregoing authorities say), but also in its degree of damage, as in the next section. For the support of life it will usually be found reasonable to disregard the *degree* of damage, and to take the whole stream, but it is coming to be regarded as not a hard-and-fast rule, if the facts of each case do not bear it out.[6] In Lux v. Haggin[7] it is said: "Even the use of water of a stream for potation may not be of paramount importance, when the stream is small, and the particular proprietor is amply supplied with water for such purpose by living springs independent of the creek; and it may happen, all the conditions being considered, that the exhaustion of an entire stream by large bands of cattle ought not to be permitted. . . . . The distinction between natural and artificial 'wants' would be, under supposable conditions, somewhat fanciful." And in a Nebraska case[8] "This subject has been confused needlessly by the unfortunate use of the words 'natural' and 'ordinary' in this connection to distinguish those uses which the common law does not attempt to limit, and 'artificial' or 'extraordinary' to designate those which are required to be exercised within reasonable bounds. . . . . The law does not regard the needs and desires of the person taking the water solely to the exclusion of all other riparian proprietors, but looks rather to the natural effect of his use of the water upon the stream and the equal rights of others therein. The true distinction appears to lie between those modes of use which ordinarily involve the taking of small quantities, and but little interference with the stream, such as drinking and other household purposes, and those which necessarily involve the taking or diversion of large quantities and a considerable interference with its ordinary course and flow, such as manufacturing purposes. The purpose of the law is to secure equality in the use of the water by riparian owners, as near as may be, by requiring each to exercise his rights reasonably, and with due regard to the right of other riparian owners to apply the water to the same or to other purposes. This purpose is not subserved by any arbitrary classification."[9]

[6] Wiggins v. Muscupiabe etc. Co., 113 Cal. 182, 54 Am. St. Rep. 337, 45 Pac. 160, 32 L. R. A. 667.

[7] 69 Cal. 255, 10 Pac. 674.

[8] Meng v. Coffey, 67 Neb. 500, 108 Am. St. Rep. 697, 93 N. W. 715, 60 L. R. A. 910.

[9] To the same effect, Crawford v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647, 93 N. W. 781, 60 L. R. A.

The modern tendency is thus to disregard the classification into natural and artificial uses, and to view all uses ("natural" uses included) not alone from the reasonableness of the purpose of the taker, but also, in all cases, from the reasonableness of the degree of damage from the taking or use, upon the complaining proprietors, as considered in the following sections.[10]

(3d ed.)

§ 742. **Irrigation not Within This Class.**—There was at one time in the West an attempt to bring irrigation in the arid regions within the classification of "natural uses." But this was a misunderstanding of the application of that term, which was intended to classify the uses immediately necessary to sustain life. One case says: "At an early day there was a tendency to class irrigation among those uses of a stream which might be carried even to entire consumption of its waters. But another view has long prevailed, and is now well established, not only in the eastern portion of the country, but even in the arid and semi-arid States (so far as such States recognize the common-law doctrine as to riparian rights), to the effect that irrigation is one of those uses which must be exercised reasonably with due regard to the rights of others."[11] And another: "We do not think that irrigation, at least when conducted in the manner that this was, can constitute a use which will justify an upper riparian owner in taking all of the water, to the destruction of the ordinary domestic uses thereof by a riparian owner below, in the absence of prior legal appropriation."[12] [By "prior legal appropriation" is meant one

889. See, also, Rogers v. Overacker, 4 Cal. App. 333, 87 Pac. 1107; Jones v. Conn, 39 Or. 30, 87 Am. St. Rep. 634, 64 Pac. 855, 65 Pac. 1068, 54 L. R. A. 630.

10 But a preference to domestic uses is sometimes introduced in the law of appropriation by statute. See *supra*, sec. 308.

11 Meng v. Coffey, 67 Neb. 500, 108 Am. St. Rep. 697, 93 N. W. 715, 60 L. R. A. 910 (citing Low v. Schaffer, 24 Or. 239, 33 Pac. 678; Gillett v. Johnson, 30 Conn. 180; Black's Pomeroy on Water Rights, sec. 151; Gould on Waters, secs. 205, 217). See, also, Lone Tree Co. v. Cyclone Co. (S. D.), 128 N. W. 596.

12 Nielson v. Sponer, 46 Wash. 14, 123 Am. St. Rep. 910, 89 Pac. 155, citing Nesalhous v. Walker, 45 Wash. 621, 88 Pac. 1032; Smith v. Corbit, 116 Cal. 587, 48 Pac. 725; Shotwell v. Dodge, 8 Wash. 337, 36 Pac. 254; Benton v. Johncox, 17 Wash. 277, 61 Am. St. Rep. 912, 49 Pac. 495, 39 L. R. A. 107; Union Mill Co. v. Ferris, 2 Saw. (U. S.) 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90; Howe v. Norman, 13 R. I. 488; Brosnan v. Harris, 39 Or. 148, 87 Am. St. Rep. 649, 65 Pac. 867, 54 L. R. A. 628; Ellis v. Tone, 58 Cal. 289; Harris v. Harrison, 93 Cal. 676, 29 Pac. 325; Lord v. Meadville Water Co., 135 Pa. 122, 20 Am. St. Rep. 864, 19 Atl. 1007, 8 L. R. A. 202; Pomeroy on Water Rights, sec. 134; Gould on Waters, secs. 205, 536.

on public land before the riparian land was settled upon by others.] [13] In a well-known case,[14] the respondents claimed that in a hot and arid climate, the use of water for irrigation was a natural want; that the upper proprietors on the stream might consume *all* the water for the purpose of irrigating their land, and that such use would be reasonable. The court, in considering this question, said: "To lay down the arbitrary rule contended for by the defendant, and say that one proprietor on the stream has so unlimited a right to the use of the water for irrigation, seems to us an unnecessary destruction of the rights of other proprietors on the stream who have an equal need and an equal right."

While, as the authorities below considered further show, it is the accepted rule in the West that irrigation is not within the "natural uses" in the sense that one owner may for that purpose wholly deprive other owners of their water supply, yet the law of Texas forms an exception and has alone, of all the Western States, been built (in part) upon this ground.[15] Accordingly, it is the rule in Texas that under the law of riparian rights, *in the arid districts* of this State, the waters of all natural streams may be appropriated by an upper riparian owner for irrigation of land, to the exclusion of the use thereof by a lower riparian owner.[16] Possibly it was this idea which induced the Nebraska legislature to declare water for irrigation a "natural want," [17] though the rule is well settled now in Nebraska that no riparian proprietor is entitled to more than a reasonable share of the water against other riparian owners for irrigation, if the case is one arising under the common law.[18]

[13] See *supra*, sec. 257, subsequent settler.

[14] Mining Co. v. Ferris, 2 Saw. 176, 195, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90.

[15] Acting upon the suggestion in an Illinois case (Evans v. Merriweather (Ill.), 3 Scam. 492, 38 Am. Dec. 106) that in arid regions irrigation by any one proprietor should be regarded as a natural use permitting entire exhaustion of the stream by any one proprietor against all the others. There were also some early New England cases (now discredited) to the same effect. Weston v. Allen (1811), 8 Mass. 136; Daniels et al. v. Daniels et al., 7 Mass. 136. Likewise Perkins v. Dow (Conn. 1739), 1 Root, 535. But see Arnold v. Foot, 12 Wend. 330, 8 Morr. Min. Rep. 83. And an English case suggested (now also discredited) that in manufacturing districts, entire consumption for manufacturing may come within the primary uses for which one riparian owner might deprive other manufacturers or riparian owners of their supply. (Brett, M. R., in Ormerod v. Todmorden Mill Co. (1883), 11 Q. B. D. 168, *dictum*.)

[16] *Supra*, sec. 117; Barrett v. Metcalf, 12 Tex. Civ. App. 247, 33 S. W. 758; Rhodes v. Whitehead, 27 Tex. 310, 84 Am. Dec. 631; Tolle v. Correth, 31 Tex. 365, 18 Am. Dec. 540. But see Stacy v. Delery (Tex. Civ. App. 1909), 122 S. W. 300.

[17] Neb. Comp. Stats. 6473.

[18] *Infra*, sec. 748.

But, as already said, Texas stands alone in this. All other States that give anyone a larger share of a stream for irrigation than would be reasonable in comparison with the susceptibility of use by the land of other riparian proprietors entitled to an equal use, do so by avowedly departing from the common law,[19] and not by pretending to act under it.

(3d ed.)

§ 743. **Artificial Uses—(Business Uses).**—Artificial uses are all those that do not minister directly to the necessities of life upon the land such as uses for the purpose of improvement, trade or profit. These include fishing, bathing, boating, floatage,[20] diversion for irrigation, the running of machinery and all the many other varied purposes for which water can be used. The early common-law cases dealt, aside from domestic use or "natural uses," chiefly with use for mill or power purposes,[21] and this is just as permissible to-day in the West.[22]

For these business uses the riparian owner can never take all to the exclusion of other riparian owners.[23] He can take only what is reasonable with due regard to the uses of others on the same stream.[24] While the law permitted damage from "natural uses,"

[19] *Supra*, sec. 118.

[20] See Pealer v. Gray's etc. Co. (1909), 54 Wash. 415, 103 Pac. 451. See, also, 16 Am. & Eng. Ann. Cas. 235, note.

[21] E. g., Tyler v. Wilkinson, 4 Mason, 397, Fed. Cas. No. 14,312; Prentice v. Geiger, 74 N. Y. 341.

[22] "The objection that the petition does not sufficiently allege a reasonable use by plaintiff can be upheld only on the theory that no other use is reasonable that interferes with irrigation. The right and reasonableness of use of water-power to propel a flouring-mill by a riparian owner needs no justification. It has been practiced and protected ever since English law began." Cline v. Stock, 71 Neb. 70, 98 N. W. 456, 102 N. W. 265. See Stanford v. Felt, 71 Cal. 249, 250, 16 Pac. 900, *dictum;* Kalama Co. v. Kalama Co., 48 Wash. 612, 125 Am. St. Rep. 948, 94 Pac. 469, 22 L. R. A., N. S., 641; Meatone Co. v. Redlands Co., 155 Cal. 323, 100 Pac. 1082, 22 L. R. A., N. S., 382, 17 Ann. Cas. 1222. See *infra*, secs. 746, 747, 1081.

[23] Learned v. Tangeman, 65 Cal. 334, 4 Pac. 191; Gould v. Stafford, 7 Cal. 66, 18 Pac. 879; Alta etc. Co. v. Hancock, 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. 645; Harris v. Harrison, 93 Cal. 676, 29 Pac. 325.

[24] *Ibid.;* and Lux v. Haggin, 69 Cal. 255, at 394, 397, 10 Pac. 674; Ferrea v. Knipe, 28 Cal. 344, 87 Am. Dec. 128; Hale v. McLea, 53 Cal. 578; Stanford v. Felt, 71 Cal. 249, 16 Pac. 900; Heilbron v. Land and Water Co., 80 Cal. 189, 22 Pac. 62 (must be reasonable). See Stenger v. Tharp, 17 S. D. 13, 94 N. W. 402; Morris v. Bean (Mont.), 146 Fed. 431; Union Min. Co. v. Ferris, 2 Saw. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90; Same v. Dangberg, 2 Saw. 450, Fed. Cas. No. 14,370, 8 Morr. Min. Rep. 113; Swift v. Goodrich, 70 Cal. 103, 11 Pac. 561; Gould v. Stafford, 77 Cal. 66, 18 Pac. 879; Durga v. Lincoln etc. Co., 47 Wash. 477, 92 Pac. 343; Turner v. James Canal Co., 155 Cal. 82, 132 Am. St. Rep. 59, 99 Pac. 520, 22 L. R. A., N. S., 401, 17 Ann. Cas. 823; Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748; Stacey v. Delery (Tex. Civ. App.), 122 S. W. 300.

regardless of degree of damage, for other uses it is *damnum absque injuria* only to a certain extent—a question of degree in each case. What is a reasonable use is a question of fact to be decided in each case.[25] No one thing will determine how much water a riparian owner is entitled to take as against other riparian owners; it depends upon the whole evidence, and he is entitled to offer in evidence all pertinent facts which will enable the jury to conclude whether his use is reasonable or not. The decision must be made, "reference being had to the use required by the others."[1] The necessity of one proprietor, however pressing, is not the sole measure, though he took no more than necessary for his use; it must be in comparison with the necessities of the other owners.[2]

The State owning riparian land cannot as riparian proprietor take water for thirteen hundred people in a penitentiary and insane asylum a quarter of a mile from the stream,[3] a case in which the test of "natural uses" must give way on the facts because unreasonable. Likewise the watering of large bands of cattle will not be allowed to the exclusion of other proprietors under the plea that the watering of cattle is a "natural use."[4] An irrigation company owning riparian land has not thereby any greater right than other riparian owners.[5]

To point the rule, reference may be made to a New York case where it is said: "He may also construct ornamental ponds, and store them with fish, or use them for his geese, his ducks, or his swans, so long as the size of the ponds is not so large as to materially diminish, by evaporation and absorption, the quantity of

25 See, also, Stanford v. Felt, 71 Cal. 249, 16 Pac. 900; Heilbron v. L. & W. Co., 80 Cal. 194, 22 Pac. 62; Meng v. Coffey, 67 Neb. 500, 108 Am. St. Rep. 697, 93 N. W. 715, 60 L. R. A. 910; Turner v. James Canal Co. (1909), 155 Cal. 82, 132 Am. St. Rep. 59, 99 Pac. 520, 22 L. R. A., N. S., 401, 17 Ann. Cas. 823; Union etc. Co. v. Ferris, 2 Saw. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90; Union M. Co. v. Dangberg, 81 Fed. 73; Staccy v. Delery (Tex. Civ. App.), 122 S. W. 300; Red Riv. Co. v. Wright, 30 Minn. 249, 44 Am. Rep. 194, 15 N. W. 167; Dilling v. Murray (1855), 6 Ind. 327, 63 Am. Dec. 385; Wadsworth v. Tillotson, 15 Conn. 366, 39 Am. Dec. 391; Lockwood Co. v. Lawrence, 77 Me. 277, 52 Am. Rep. 763; Ulbricht v. Enfaula W. Co., 86 Ala. 587, 11 Am. St. Rep. 72, 6 South. 78, 4 L. R. A. 572; Boyd v. Schreiver (Tex. Civ. App.), 116 S. W. 100.

1 Lux v. Haggin, 69 Cal. 255, at 311, 10 Pac. 674.

2 Verdugo W. Co. v. Verdugo (1908), 152 Cal. 655, 93 Pac. 1021.

3 Salem etc. Co. v. Lord, 42 Or. 82, 69 Pac. 1033, 70 Pac. 832; McCartney v. Londonderry Ry. [1904] App. Cas. 301.

4 Lux v. Haggin, 69 Cal. 255, at 407, 10 Pac. 674. See 79 Am. Dec. 642, note.

5 State ex rel. Kettle Falls etc. Co. v. Superior Court, 46 Wash. 500, 90 Pac. 653.

water usually flowing in the stream."[6] In the arid West at first sight this would be considered opposed to all ideas of reasonableness, and it is doubtful whether a court would uphold it against another *riparian owner* with whose irrigation it interferes. Yet it shows the view of the common law that each case must be considered upon its own facts and its own surroundings. Where the stream is large and the duck-pond small, and the complaining riparian proprietor's irrigation not impaired, and all the evidence is of the same tenor, probably every common-law court West or East would protect the pond against what would then be but a willful injury. On the other hand, if the stream must be hoarded for irrigation the duck-pond would not be permitted to impair the use by the riparian irrigators, because, viewing the situation as a whole, the proof would show it to be unreasonable under the entire evidence. "We feel that where water is so precious it should not be used for mere matters of taste and fancy [artificial ponds and fountains], while those who need it for useful purposes go without."[7]

There is a tendency in the common-law States of the West to ignore all uses but irrigation, and to disregard any right in a riparian proprietor *against other riparian owners*, where his land is incapable of being irrigated.[8] This is rather a rule of fact than of law, however. Upon a stream urgently required for irrigation, and so used by the custom of the community, any other use impairing irrigation is entitled to small consideration as matter of fact in determining what is reasonable. Nevertheless, as a matter of law, all possible uses are entitled to some consideration in reaching a conclusion, and the fact that a riparian proprietor's lands are not irrigable is not conclusive that he is entitled to no water, since domestic use or a mill-power may be possible, or some other of the various purposes to which water is applicable. As a question of fact, the possibility of such use may be, and usually is, under the circumstances, entitled to little consideration in deciding what is reasonable, and the tendency undoubtedly is to pass it by where irrigation is in question. The usages and wants of the stream com-

[6] Pierson v. Speyer, 178 N. Y. 270, 102 Am. St. Rep. 499, 70 N. E. 799.

[7] Los Angeles v. Pomeroy (1899), 124 Cal. 597, at 650. See, also, *Ibid.*, p. 640, 57 Pac. 585. So likewise the law, "excludes, where water is reasonably used above for irrigation, mere sentiment" or that its flow "merely pleases the eye or gratifies a taste for the beautiful," the court says in Lux v. Haggin, 69 Cal. 255, at 396, 10 Pac. 674. See, also, *infra*, sec. 822.

[8] E. g., Southern Cal. Co. v. Wilshire, 144 Cal. 68, at 71, 77 Pac. 767, quoted *infra;* Montecito etc. Co. v. Santa Barbara, 151 Cal. 377, 90 Pac. 935.

munity as a whole form an important circumstance bearing upon what is reasonable in each case.[9] Correspondingly, where all but one proprietor on the stream use it for power, the exceptional proprietor would probably receive less consideration for his irrigation.

(3d ed.)

§ 744. **Same.**—The principle is that the reasonable use to which each proprietor is entitled is the reasonable use of his *land*. As was said by Mr. Justice Temple in Katz v. Walkinshaw:[10] "Proprietary rights are limited by the common interests of others,—that is, to a reasonable use,—and such use one may make of his *land*, though it injures others. This proposition is generally recognized. . . . . All rights in respect to water are peculiarly within its province." In the reasonable use of one's own *land*, the damage to the neighbor is *damnum absque injuria*.[11]

We would state the following propositions with regard to permitted uses among riparian owners between themselves:

A riparian proprietor may, for the support of life ("natural uses") on his riparian land, use the water to the damage of another riparian proprietor, such damage being *damnum absque injuria*, regardless of the degree of damage.

He may also, for other useful purposes ("artificial uses") on and for the benefit of his riparian land, use the water to the damage of another riparian proprietor, but only to a reasonable degree of damage; such damage being *damnum absque injuria* only with regard to the degree of damage in consideration of the necessities and equal rights of both to enjoy their own land; any damage in excess of that reasonable degree (to be determined in each case) being wrongful.

[9] Parker v. American etc. Co., 195 Mass. 591, 81 N. E. 468, 10 L. R. A., N. S., 584; Carey v. Daniels (Mass. 1844), 8 Met. 420, 41 Am. Dec. 532; Red River Co. v. Wright, 30 Minn. 249, 44 Am. Rep. 194, 15 N. W. 167; Snow v. Persons, 28 Vt. 463, 67 Am. Dec. 723; Dilling v. Murray (1855), 6 Ind. 328, 63 Am. Dec. 385. See St. Helen's Co. v. Tipping (1865), 11 H. L. Cas. 642, 11 Eng. Reprint, 1483 (smelter fumes). Uses to which community applies the stream (in this case solely domestic use) form an almost controlling circumstance in determining what is reasonable use by any one or them. Lawrie v. Silsby (1909), 82 Vt. 505, 74 Atl. 94.

[10] 141 Cal. 116, at 144, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236.

[11] "If his proper and reasonable use causes damage to the lower owner, such damage flowing from the proper use of a natural right is *damnum absque injuria*." McEvoy v. Taylor (1909), 56 Wash. 357, 105 Pac. 851.

Where his use is to no possible damage of another, we refer to a following chapter.[12]

B. REASONABLE USE.

(3d ed.)

§ 745. Reasonable Use Generally.—As there has been so much misrepresentation as to the rights of riparian proprietors *inter se*, we here quote at large from decisions throughout the English and Eastern jurisdictions showing that the test of reasonableness everywhere is the governing principle among riparian proprietors between themselves; and that what is reasonable is a question of fact, depending upon all the evidence which may be adduced, showing the characteristic circumstances and conditions surrounding the parties and their lands and the stream; the final decision resting upon the best judgment of the jury (or the court sitting without one), passing upon each controversy as it arises.

In a recent California case it is said: "The defendant was entitled only to a reasonable use of the waters of all parts of the stream including the spring; the part of the judgment complained of gives him more than this and is wrong."[13] In a late Washington case: "The parties being riparian owners, their respective rights to the use of the water are to be determined by their rights as such riparian owners. These rights are now well established. Each riparian owner is entitled to a reasonable use of the waters as an incident to his ownership, and, as all owners upon the same stream have the same right of reasonable use, the use of each must be consistent with the rights of others, and the right of each is qualified by the rights of others."[14]

The law of England has been very recently summed up as follows (referring to irrigation *inter alia*): "If a lower proprietor has a right to the free flow of the water without diminution or alteration, a right to consume the water before it reaches him is apparently irreconcilable with it; but such inconsistencies are to be met with in all natural rights, and the law reconciles them by holding that

[12] *Infra*, secs. 795 et seq., 819 et seq.

That reasonable use of one's own land will excuse damage to a neighbor is also the American law of percolating water; is becoming so regarding surface water; and is generally also the law of extrahazardous uses, *contra* to Rylands v. Fletcher. The spirit of the English law is now to leave the parties alone; of the American law it is, on the one hand, to permit a reasonable use of land by all, and, on the other, to prohibit an excessive use by any.

[13] Gutierrez v. Wege, 145 Cal. 734, 79 Pac. 449.

[14] McEvoy v. Taylor (1909), 56 Wash. 357, 105 Pac. 851. Affirmed in City of Aberdeen v. Lytle etc. Co. (Wash.), 108 Pac. 945.

each is only to be enjoyed *reasonably*, that they are not absolute rights without limit, but that they are rights modified by all the rights of others."[15] Chancellor Kent said: "Though he may use the water while it runs over his land as an incident to the land, he cannot *unreasonably* detain it or give it another direction, and he must return it to its ordinary channel where it leaves his estate."[16] Chief Justice Shaw, in Massachusetts, said: "The right to flowing water is now well settled to be a right incident to property in land; it is a right *publici juris*, of such character that, whilst it is common and equal to all through whose land it runs, and no one can obstruct or divert it, yet, as one of the beneficial gifts of Providence, each proprietor has a right to *a just and reasonable use* of it as it passes through his land; and so long as it is not *wholly* obstructed or diverted, or no larger appropriation of the water running through it is made than a just and reasonable use, it cannot be said to be wrongful or injurious to a proprietor lower down. What is such a just and reasonable use may often be a difficult question depending on various circumstances."[17] And a recent case in the same court declares: "This is a common right, and each must exercise it with due regard to the rights of others, and each must submit to that degree of inconvenience and hardship in the exercise of his rights which results from the existence of like rights in others. In such cases each proprietor is entitled to use the stream in such reasonable manner, according to the usages and wants of the community, as will not be inconsistent with a like use by other proprietors above or below him."[18] In Maine it was said: "The right of property is in the right to use the flow, and not in the specific water," and "reasonable use is the touchstone for determining the rights of the respective parties."[19] In a Pennsylvania case: "Each proprietor may make any reasonable use of the water upon his premises; he may diminish the quantity, but the use must be a reasonable one."[20]

[15] 14 Ency. of Laws of Eng., 606, 607, article "Watercourse," by J. L. Goddard, author of Goddard on Easements.

[16] 3 Kent's Commentaries, sec. 439. This is so similar to the Code Napoleon (quoted *supra*, sec. 685) as to indicate that it might have been copied therefrom, especially in view of the fact that Chancellor Kent's familiarity with the civil law has been said by himself to be one of the chief reasons for the authoritative position of his commentaries.

[17] Elliott v. Fitchburg Ry., 10 Cush. 193, 57 Am. Dec. 85. Italics ours.

[18] Parker v. American etc. Co., 195 Mass. 591, 81 N. E. 468, 10 L. R. A., N. S., 584.

[19] Lancey v. Clifford, 54 Me. 487, 92 Am. Dec. 561.

[20] Charge of trial court affirmed. Brown v. Kistler, 190 Pa. 499, 42 Atl. 885.

See, likewise, Wadsworth v. Tillotson, 15 Conn. 366, 39 Am. Dec. 391.

These are general expressions, and are given to show that "reasonable use is the touchstone for determining the rights" of riparian owners among themselves, not only in California but throughout the common law, and that the statements sometimes made that the enforcement of this rule in California was a departure from the common law are unwarranted and a misrepresentation of the common law.[20a]

(3d ed.)

§ 746. Reasonable Use for Power Purposes.—As the question of reasonable use is one of fact in each case depending upon the circumstances, what is reasonable upon a mill stream will be different as a fact from what is reasonable upon an irrigation stream.

The circumstances chiefly to be considered where use for power preponderates among the riparian owners are found chiefly in the Eastern cases, where mill use is the dominating use. Thus, in an early Massachusetts case the learned judge already quoted said in another case,[21] applying this to mill use: "It is, therefore, held that each proprietor is entitled to such use of the stream so far as it is reasonable, conformable to the usages and wants of the community, and having regard to the progress of improvement in hydraulic works, and not inconsistent with a like reasonable use by the other proprietors of land on the same stream above and below."[22] And still again in another case the same eminent authority laid down the law for power use as follows: "What is a reasonable use must depend on circumstances, such as the width and depth of the bed, the volume of water, the fall, previous usage, and the state of improvement in manufactures and the useful arts." [Defendant detained the entire flow long enough to fill a mill pond, causing a shut-down of plaintiff's mill for two days in June and four days in July.] "The court are of opinion that this was not an unreasonable use of the watercourse by the defendants, and that any loss which the plaintiff temporarily sustained by it, was *damnum absque injuria.*"[23] In Wisconsin: "What constitutes rea-

20a *Supra*, sec. 673.

21 Chief Justice Shaw in Carey v. Daniels (1844), 8 Met. 470, 41 Am. Dec. 532. Italics ours.

22 Subject to a modification in favor of prior occupancy of millsite backing water under the special Massachusetts Mill Acts.

23 Shaw, C. J., in Pitts v. Lancaster Mills, 54 Mass. (13 Met.) 156. Riparian owner may dam stream to a reasonable extent for water-power. Corse v. Dexter (1909), 202 Mass. 31, 88 N. E. 332.

sonable use," says the court in a power case, "depends upon the circumstances of each particular case; and that no positive rule of law can be laid down to define and regulate such use with entire precision, is the language of all the authorities upon the subject. In determining this question, regard must be had to the subject matter of the use, the occasion and manner of its application, its object, extent and the necessity for it, to the previous usage, and to the nature and condition of the improvements upon the stream; and so, also, the size of the stream, the fall of water, its volume, velocity, and prospective rise and fall, are important elements to be considered."[24] In Minnesota the court declares:[25] "In determining what is a reasonable use, regard must be had to the subject matter of the use, the occasion and manner of its application; the object, extent, necessity and duration of the use; the nature and size of the stream; the kind of business to which it is subservient; the importance and necessity of the use claimed by one party, and extent of the injury to the other party; the state of improvement of the country in regard to mills and machinery, and the use of water as a propelling power, the general and established usages of the country in similar cases; and all the other and ever varying circumstances of each particular case, bearing upon the question of the fitness and propriety of the use of the water under consideration.[26] Evidence of the uniform and general custom in like cases is competent, although of course not conclusive, upon the question whether a use is a reasonable one."

These cases are quoted to show that the basic common-law test is what is reasonable between the contesting riparian proprietors; that what is reasonable on a mill stream may not be so on an irrigation stream and *vice versa;* that the custom of the community, that is, whether the dominant use of the stream by the majority of the riparian proprietors is for power or for irrigation or for some other use, must considerably affect the decision of what any one of them may do; but that only the facts vary, the ultimate test (reasonable use) remaining in all cases unchanged.

(3d ed.)

§ 747. **Same—In California.**—A recent California case for the first time deals at some length with power uses by a riparian owner

[24] Timm v. Bear, 29 Wis. 254.

[25] Red River Co. v. Wright, 30 Minn. 249, 44 Am. Rep. 194, 15 N. W. 167.

[26] Citing cases.

as such. Many mining cases have, in California, dealt with power use under the law of appropriation on public land in the pioneer days, but this is the first considering it specifically with reference to riparian owners as such, and among themselves, now that much of the land of the State has become private and the law of riparian rights has so largely displaced the law of appropriation.[1] The court said, per Mr. Justice Shaw:[2]

"The power company owns the land on which the power-house stands, and all the intervening land between the power-house and the dam at the head of its pipe-line; and all this land is riparian to Mill Creek. The electricity generated at the power-house by the use of the water from the pipe is carried away to Redlands and other places not on the stream, and there used for light, heat and power. The plaintiff makes the novel proposition that the use of the water to generate electric power by means of a power-house situated on riparian land is not a use within the scope of the riparian rights which attach to the land, unless the electric power is not only generated upon that land, but is also applied and used within its confines. There is no merit in this proposition. . . . . The use of the water in its passage through his land to operate a power plant thereon is as clearly within his rights as is his right to operate a mill thereon with which to grind grain or to operate any other machinery, than which there is no more ancient or well-established feature of riparian rights. The theory of the plaintiff on this point would seem to come to this, that in the process the water is in some way transformed into electricity and, in that form, is carried away and used on nonriparian land. If this were correct, perhaps the use would not be included in the riparian right and perhaps even a prior appropriator below could prevent such use if it worked injury to his right. But no such thing occurs. The water is not changed into electricity, nor carried away by the process. It is not the water that becomes electricity. It is the force of gravity, the weight of the water, which turns the wheels, and, being converted into electric power, is carried away on the wires, the water itself being turned back into the stream, precisely as in the case of its use to turn an ordinary mill wheel. The power company, being the owner of the riparian land, has the full right to use the water in its natural course on its land for that purpose.

[1] *Supra*, secs. 116, 231; *infra*, sec. 815.

[2] Mentone Co. v. Redlands Co. (1909), 155 Cal. 323, 100 Pac. 1082, 22 L. R. A., N. S., 382, 17 Ann. Cas. 1222.

It has also the right, if it is more convenient and effective so to do, to turn it out of its natural channel at the upper end of its possessions, use it for generating power thereon and turn it back into the stream within its lands below, provided such interference with natural conditions does not unduly injure others who have rights in the water."

(3d ed.)

§ 748. **Reasonable Use for Irrigation.**—For all but "natural uses" the riparian proprietor is limited in his use so as not to unreasonably interfere with the use of their lands by other riparian owners. The same is true of irrigation just as of other uses for profit.[3] One riparian proprietor cannot take water for irrigation to the unreasonable exclusion of the others below, or take all.[4] Concerning the reasonable use allowed the riparian proprietor for irrigation extracts are here given from some decisions, English and Eastern as well as Western. They all agree; namely, that the use for irrigation is proper within the limit that it must not unreasonably prevent the possibility of equal use by the other riparian proprietors.

In a California case Mr. Justice Shaw said: "Where two persons own land along the line of a watercourse, the measure of their rights is not necessarily controlled solely by the length of their respective frontages on the stream. Many other things may enter into the question. One may have a tract of land of such character that but little use could be made of the water upon it, while the land of the other may all be so situated that it could be irrigated with profit and advantage. In Harris v. Harrison,[5] it is said: 'In such a case, the length of the stream, the volume of water in it, the extent of each ownership along the banks, the character of the soil owned by each contestant, the area sought to be irrigated by each—all these, and many other considerations, must enter into the solution of the problem.' And the general rule is there stated to be, in cases where there is not water enough to supply the wants of both, that each owner has the right to the reasonable use of the water, taking into consideration the rights and necessities of the other."[6] In Nevada Judge Hawley said: "Under the rules of the

[3] Lone Tree etc. Co. v. Cyclone etc. Co., 15 S. D. 519, 91 N. W. 352; Tolle v. Corrith, 31 Tex. 362, and cases *supra*, 98 Am. Dec. 540.

[4] Learned v. Tangerman, 65 Cal. 334, 4 Pac. 191, and cases *supra*.

[5] 93 Cal. 681, 29 Pac. 325.

[6] Southern Cal. etc. Co. v. Wilshire, 144 Cal. 68, at 71, 77 Pac. 767.

common law, the riparian proprietors would all have the right to a reasonable use of the waters of a stream running through their respective lands for the purpose of irrigation. It is declared in all the authorities upon this subject that it is impossible to lay down any precise rule which will be applicable to all cases. The question may be determined in each case with reference to the size of the stream, the velocity of the water, the character of the soil, the number of proprietors, the amount of water needed to irrigate the lands per acre, and a variety of other circumstances and conditions surrounding each particular case; the true test in all cases being, whether the use is of such a character as to materially affect the equally beneficial use of the waters of the stream by the other proprietors."[7] In a Nebraska case:[8] "The common law seeks to secure equality in use of the water among all those who are so situated that they may use it. It does not give to any riparian owner property in the *corpus* of the water, either so as to be able to take all of it, or so as to insist that every drop of it flow in its natural channel.[9] When, therefore, counsel tell us that their clients have a natural right to irrigate, and that reasonable use of the water is necessary in exercise of that right, they urge nothing against the rules of the common law, since the latter merely insist that others along the streams in question have the same natural right, and permit every reasonable use by each, consistent with like use by all." And elsewhere in the same case: "For, if we regard the question of what is reasonable use as in great part one of fact, the conditions of soil, climate and rainfall in any given locality, when proved, may be considered properly as important elements of fact, without in the least affecting the general rule. But if we concede so much, the law insists that the lower owner shall not be deprived of the use of the water to an unreasonable extent.[10] The uses which an

See, also, Gutierrez v. Wege, 145 Cal. 730, 79 Pac. 449; Anaheim etc. Co. v. Fuller, 150 Cal. 327, 88 Pac. 978; Nesalhous v. Walker, 45 Wash. 621, 88 Pac. 1032.

[7] Jones v. Adams, 19 Nev. 78, 3 Am. St. Rep. 788, 6 Pac. 442, and repeated in Union Min. Co. v. Dangberg, 81 Fed. 73. "Irrigation must be held in this climate to be a proper mode of using water by a riparian proprietor, the lawful extent of the use depending upon the circumstances of each case. With reference to these circumstances, the use must be reasonable, and the right must be exercised so as to do the least possible injury to others. There must be no unreasonable detention or consumption of the water." Union etc. Min. Co. v. Farris, 2 Saw. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90.

[8] Meng v. Coffey, 67 Neb. 500, 108 Am. St. Rep. 697, 93 N. W. 715, 60 L. R. A. 610.

[9] Citing Vernon Irr. Co. v. Los Angeles, 106 Cal. 237, 39 Pac. 762.

[10] Citing Sampson v. Hoddinott, 1 Com. B., N. S., 590, 3 Jur., N. S. 243.

upper riparian owner may make of a stream for purposes of irrigation must be judged, in determining whether they are reasonable, with reference to the size, situation and character of the stream, the uses to which its waters may be put by other riparian owners, the season of the year, and the nature of the region. These circumstances differ in different cases, and what use is reasonable must be largely a question of fact in each case.[11] Some things, however, are clearly unreasonable, and it may be laid down absolutely that the upper owner, in using the water for irrigation, must not waste, needlessly diminish, or wholly consume it, to the injury of other owners, nor so as to prevent reasonable use of it by them also."[12]

The principle that it is entirely a question of degree is set forth in a leading Massachusetts case,[13] saying: "It has sometimes been made a question whether a riparian proprietor can divert water from a running stream for purposes of irrigation; but this, we think, is an abstract question, which cannot be answered either in the affirmative or negative, as a rule applicable to all cases. That a portion of the water of a stream may be used for the purpose of irrigating land we think is well established as one of the rights of the proprietors of the soil along or through which it passes; yet a proprietor cannot, under color of that right, or for the actual purpose of irrigating his own land, wholly abstract or divert the watercourse, or take such an unreasonable quantity of water, or make such unreasonable use of it, as to deprive other proprietors of the substantial benefits which they might derive from it if not diverted or used unreasonably." In a New York case it is said he may use the water "for the purpose of irrigation of his lands when the amount used is reasonable and not out of proportion to the size of the stream."[14] In Kent's Commentaries it is said: "If I am the first person who applies the water of a running stream to the purpose of *irrigation* or a mill, I cannot afterward be lawfully disturbed in any essential degree, in the exercise of my right, though

11 Citing Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Baker v. Brown, 55 Tex. 377; Harris v. Harrison, 93 Cal. 676, 29 Pac. 325; Minnesota Loan & Trust Co. v. St. Anthony Falls Water Power Co., 82 Minn. 505, 85 N. W. 520; Embrey v. Owen, 6 Ex. 353, 20 L. J. Ex. 212; Pitts v. Lancaster Mills, 13 Met. (Mass.) 156.

12 Citing Union Mill Co. v. Dangberg, 2 Saw. 450, Fed. Cas. No. 14,370, 8 Morr. Min. Rep. 113; Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Harris v. Harrison, 93 Cal. 676, 29 Pac. 325; Gould v. Eaton, 117 Cal. 539, 49 Pac. 577, 38 L. R. A. 181; Coffman v. Robbins, 8 Or. 279, 8 Morr. Min. Rep. 131; Gillett v. Johnson, 30 Conn. 180.

13 Elliott v. Fitchburg Ry. Co., 10 Cush. 193–195, 57 Am. Dec. 85.

14 Pierson v. Speyer, 178 N. Y. 270, 102 Am. St. Rep. 499, 70 N. E. 799.

I may not have enjoyed it for twenty years; *provided the water be used by me reasonably,* so as not to divert the natural course of the stream from the lands below, or *essentially* destroy the same use of it, as it naturally flowed over adjacent lands."[15] In a Pennsylvania case: "It is a well-recognized rule that a riparian proprietor may, *jure naturae,* divert water from a stream for domestic purposes and for the irrigation of his land"; adding that the extent for irrigation depends on whether it is reasonable under all the circumstances.[16] In a case in Maine it is said that a riparian proprietor may diminish volume for irrigation, provided he does not do so unreasonably, which "depends much upon the nature and size of the stream as well as the use to which it is subservient."[17]

In a comparatively early English case the right to irrigate was recognized,[18] and it was clearly set forth in another decision upon which the principles set forth in the foregoing quotations are undoubtedly directly or indirectly founded. Baron Parke said in Embrey v. Owen:[19] "This must depend upon *the circumstances of each case.* On the one hand, it could not be permitted that the owner of a tract of many thousand acres of porous soil, abutting on one part of the stream, could be permitted to irrigate them continually by canals and drains, and so cause a serious diminution of the quantity of water, though there was no other loss to the natural stream than that arising from the necessary absorption and evaporation of the water employed for that purpose. On the other hand, one's common sense would be shocked by supposing that a riparian owner could not dip a watering-pot into the stream in order to water his garden, or allow his family or his cattle to drink it. *It is entirely a question of degree,* and it is very difficult, indeed impossible, to define precisely the limits which separate the reasonable and permitted use of the stream from its wrongful application; but there is often no difficulty in deciding whether *a particular case* falls within the permitted limits or not."[20]

[15] Kent's Commentaries, pt. VI, lec. 52, Browne's ed., p. 631.

[16] Messinger's Appeal, 109 Pa. 285, 4 Atl. 162.

[17] Davis v. Getchell, 50 Me. 605, 79 Am. Dec. 636.

[18] Miner v. Gilmour, 12 Moore P. C. 156, 14 Eng. Reprint, 861.

[19] 6 Ex. 352, 20 L. J. Ex. 212.

[20] Says a Scotch authority: "In the earliest of these cases the watering of the ground had been spoken of as 'being the most natural and ordinary effects of burns and waters,' and probably a reasonable use for that purpose would be sustained (see Embrey v. Owen (1851), 6 Ex. 353, 20 L. J. Ex. 212), provided it was not excessive in view of the size of the stream, and of the needs of the lower heritors, and care was taken to return the whole sur-

(3d ed.)

§ 749. Same—Turner v. James Canal Co.—The recent California case of Turner v. James Canal Co.[21] is worth stating at some length, and contains an instructive exposition of the law. It was held, per Mr. Justice Shaw, that what is a reasonable use for irrigation depends on the facts of the case, and where water is taken from a slough connecting with the stream, regard must be had to the quantity of water in the slough as compared to that in the stream, the quantity the slough is capable of naturally receiving from the river, the quantity of land of each claimant, their respective interests and requirements, and all other circumstances showing the needs of each. In this case Fresno Slough at ordinary times connected only with the San Joaquin River, being filled with water therefrom, rising and falling with the varying height of that river, but having no regular current of its own. At times of high summer floods, the opposite end of the slough connects also with another river (Kings River) and a lake (Tulare Lake), and receives water at that end also, and there will be a flow from one end to the other in either direction according to whether the Kings or the San Joaquin is at a higher stage.[22] Defendant, owning land upon this slough, took water directly from the slough and also from another point on San Joaquin River itself thirty or forty miles above its land. All the water so taken at both points defendant used to irrigate its land along the slough. Plaintiff, a riparian owner on the San Joaquin River below the slough, had arranged a series of levees, checks and other works, to utilize the natural overflow in flood time (so that it covered an extensive area, depositing fertilizing sediment, and naturally irrigating it) for the purpose of growing large crops of grass, which will be diminished by defendant's diversions.

It was held that defendant's land bordering on the slough is to be regarded as riparian to one or the other river, according to which is furnishing the slough with its water at times of use, and entitled to a reasonable use of the water of such river (though it results in diminishing the flow), in conjunction with other riparian owners on such river, the slough at such times being in effect a branch or

plus to the channel. The return of any surplus is essential." Ferguson on The Law of Water in Scotland, p. 241. In Sampson v. Hoddinott, 1 Com. B., N. S., 603, Cresswell, J., said: "Irrigation is a riparian right, to be exercised subject to the rights of the other riparian proprietors."

[21] (1909), 155 Cal. 82, 132 Am. St. Rep. 59, 99 Pac. 520, 22 L. R. A., N. S., 401, 17 Ann. Cas. 823.

[22] The slough was fourteen miles long and crooked, and from one hundred to two hundred feet wide.

inlet of such river.[23] In making this reasonable use, the water may be taken by defendant either from the slough or from the river itself above complainant, so long as complainant's land is not trespassed upon. The quantity to be taken by defendant as reasonable is to be determined by the trial court, as a question of fact. It is not to be denied because such use may interfere with the natural irrigation of plaintiff's lands by the overflowing of the river during floods; saying: "To what extent such interference can be allowed without being unreasonable is a question of fact for the trial court upon a consideration of the needs of each, the comparative benefits of the respective uses, the comparative injuries caused to each by the deprivation ensuing from the use by the other, and all other circumstances bearing thereon." And regard must be had "to the quantity of land of each, their respective interests, the quantity of water in the slough, as compared to that in the river, the quantity the slough is capable naturally of diverting from the river, and all other circumstances affecting the question of a reasonable division of the water in case there should not be enough to supply the needs of all."

(3d ed.)

§ 749a. Same.—The enforcement of this rule in California is the so-called "modification" of the common law which some declare to exist in the West even in States such as California which recognize riparian rights.[24] The misnomer arose from a misinterpretation of

[23] Mr. Justice Shaw says: "There is no more reason for declaring that the owner of lands on the river can prevent the owner of lands on the slough from taking a reasonable share of the water of the slough, although it may affect the flow of the river, than of holding that the owner of land on the slough could prevent the riverman from taking his reasonable part of the water of the river to the depletion of the water in the slough. One has as clear a right as the other to the natural advantages of his situation, and an equal right to complain of the deprivation thereof by the undue use of the other."

[24] Thus Harris v. Harrison, 93 Cal. 676, 29 Pac. 325, said: "But in some of the Western and Southwestern States and territories, where the year is divided into one wet and one dry season, and irrigation is necessary to successful cultivation of the soil, the doctrine of riparian ownership has, by judicial decision, been modified, or, rather, enlarged, so as to include the reasonable use of natural water for irrigating the riparian land, although such use may appreciably diminish the flow down to the lower riparian proprietor. And this must be taken to be the established rule in California, at least, where irrigation is thus necessary." Also, Wiggins v. Muscupiabe etc. Co., 113 Cal. 182, 54 Am. St. Rep. 348, 45 Pac. 160, 32 L. R. A. 667; Bathgate v. Irvine, 126 Cal. 136, 77 Am. St. Rep. 158, 58 Pac. 442; Katz v. Walkinshaw, 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236 (per Mr. Justice Shaw); City of Los Angeles v. Los Angeles etc. Co. (1908), 152

Lux v. Haggin,[25] where the matter was thoroughly examined and it was, on the contrary, shown that there was nothing in this peculiar to the West. If the above authorities are not sufficient to show that to call it a "change" is erroneous and that the California rule is no change or modification, then we refer the reader to a later section where some more are quoted,[26] and will now add in this place still a few others.

In Washington the court says:[27] "It is suggested on behalf of the appellants that the use of water for irrigation was practically unknown to the common law. But, while it may be true that it is seldom necessary or desirable to irrigate land in England by artificial means, yet it appears that a reasonable use of running streams for that purpose by riparian proprietors is recognized by the courts of that country. It is expressly so stated in Gould on Waters,[1] where a number of English cases are cited; and in Pomeroy on Riparian Rights,[2] it is declared that the common-law rule that every riparian proprietor has an equal right to the use of water as it is accustomed to flow, without diminution or alteration, is subject to the well-recognized limitation that each owner may make a reasonable use of the water for domestic, agricultural and manufacturing purposes; and the author there cites several English and many American decisions in support of that declaration." And the Oregon court,[3] citing many cases, says: "It is accordingly now quite *generally* held *in this country and in England*, that, after the natural wants of all the riparian proprietors have been supplied, each proprietor is entitled to a reasonable use of the water for irrigating purposes." And another authority declares "The right at common law of a riparian proprietor to make a reasonable use of the waters of a natural stream for irrigation purposes is well settled, both in England and in the United States."[4] A late New Jersey case says: "That diversion for use

Cal. 645, 93 Pac. 869, 1135; Turner v. James Canal Co. (1909), 155 Cal. 82, 132 Am. St. Rep. 59, 99 Pac. 520, 22 L. R. A., N. S., 401, 17 Ann. Cas. 823 (per Mr. Justice Shaw); Burr v. Maclay R. Co., 154 Cal. 428, 98 Pac. 260 (per Mr. Justice Shaw); Lobdell v. Simpson, 2 Nev. 274, 90 Am. Dec. 537, and the decisions of the States following the Colorado doctrine rejecting riparian rights *in toto* (quoted *supra*, secs. 112, 118, 168), on the ground that the common law is destructive of irrigation.

[25] 69 Cal. 255, at 398 et seq., 10 Pac. 674. See *supra*, sec. 673.

[26] *Infra*, sec. 799.

[27] Benton v. Johncox, 17 Wash. 277, 61 Am. St. Rep. 912, 49 Pac. 498, 39 L. R. A. 107.

[1] Section 217.

[2] Section 125.

[3] Jones v. Conn, 39 Or. 30, 87 Am. St. Rep. 634, 64 Pac. 855, 65 Pac. 1068, 54 L. R. A. 630.

[4] 17 Am. & Eng. Ency. of Law, 487.

upon riparian lands and for domestic and agricultural or manufacturing purposes is in its nature a reasonable use is the settled law of this State, and diversion for irrigation has also been held to be a reasonable use *in accordance with the general American doctrine and the English authority.*"[5] In Year Book XII, Edward III (A. D. 1331), plaintiff complained of diversion from his meadow of a stream "with which water he was wont to water his cattle, namely, horses, sheep and cows, and also to fish therein and brew therewith, *and irrigate* [*adaquare*] *the aforesaid meadow in time of drought,*" and the assize passed for plaintiff. In another English case[6] it was said: "Now the plaintiff was not hurt as to culinary purposes, nor *irrigation,* nor as to his cattle nor drainage," and an injunction was refused. As the Kansas court says: "The authorities are unanimous to the effect that the use of water for irrigation is one of the common-law rights of a riparian proprietor."[7]

(3d ed.)

§ 750. **Reasonable Use (Concluded).**—The common law and the civil law are in this the same. The civil law is: "If water passes between estates of different owners, each one of these can use it for the irrigation of his estate or for any other object, but not the whole of it, but only the part which corresponds to him, because both have equal rights, and the one can consequently oppose use of it all by the other, or even a part considerably more than his own."[8]

The principle of equality is the foundation of the common law in all jurisdictions. English and Eastern cases presented difficulties of fact in equalizing uses for conflicting purposes (e. g., a mill and an irrigator on the same stream).[9] The difference in the West is merely the greater simplicity of fact because usually irrigation is alone the predominating use, so that equality becomes more easily attainable as a matter of division and apportionment.

5 City of Paterson v. East Jersey W. Co., 74 N. J. Eq. 49, 70 Atl. 484.

6 Elmhirst v. Spencer, 2 Macn. & G. 45, 42 Eng. Reprint, 18.

7 Clark v. Allaman, 71 Kan. 206, 80 Pac. 584, 70 L. R. A. 971.

8 Hall's Mexican Law, sec. 1391. See the Code Napoleon and other civil-law authorities given *supra,* sec. 685, and *infra,* sec. 1025 et seq.

9 The difficulty of satisfactorily adjusting power and irrigation uses on the same stream is illustrated in Schodde v. Twin Falls Co. (Idaho), 161 Fed. 43, 88 C. C. A. 207; Mentone Co. v. Redlands Co. (1909), 155 Cal. 323, 100 Pac. 1082, 22 L. R. A., N. S., 382, 17 Ann. Cas. 1222.

C. APPORTIONMENT.

(3d ed.)

§ 751. Apportionment.—To secure to all contesting riparian proprietors the reasonable use to which each is entitled, *a court of equity* will, if necessary, apportion the water.[1] This was comparatively early said to be well settled and not a Western innovation, and Professor Pomeroy, cited in the note, says it is a matter regularly within the jurisdiction of equity.[2]

The apportionment may be measured in any manner best calculated to a reasonable result. "Riparian owners are not to be debarred from use of water because the season is dry and the stream

[1] Harris v. Harrison, 93 Cal. 676, 29 Pac. 325; Wiggins v. Muscupiabe etc. Co., 113 Cal. 182, 54 Am. St. Rep. 337, 45 Pac. 160, 32 L. R. A. 667; Smith v. Corbit, 116 Cal. 587, 48 Pac. 725. See Metcalfe v. Faucher (Tex. Civ. App.), 99 S. W. 1038. It is said that this will be done with percolating waters also. Katz v. Walkinshaw, 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, as to which, see Glassell v. Verdugo, 108 Cal. 503, 41 Pac. 403; Verdugo Co. v. Verdugo (1908), 152 Cal. 655, 93 Pac. 1021.

[2] McKee, J., in Anaheim W. Co. v. Semi-Tropic W. Co., 64 Cal. 197, 30 Pac. 623 (see for another early case, Los Angeles v. Baldwin, 53 Cal. 471); Pomeroy on Riparian Rights, sec. 155, relying on a New York case. In Tyler v. Wilkinson, 4 Mason, 413, Fed. Cas. No. 14,312, between mill owners, the case (decided by Justice Story) was referred to a master to ascertain, "as near as may be . . . . the quantity to which the trench owners are entitled, and to report a suitable mode and arrangement permanently to regulate and adjust the flow of the water so as to preserve the rights of all parties." In a Massachusetts case (Ballou v. Inhabitants of Hopkinton, 4 Gray (Mass.), 324, 328): "In regulating the rights of mill owners and all others in the use of a stream, wherein numbers of persons are interested, equity is able, by one decree, to regulate their respective rights, to fix the time and manner in which water may be drawn, and within what limits it shall or shall not be drawn by all parties, respectively," etc. In an Illinois case it was held that where two steam mills or factories are located on the same stream, the rule is this: "That so far as the water is destroyed by being converted into steam, neither is entitled to its exclusive use. It is to be divided between them as nearly as may be according to their respective requirements. If each requires the same quantity, it should be equally divided." Bliss v. Kennedy (1867), 43 Ill. 67. In a recent New Hampshire case, among mill and power users, apportionment was decreed. Roberts v. Clarement Co., 74 N. H. 217, 124 Am. St. Rep. 962; 66 Atl. 485; citing Horne v. Hutchins, 71 N. H. 128, 51 Atl. 651; Fowler v. Kent, 71 N. H. 388, 52 Atl. 554; State v. Sunapee Dam. Co., 70 N. H. 458, 50 Atl. 108, 59 L. R. A. 55; Blanchard v. Baker, 8 Me. 253, 23 Am. Dec. 504; Patten Co. v. Kankanna Co., 70 Wis. 659, 35 N. W. 737; Angell on Watercourses, secs. 98–101. Accord, Warren v. Westbrook Co., 88 Me. 58, 51 Am. St. Rep. 372, 33 Atl. 665, 35 L. R. A. 388. According to a French authority: "Les tribunaux compétemment saisis d'une demande en répartition d'eaux sont autorisés a ordonner l'établissement des ouvrages nécessaires pour assurer à chacun des riverains la portion d'eau qui lui est attribuée." Droit Civile Francais, by Aubrey & Rau, 4th ed., vol. III, p. 58. We give these authorities to show the error of considering this an innovation in Western law.

low."[3] In apportioning the water, the court of equity will adopt any mode that is reasonable on the facts to secure equality. For the protection of the rights of the several riparian proprietors it has been held that a court of equity may, in a proper case, apportion the flow of the stream, after the natural wants of the several proprietors have been satisfied, in such a manner as may seem equitable and just under the circumstances.[4] The apportionment may be by quantity, awarding to each a definite share of flow for continual use, as where a riparian proprietor's right was fixed at one hundred inches.[5] The apportionment may take the form of fixing fractions of the whole stream as to surface flow, but as to the subflow, this would be impracticable, and the apportionment must take the form of a positive quantity of water.[6] In fixing the amount, however, the caution must be insisted on, that present needs or use are not to be made the test. Actual present use does not limit the riparian right—future possible use is equally to be secured, and must be figured in the decree. "The right of a riparian owner to the use of the water is not, however, measured by the amount he actually uses, and it is not to be assumed that the same amount of land will be cultivated in every succeeding year. The amount of irrigable land belonging to each party, rather than the amount of land already under cultivation, would be properly made a controlling element in adjusting their respective rights to the flow of the stream; otherwise a readjustment would be necessary whenever either party should cultivate a greater or less area."[7]

The apportionment may be by periods of time instead of by quantity or volume. In Wiggins v. Muscupiabe etc. Co.[8] the court says: "Whenever it should appear from the circumstances of the case that the only method by which either proprietor could have a reasonable use of the stream would be to allow to each its full flow for a reasonable time, the only equitable adjustment of their rights would be to thus apportion the flow. Whether this apportionment should be for alternate weeks or alternate days, or for a specific

[3] Meng v. Coffey, 67 Neb. 500, 108 Am. St. Rep. 697, 93 N. W. 715, 60 L. R. A. 910.

[4] Jones v. Conn, 39 Or. 30, 87 Am. St. Rep. 634, 64 Pac. 855, 65 Pac. 1068, 54 L. R. A. 630, citing the California cases *supra*.

[5] Lone Tree Ditch Co. v. Cyclone Ditch Co., 15 S. D. 519, 91 N. W. 355; Same v. Same, 128 N. W. 596.

[6] Verdugo W. Co. v. Verdugo (1908), 152 Cal. 655, 93 Pac. 1021, par. 9 of opinion.

[7] Wiggins v. Muscupiabe etc. Co., 113 Cal. 194, 54 Am. St. Rep. 337, 45 Pac. 160, 32 L. R. A. 667.

[8] 113 Cal. 182, at 193, 54 Am. St. Rep. 337, 45 Pac. 160, 32 L. R. A. 667.

portion of each day, must be determined by the facts of each case." [9] For example, in Harris v. Harrison,[10] the leading case, each contesting riparian owner was awarded the entire flow for three and one-half days out of seven. In another case [11] plaintiff's land contained about two thousand acres, and the court found that fifty acres of it were adapted to cultivation and were susceptible of irrigation, and that only three acres and a fraction of defendant's land were adapted to cultivation and irrigable; and it found that a fair proportionate division of the water of the creek, for irrigation, would give to plaintiffs the entire flow of the creek for twenty days out of every twenty-one days, and to defendant the entire flow of the creek for one day out of every twenty-one days; and judgment was rendered in accordance with this finding, and affirmed on appeal.

The apportionment may be applied to use for domestic purposes ("natural uses") under the view that all uses are tested by the rule of reasonableness in effect as well as reasonableness of purpose.[12] In one case it is said: [13] "But it does not follow—as is also found by the court—that they are entitled to continuous flow of two inches or any other quantity in the ditch, and such a requirement, we think, would be unreasonable. The flow of water in a stream may, and when necessary should, be apportioned between the parties interested 'by periods of time, rather than by a division of its quantity' and artificial means of conducting it may be allowed, instead of the natural channel. Or, indeed, it would be in the power of the court to hold that the demands of the plaintiffs entitled to water for *domestic use* are sufficiently supplied by the constant flow of the water by their places for eighteen hours, to which is to be added, in case the rights of the plaintiffs to the other water in question be established, an additional flow of two or three hours, or perhaps more." [14]

Where the facts warrant it, an equal distribution will be decreed.[15] "If every riparian proprietor on a given stream owned the same quantity of land, with the same frontage on the stream, and the same susceptibility to and need of irrigation, each would be

[9] Accord, Guiterrez v. Wege, 145 Cal. 730, 79 Pac. 449.

[10] 93 Cal. 676, 29 Pac. 325.

[11] Gutierrez v. Wege, 151 Cal. 587, 91 Pac. 395.

[12] Wiggins v. Muscupiabe etc. Co., 113 Cal. 191, 54 Am. St. Rep. 337, 45 Pac. 160, 32 L. R. A. 667.

[13] Craig v. Crafton Water Co., 141 Cal. 178, 74 Pac. 762.

[14] See, also, Anderson v. Bassman, 140 Fed. 14; Rogers v. Overacker, 4 Cal. App. 333, 87 Pac. 1107.

[15] E. g., Harris v. Harrison, *supra*.

entitled to precisely the same quantity of water for that purpose." [16] And in another case it is said: "While the distribution of the waters of the stream among riparian owners, according to common-law principles, is most difficult, where the stream is long, the riparian owners numerous, and the quantity of water limited, yet in this case each of the parties owns the same quantity of land, of substantially the same character, their necessities and conditions are substantially the same, and an equal distribution of the waters of the creek between them will mete out substantial justice as nearly as substantial justice can be attained." [17]

There can be no apportionment by either time or volume in the absence of evidence of all surrounding circumstances bearing upon what would be reasonable.[18] No one thing being conclusive, evidence of the entire situation must be forthcoming, such as kind of crops, relative acreage, size of stream, number of contestants and so forth.

(3d ed.)

§ 752. Apportionment is an Equitable Remedy.—The apportionment rests upon the power of equity, as distinguished from law, to give specific relief. An award of a definite quantity of water to any riparian owner against other riparian owners is not because his substantive right is measured thereby, but because such remedy affords more adequate relief than the damages which a court of law could give.

The substantive right of each is the indivisible one to the reasonable use of his own land, and not to any fixed quantity of water. As is said in Lux v. Haggin: "We anticipate the objection that this

[16] Charnock v. Higuerra, 111 Cal. 479, 52 Am. St. Rep. 195, 44 Pac. 171, 32 L. R. A. 190.

[17] Nesalhous v. Walker, 45 Wash. 621, 88 Pac. 1032.

[18] Coleman v. Le Franc, 137 Cal. 214, 69 Pac. 1011; Riverside W. Co. v. Sargent, 112 Cal. 230, 44 Pac. 560; Rogers v. Overacker, 4 Cal. App. 333, 87 Pac. 1107; Riverside W. Co. v. Gage, 89 Cal. 410, 26 Pac. 889; Montecito Co. v. Santa Barbara, 151 Cal. 377, 90 Pac. 935; Strong v. Baldwin (1909), 154 Cal. 150, 129 Am. St. Rep. 141, 97 Pac. 178; Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748; Perry v. Calkins (Cal.), 113 Pac. 136; Hollett v. Davis, 54 Wash. 326, 103 Pac. 423. "Before the distribution can be made, we must first know the quantity of water in the stream from time to time during the irrigation season, the acreage of each farm in crops, character thereof, the amount required for the proper irrigation of each crop and kind of crop, time for irrigation of each, etc., and all of the lands should be properly surveyed and platted, showing its status in this and various other respects in detail." Hough v. Porter, 51 Or. 318, 95 Pac. 732. See, also, S. C., 98 Pac. 1083, 102 Pac. 728.

is not an absolute rule at all, but, as said by the judges in the opinions quoted from, the very nature of the common right is such that a precise rule as to which is reasonable use by any one proprietor for irrigation cannot be laid down."[19] There cannot be any permanent severance or right by any one of them.[20] The apportionment decreed in equity is not a severance of rights such as occurs in partition between tenants in common, but is an equitable expedient to enforce, under existing conditions, the unseverable right of each to a reasonable use of the riparian land. The apportionment is merely such as, *"under the circumstances and facts in this case,* would be a reasonable and equitable division of the water."[21]

Consequently, not being a severance of right, but an expedient of remedy in each case, an apportionment made at one time is not necessarily conclusive at a later point of time, when the circumstances on which it is based have changed. The apportionment is decreed in equity to afford equality on the facts existing at the time; on the circumstances then existing. When the circumstances change so that the decree no longer represents equality and reasonable division, then a readjustment must be had under the new conditions. A system of correlative rights accepting as its ground principle the determination of what is reasonable in each case, cannot in its nature be a system of permanent fixedness, such as is the system of exclusive rights by appropriation. The apportionment is permanent only if the surrounding circumstances on which it was founded remain unchanged, so that the equality of the apportionment is not destroyed; and ceases to be permanent when a subsequent change of circumstances has destroyed the reasonableness of the adjustment. For example, an apportionment based on the quantity of water needed to irrigate certain crops where both

[19] Lux v. Haggin, 69 Cal. 255, at 408, 10 Pac. 674.

[20] Union Min. Co. Cases, 8 Morr. Min. Rep. 113, Fed. Cas. No. 14,370, 2 Saw. 450, 2 Saw. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90, and 81 Fed. 73; Davis v. Chamberlain, 51 Or. 304, 98 Pac. 154, saying: "It necessarily follows, therefore, that the nature and extent of the right of a *riparian* proprietor to the water of a stream, for irrigation, cannot be measured by any definite or fixed rule, nor can the amount of water to which he is entitled to use for that purpose ordinarily be definitely ascertained or determined, although this may, perhaps, be done in exceptional cases." See, also, Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728; Lone Tree Co. v. Cyclone Co. (S. D.), 128 N. W. 596; Tacoma etc. Co. v. Smithgall (Wash.), 108 Pac. 1091.

[21] Wiggins v. Muscupiabe etc. Co., 113 Cal. 189, 54 Am. St. Rep. 337, 45 Pac. 160, 32 L. R. A. 667, in which case it is expressly recognized that there may be contingencies in which a readjustment may be necessary.

parties grow the same kind, would work great injustice when one party changes to crops requiring much less water, while the other changes to crops needing more. To make them share in the same proportion as before would work great injustice to one, simply to permit waste by the other.

There are many other changing conditions. The soil requires more water at one time than another; different crops require different quantities of water, and these requirements vary at different stages of growth; humidity of seasons varies, and with it vary both requirements and supply; one kind of soil or crop returns more water to the stream than others; the times of applying the water will be different under changed methods of cultivation; the area cultivated or owned may change; the flow of streams constantly changes; new parties may be involved in a subsequent controversy whom the former apportionment had not considered because not parties to the former suit, and whom the former decree cannot bind. All these things may produce changes subsequent to an apportioning decree to such an extent that the substantive right of each contestant to the equal reasonable use of their respective lands is no longer secured by the decree. Thus equality must depend upon circumstances, and the adjustment must change when they change. An equalized distribution at one time may become very unequal at a later point of time.[22]

The apportionment is, however, binding so long as the situation remains the same on the facts. In such a case it has been held: "The conditions do not appear to be different now from what they then were. The diversion by the defendants is the same now as then, *and while these conditions continue unchanged,* the judgment rendered in the former action operates as a bar between the parties here";[23] and without doubt a court of equity should and will

[22] As has been said: "In ordinary controversies between parties claiming only as riparian proprietors on the same stream of water, a judgment determining that at a given time the parties are entitled to appropriate the waters in certain proportions is not necessarily conclusive in a subsequent action; for the facts upon which rests the determination as to the proportion of the waters to which the parties are entitled may be materially different at the second trial. . . . . In other words, where the parties claim merely as riparian proprietors, the proportions to which they may respectively be entitled may vary from time to time, in accordance with the facts existing at the respective times." (Rhodes, J., in Los Angeles v. Baldwin, 53 Cal. 471, concurring opinion. In actual decision, the former apportionment was held binding because the circumstances had not changed *in fact.* See, also, Williams v. Altnow, 51 Or. 275, 95 Pac. 200, 97 Pac. 539.)

[23] Los Angeles v. Baldwin, 53 Cal. 469, at 470.

be slow to proceed to a reapportionment in any but the clearest cases showing that *justice* so demands, and only where the change in situation of the parties has been so extreme that the equality of the previous adjustment has been obviously destroyed. To proceed thus on light grounds would work more injustice by inducing insecurity, than justice. The adaptability of the common law of riparian rights to circumstances, through its system of correlative as opposed to exclusive rights, is, in the end, intended only to secure equal justice and right.

(3d ed.)

§ 753. Confined to the Parties Litigant.—In deciding what is a reasonable use, or in apportioning the water upon the basis of reasonable use, the decision must be confined to the parties to the litigation as already set forth. The court cannot entertain a contention that a party's riparian right should be measured by the total number of riparian proprietors on the stream when they are strangers to the action. For illustration: a stream flowing five hundred inches may have fifty riparian proprietors upon it. Other things being equal, each would be entitled to only ten inches as against all the rest, yet against the single one with whom he is litigating, this cannot be considered. It is solely a question of whether he is unreasonably interfering with his opponent without regard to the others, so that, as between the two, the court might well decree two hundred and fifty inches to each. This is a principle fundamental in all law, the law of appropriation as well. This is overlooked in a couple of Nebraska cases which say that where there are a large number of riparian proprietors, the right of each is infinitesimal and a diversion does him but nominal damage.[24] As between any one of them and another or against a nonriparian diverter, that is far from true. The rights of the many others have no bearing upon the suit. As between the two disputing riparian proprietors, the sole question is what is reasonable between the two; and as against the nonriparian diverter, the complaining riparian proprietor is entitled to the entire flow that he could possibly use, regardless of what the remaining riparian proprietors may be entitled to.[25] The possible use of a riparian

[24] McCook Irr. Co. v. Crews, 70 Neb. 115, 102 N. W. 249; Cline v. Stock, 71 Neb. 70, 102 N. W. 265.

[25] Lux v. Haggin, 69 Cal. 255, at 396, 10 Pac. 674, saying: "Undoubtedly as against an appropriation by a mere wrongdoer, a riparian proprietor may insist upon the entire and complete natural flow of the stream."

proprietor can be limited only by the right of another riparian proprietor, and only by such other as contests it. Authorities setting forth this principle are elsewhere given.[1] If a determination based upon the rights of all the riparian proprietors is desired, all must be brought into court, and must join issue *inter se*.[2]

This is another instance in which an apportionment may not be permanent; that is, where made originally between a limited number of private parties, and later a suit arises with an additional number of riparian owners involved.

D. MISCELLANEOUS.

(3d ed.)

§ 754. Manner of Use.—The manner of use must be reasonable. Between riparian owners, waste will be enjoined,[3] as where water is spread out so that it will be lost by evaporation,[4] or where it is ditched through porous soil in such a way that much or all is lost before reaching the end of the ditch.[5] The means of use are immaterial and the taking may be by a seepage tunnel.[6] It is no objection to pumps that the water is raised to a level to which it would not otherwise flow, so long as it is properly used at that level.[7] Two or more riparian proprietors may join in a common diversion if they take no more than their combined share.[8]

A riparian owner may place a dam in the stream if he takes thereby no more than his due proportion of the water. The dam is not *per se* an improper structure as to lower owners.[9] And he may, to a reasonable extent, store water in the wet season for his sole use in the dry season.[10] "The mere storage of water in reservoirs by means of dams is not, *per se*, an unreasonable use of the water of a stream by an upper riparian owner."[11] But it becomes wrongful if it causes waste or unreasonable or excessive loss of water

1 *Supra*, sec. 626 et seq.

2 *Ibid.*

3 Campbell v. Grimes, 62 Kan. 503, 64 Pac. 62; McClintock v. Hudson, 141 Cal. 275, 74 Pac. 849. See 15 L. R. A., N. S., 238, note.

4 Ferrea v. Knipe, 28 Cal. 340, 87 Am. Dec. 128; Barneich v. Mercy, 136 Cal. 205, 68 Pac. 589. Cf. Lawrie v. Silsby (1909), 82 Vt. 505, 74 Atl. 94.

5 Shotwell v. Dodge, 8 Wash. 337, 36 Pac. 254; Nielson v. Sponer, 46 Wash. 14, 123 Am. St. Rep. 910, 89 Pac. 155.

6 McClintock v. Hudson, 141 Cal. 275, 74 Pac. 849.

7 Charnock v. Higuerra, 111 Cal. 473, 52 Am. St. Rep. 195, 44 Pac. 171, 32 L. R. A. 190. See Chatfield v. Wilson, 31 Vt. 358.

8 Verdugo W. Co. v. Verdugo (1908), 152 Cal. 655, 93 Pac. 1021.

9 Arroyo D. Co. v. Baldwin (1909), 155 Cal. 280, 100 Pac. 874. Cf. Bickett v. Morris, L. R. H. of L. 47.

10 Stacey v. Delery (Tex. Civ. App. 1909), 122 S. W. 300.

11 Parry v. Citizens' W. W. Co., 59 Hun, 199, 13 N. Y. Supp. 471.

to other riparian owners,[12] or floods their lands [13] or unreasonably accelerates or retards the flow.[14]

Where a riparian owner owns both banks of the stream where it passes his land, or where the opposite owner does not object, he may, as against lower owners, change the course of the stream on his land at will, so long as he returns the water to its natural channel before it reaches the land of the lower owners and does them no undue damage.[15] He may change his place of use or of diversion so long as he does no unreasonable injury to lower owners.[16]

If a riparian owner takes no more than his share of water from a stream for irrigation, it is immaterial to lower riparian owners at what point the water is diverted or by what means.[17] He must divert on his own land as between himself and the owner of the land his ditch crosses;[18] but he is not restricted to diversions on his own land so far as concerns strangers to the land on which he diverts. In Turner v. James Canal Co.[19] Mr. Justice Shaw says: "It has, during such periods, a right to take its share of the water from the main river at any convenient point thereon, whether such point of diversion is upon its own land or not, so long as such taking does not injuriously affect the rights of owners of land abutting upon the river between the point of diversion and the company's riparian land. The fact that it must carry the water from the river over intervening nonriparian lands, belonging to other persons, is of no consequence. The person over whose land it is carried could object, of course, but other riparian owners have no privity with such third person, and cannot avail themselves of his rights," and they "have no right to inquire, how, or by what means, or at

12 Ferrea v. Knipe, 28 Cal. 340, 87 Am. Dec. 128; Barneich v. Mercy, 136 Cal. 206, 68 Pac. 589.

13 Durga v. Lincoln etc. Co., 47 Wash. 477, 92 Pac. 343.

14 Radford v. Wood (1909), 83 Neb. 773, 120 N. W. 458; Trullinger v. Howe, 53 Or. 219, 97 Pac. 549, 99 Pac. 880, 22 L. R. A., N. S., 545.

15 Mentone Co. v. Redlands Co. (1909), 155 Cal. 323, 100 Pac. 1082, 22 L. R. A., N. S., 382, 17 Ann. Cas. 1222; Cook v. Seaboard etc. Ry., 107 Va. 32, 122 Am. St. Rep. 825, 57 S. E. 564, 10 L. R. A., N. S., 966, and cases cited in 122 Am. St. Rep. 830, note; Wood v. Craig, 133 Mo. App. 548, 113 S. W. 677.

16 Kidd v. Laird, 15 Cal. 161, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571, relying on common-law cases; Whittier v. Cocheco Co. (1838), 9 N. H. 458, 32 Am. Dec. 382.

17 Turner v. James Canal Co., 155 Cal. 82, 132 Am. St. Rep. 59, 99 Pac. 520, 22 L. R. A., N. S., 401, 17 Ann. Cas. 823.

18 Cal. etc. Co. v. Enterprise etc. Co. (Cal.), 127 Fed. 742.

19 (1909), 155 Cal. 82, 132 Am. St. Rep. 59, 99 Pac. 520, 22 L. R. A., N. S., 401, 17 Ann. Cas. 823. Accord, Redwater Co. v. Jones (S. D.), 130 N. W. 85. In the French law of riparian rights the same rule is laid down in Pardessus, Traite de Servitudes, vol. I, p. 262.

what place, he manages to divert his share from the stream, whether at a point on his own land, or at some point far above, where the elevation of the stream will be sufficient to carry it by gravity to the surface of his land, and whether by a dam and headgate, or by pumps and buckets. . . . . In such cases it may be that there will be an unreasonable waste of water by carrying it in open ditches subject to evaporation and seepage, and to that extent the method and place of diversion is a proper subject of inquiry in determining the comparative rights of different riparian owners." Against those below, one riparian owner may take water from the stream in a prescriptive ditch upon another's riparian land above him.[20]

(3d ed.)

§ 755. **Return of Surplus.**—While a riparian owner may divert the water within the above limitations, the surplus must in any case be returned to the stream, and must be returned above the upper line of the land of lower complaining riparian owners,[21] whether the use is for irrigation or water-power or any other purpose.[22] The manner of return is immaterial.[23] An artificial flow may be substituted in the return, for the natural flow; that is, the return may be made through a ditch instead of the natural channel,[24] and it is sufficient if returned above the lower owner's boundary, though this may be below the defendant's boundary, there being intervening owners who do not complain.[25] One owning both banks of a

20 Logan v. Guichard (Cal. 1911), 114 Pac. 989, holding however, that such prescriptive ditch can carry water as against lower owners only for riparian use, and only (as against the upper owner) the amount used during the prescriptive period, even though as riparian owner he has a right to more elsewhere on the stream (*semble*).

21 Bathgate v. Irvine, 126 Cal. 135, 77 Am. St. Rep. 158, 58 Pac. 142; Meng v. Coffey, 67 Neb. 500, 108 Am. St. Rep. 697, 93 N. W. 715, 60 L. R. A. 910; Nielson v. Sponer, 46 Wash. 14, 123 Am. St. Rep. 910, 89 Pac. 155, saying a statute to the contrary would be unconstitutional.

22 Weiss v. Oregon etc. Co., 13 Or. 496, 11 Pac. 255; City of Canton v. Shock, 66 Ohio St. 19, 90 Am. St. Rep. 557, 63 N. E. 600, 58 L. R. A. 637.

23 Mason v. Cotton (C. C.), 4 Fed. 792, 2 McCrary, 82; Gould v. Eaton, 117 Cal. 539, 49 Pac. 577, 38 L. R. A. 181; Wiggins v. Muscupiabe etc. Co., 113 Cal. 182, 54 Am. St. Rep. 337, 45 Pac. 160, 32 L. R. A. 667.

24 Mason v. Cotton (Colo.), 4 Fed. 792. See *supra*, sec. 279.

25 *Ibid.*, and cases in last section. "De même, encore bien que le texte littéral de l'article 644 oblige celui qui détourne l'eau sur sa propriété, à lui rendre son cours naturel à la sortie de son fonds, si, la position du terrain présentant quelques obstacles, il ne rendoit l'eau que par une sortie pratiquée sur un autre fonds dont il n'est pas propriétaire, mais avec le consentement du maître de ce fonds, le voeu de la loi nous sembleroit être suffisamment rempli." Pardessus, Traite de Servitudes, vol. I, p. 263.

stream may change the course of the stream as he chooses within his boundaries, so long as he returns it to its natural channel above the lower claimant without unreasonable diminution.[1]

For example of what is held unreasonable, the facts in a Nebraska case were: "It takes the water away from the creek to a point about a mile off, where the dip is but very slightly toward the creek, and there discharges it, so that practically all that is not used in irrigation will, in hot weather, evaporate, and not return to the creek. On one occasion, when the season was very dry in that vicinity, and a number of Mr. Brewster's neighbors below him were complaining because they could get no water, it appears that he was turning the water upon a meadow of eighty to one hundred acres, so that it stood there from one to one and one-half inches deep; and, as we have seen, what was not used was substantially wasted. This is obviously unreasonable."[2]

(3d ed.)

§ 756. Possibility for a Riparian Administrative System.—This system of law would seem to offer a field for administrative legislation; in fact, a readier field than the law of prior appropriation. Where the test is what is reasonable in each case, discretion must necessarily come into play, whereas where parties have exclusive rights measured by priority there is (theoretically) little room for the exercise of discretion by administrative officers (though in practice under the Wyoming system the water officials assume more or less to exercise discretion, and are thereby modifying the law of appropriation along the lines of the common law). Where the common law applies the test of reasonableness, legislation is apt and readily applied; as, for example, in dealing with public service companies. The common law says their rates and regulations must be "reasonable," and accordingly public service commissions and similar bodies are created. Likewise under the new law of percolating water "reasonable use" has become the test, and statutory regulation based thereon is being adopted.[3] As yet, however, there has been no attempt to provide a statutory system governing the reasonable use of water by riparian proprietors among themselves.

[1] Mentone Irr. Co. v. Redlands Co., 155 Cal. 323, 100 Pac. 1082.

[2] Meng v. Coffey, 67 Neb. 500, 108 Am. St. Rep. 697, 93 N. W. 715, 60 L. R. A. 910.

[3] *Infra*, sec. 1142.

in jurisdictions applying that system, though there would seem a clear field for such legislation if desired.[4]

[4] See Head v. Amoskeag Co., 113 U. S. 9, 5 Sup. Ct. Rep. 441, 28 L. Ed. 889; Blackstone Mfg. Co. v. Town of Blackstone, 200 Mass. 82, 85 N. E. 880, 18 L. R. A., N. S., 755.

§§ *757–764. (Blank numbers.)*

CHAPTER 33.

LIMITATIONS ON USE OF WATER BETWEEN RIPARIAN PROPRIETORS THEMSELVES (CONTINUED).

USE CONFINED TO RIPARIAN LAND.

§ 765. Introductory.
§ 766. Use confined to riparian land.
§ 767. Same.
§ 768. What is riparian land—Must touch the stream.
§ 769. Receding from the stream—Recession of land title.
§ 770. Same.
§ 771. Same.
§ 772. Same.
§ 773. Within the watershed.
§ 774. Bounded by reasonableness in each case.
§ 775. Conclusions as to riparian land.
§§ 776–794. (Blank numbers.)

(3d ed.)

§ 765. Speaking generally, nonriparian owners are excluded entirely from rights in the stream, and riparian owners are given rights only for use on their own riparian land; they also cannot take the water to nonriparian land, whether it be their own or someone else's. The point illustrates the philosophy of the riparian system, which presupposes a closely settled region with a community of people living along the banks of the stream itself and sharing the water between them, each for his own need alone.

(3d ed.)

§ 766. **Use Confined to Riparian Land.**—The limitation to riparian land arises, first, by the exclusion of nonriparian owners because their lands have no access to the water; second, because he who has access (the riparian proprietor) can excuse the damage (which any taking may cause to the land of other riparian proprietors) only on the ground of a reasonable use of his own land. The water in the stream being nobody's property, the riparian proprietors, having alone access to the stream, could alone use it.[1] Any use by one at all usually means damage to the others (that is, a lessening of the opportunities and benefits or natural ways in which

1 *Supra*, sec. 692 et seq.

the flow contributes to the potentialities of their estates), but such damage is *damnum absque injuria* so far (and only so far) as done in the reasonable use of the taker's own (the riparian) land. Nonriparian owners are thus first excluded because they have no access to the stream, and riparian owners (who have access) are then confined to use on their own land as the ground upon which the damage which the use causes to the estates of other proprietors becomes *damnum absque injuria.* This principle, that damage caused to a neighbor in reasonable use of one's own land (and there only) is *damnum absque injuria,* runs through the entire law of waters, as elsewhere more fully set forth[1a] and, with the fact of access, founds the limitation to riparian use.[2]

The use of the water by any proprietor is not only limited to a reasonable amount, but the water must be used upon the riparian land, from ownership of which the right arises, and cannot be used upon distant or nonriparian land to the detriment of the riparian estate of any riparian owner.[3] Such land has no access to the stream, and no right to the benefit of the water flows from its ownership. Water cannot, under the doctrine of riparian ownership, be used, to the detriment of the riparian estate of any riparian owner,

1a *Supra,* sec. 741; *infra,* sec. 1119.

2 "The theory upon which the right of a riparian owner to be protected in the use of the waters of a stream to which his lands are riparian is that, nature having given these lands the benefit of the flow and the natural advantage of its use on the lands, one riparian owner may not divert these waters to lands not riparian, to the injury of another riparian owner who can use them. The same principle has been applied, as we have seen, to the use of waters as between the owners of lands overlying a common stratum of percolating waters." Miller v. Bay Cities W. Co., 157 Cal. 256, 107 Pac. 115.

3 Gould v. Eaton, 117 Cal. 539, 49 Pac. 577, 38 L. R. A. 181; Gould v. Stafford, 77 Cal. 66, 18 Pac. 879; Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. 1113; Same v. Same, 151 Cal. 377, 90 Pac. 935; Broadmoor etc. Co. v. Brookside etc. Co., 24 Colo. 541, 52 Pac. 792; Redwater Co. v. Reed (S. D.), 128 N. W. 702; Swindon W. W. Co. v. Wilts etc. Co., L. R. 7 H. L. 697, and cases cited throughout this chapter. "It is also plain that he was not the 'owner' nor entitled to the 'exclusive use' of the water by virtue of being a riparian proprietor. As such riparian owner the water was parcel of the land, and he, as against other riparian owners, was entitled only to a reasonable use of the water upon the riparian lands, with no power to convey it elsewhere to the detriment of the riparian owner below him on the stream." Gutierrez v. Wege, 145 Cal. 733, 79 Pac. 449. One case speaks of the upper owner, and says he may irrigate, "but it is clear that in no case can he, for that purpose as against the lower owner, use all the water of the stream. . . . . Whatever may be the right of the upper proprietor to use part of the water of the stream to irrigate his riparian land, he has no right to take any of it away to lands not riparian," saying, because the surplus belongs to the man below. Gould v. Stafford, 77 Cal. 66, 18 Pac. 879.

to irrigate nonriparian land.[4] Riparian owners will be enjoined from using the water on nonriparian lands owned by them.[5] The above authorities hold the rule the same whether the nonriparian use is for nonriparian owners, or for nonriparian lands belonging to a riparian owner. Water cannot be taken to irrigate distant land merely because the claimant also owns riparian land.[6] Nor, to the detriment of the riparian estates of other owners, can one riparian owner divide his estate and give the portions now separated from the stream a right to use the water.[7]

In stating the rule above we have used the words "to the detriment of the riparian estate of any other riparian owner," though there is doubt upon the propriety of the insertion and much in the authorities just cited which would support a rule that the nonriparian use is an injury *per se*, and that no actual or possible damage to the riparian estate of the complaining proprietor need be shown.[8]

The rule against nonriparian use applies to "natural" uses (domestic uses) with the same force (if not more) as to other or "artificial" uses.[9] The rule is the same in the civil law as in the common law.[10]

(3d ed.)

§ 767. **Same.**—An important illustration is that (except by grant, condemnation or prescription) water cannot, at common

4 Gould v. Stafford, 77 Cal. 66, 18 Pac. 879; Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. 1113; Same v. Same, 151 Cal. 377, 90 Pac. 935.

5 Anaheim Water Co. v. Fuller, 150 Cal. 327, 88 Pac. 978.

6 Boehmer v. Big Rock etc. Co., 117 Cal. 19, 48 Pac. 908; Gould v. Stafford, 77 Cal. 66, 18 Pac. 879. See Alta etc. Co. v. Hancock, 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. 645; McClintock v. Hudson, 141 Cal. 281, 74 Pac. 849; Anaheim W. Co. v. Fuller, *supra*.

7 See *infra*, secs. 769, 847.

8 See the following chapters.

9 Bathgate v. Irvine, 126 Cal. 135, 77 Am. St. Rep. 158, 58 Pac. 442; Broadmoor etc. Co. v. Brookside etc. Co., 24 Colo. 541, 52 Pac. 792.

10 "C'etait autrefois un point controversé, que celui de savoir si le riverain d'un cours d'eau naturel, non compris dans le domaine public, pouvait, pour l'irrigation de ses proprietés non-riverain, disposer des eaux dont il avait l'usage comme riverain, et le negative est assez généralement admise." Adding that nevertheless another nonriparian proprietor cannot on this ground prevent him from getting a right of way for such waters; that is, only other riparian proprietors can raise the point. Droit Civile Francais, par Aubrey & Rau, 4th ed., vol. III, p. 14, note 5. The authors further expressly say (Id., 17, note 13): "En d'autres termes, les propriétaires des fonds intermédiaires ne peuvent pas, afin de faire réduire le volume d'eau pour lequel le passage est demandé, se prévaloir des droits des autres riverains, qui ne s'opposeraient pas a la prise d'eau tell qu'elle a été pratiquée."

law, be taken from a stream either by a riparian proprietor or a nonriparian proprietor for the purpose of sale off the land where taken. This has frequent application in cases where cities or city-supply water companies purchase a parcel of land along a stream and then seek to divert the stream to the city. Absolute injunctions are usually granted. A further consideration of this is left to later sections.[11]

(3d ed.)

§ 768. What is Riparian Land—Must Touch the Stream.—"It is only the tracts next the stream which are riparian lands, and the owners of such tracts are alone riparian owners."[12] They alone have the right of access from which the right to take the water arises. "It is, *of course*, necessary to the existence of a riparian right that the land should be in contact with the flow of the stream."[13] To be a riparian proprietor one must have access to the stream over the land he owns. "It is by virtue of that right of access that he obtains his water-rights."[14]

Land bordering on a stream except for a public highway along the bank is probably to be regarded as riparian whether the public owns the fee or only as easement in the roadbed. In Louisiana there is an extensive system of public levees to hold the rivers, and the public passes along the levees as highways. The rule is there that land bordering upon the levee is riparian to the stream, though the levee be some distance back from the actual water; the levee is regarded as the real bank of the river.[15]

Lands in the flood plain of a river give rise to a difficult state of facts. Within a broad shallow bottom the stream may meander to and fro, at times shifting its course from side to side but not filling the whole except in times of flood. The land abutting only

[11] *Infra*, sec. 815 et seq., protection against nonriparian use; sec. 847, grants; sec. 1123, percolating water.

[12] Lux v. Haggin, 69 Cal. 255, 10 Pac. 674.

[13] Lord Selborne in Lyon v. Fishmongers' Co., L. R. 1 App. Cas. 673, italics ours. See Strong v. Baldwin, 154 Cal. 150, 129 Am. St. Rep. 149, 97 Pac. 178, *dictum contra*, but dealing with what was in fact a different matter. (See *infra*, sec. 845, grant *inter partes*.) "In order for one to have riparian rights there must be an actual water boundary of the land in connection with which such rights are claimed." Axline v. Shaw, 35 Fla. 305, 17 South. 411, 28 L. R. A. 391. See, also, Buchannan v. Ingersoll Co., 30 Ont. Rep. 456.

[14] Stockport W. W. v. Potter, 3 Hurl. & C. 300, 10 Jur., N. S., 1005.

[15] Hart v. Board of Commissioners, 54 Fed. 559. See McCloskey v. Pac. Coast Co., 160 Fed. 794, 87 C. C. A. 568.

on the outer rim of such a bottom was held [16] to be riparian when the stream is swollen. On the other hand when the stream is partly dry, the dry spots of what is bed only in time of flood, now are on the bank. Such bottom land alternating between the character of bed and of bank with the alternating water stage, has been held to be riparian land while dry.[17] In the same case it is left open whether, in determining what land is riparian, a river is to be considered only with regard to the surface flow, or whether lands abutting upon the wider space through which the subflow extends, are also to be considered riparian though not touching the surface flow. That is, whether land abutting upon the underflow is equivalent to abutting upon the stream.[18] That such land is riparian seems to be held in a later case.[19]

The bed of the stream is not riparian land, nor is one owning only the bed a riparian proprietor. This was held in Lux v. Haggin,[20] with regard to the owner of land all covered by a swamp through which a moving current, as of a stream, appeared.

Land abutting on a bay, inlet or slough connecting with a stream has a right to use the water equal to the rights of those owning land abutting upon the stream itself.[21]

The altitude of the bank does not affect the riparian character of the land touching the stream, nor does a high bank upon which the water cannot be brought without pumps deprive the owner of use of the water.[22]

As between themselves, alone, parties to a contract, partition or other conventional arrangement may define riparian land as they like.[23] The present discussion is as to the definition given by law between independent riparian proprietors.

(3d ed.)

§ 769. Receding from the Stream—Recession of Land Title.—Looking, for the present, only to land title, all land is, as an out-

[16] Ventura etc. Co. v. Meiners, 136 Cal. 284, 89 Am. St. Rep. 128, 68 Pac. 818.

[17] Anaheim etc. Co. v. Fuller, 150 Cal. 337, 88 Pac. 978, 11 L. R. A., N. S., 1062.

[18] See *infra*, sec. 1078, subflow.

[19] Where an intermittent stream diffuses itself underground through a valley, valley owners are riparian to the stream though not touching its surface channel. *Semble*, Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748. See, also, Miller v. Bay Cities Water Co. (1910), 157 Cal. 256, 107 Pac. 115.

[20] 69 Cal. 255, at 413, 10 Pac. 674.

[21] Turner v. James Canal Co. (1909), 155 Cal. 82, 132 Am. St. Rep. 59, 99 Pac. 520, 82 L. R. A., N. S., 401, 17 Ann. Cas. 823.

[22] Charnock v. Higuerra, 111 Cal. 478, 52 Am. St. Rep. 195, 44 Pac. 171, 32 L. R. A. 190.

[23] Strong v. Baldwin (1908), 154 Cal. 150. **See *infra*, secs. 845, 846, alienation.**

side limit so far as title is alone concerned, riparian, which has unbroken access to the stream at the time of use thereon. It has access if there is no land intervening between it and the stream belonging to some other person. It is all that land of the bank-owner extending back from the stream until his land continuity ends; that land from the end of which the owner may pass continuously over his own land to the stream without having to go upon land not owned by him. All such land at the time of use has access to the stream, and is (so far as land title affects the question) riparian. The past history of the title has no bearing upon this simple question of physical fact of access at the time of use, for such land at that time has access and is riparian as regards title, whether held in one parcel from time immemorial, or built up of numerous small contiguous parcels acquired at different times. (Remembering always that use on even riparian land must be reasonable, and that the land must, as a further test, lie within the watershed, as hereafter discussed.)

We have stated that the ownership at time of use alone governs the question of title, because upon principle we think this clear; but the authorities are by no means unanimous. That the boundary at time of use governs to *exclude* land formerly but not then owned, there is no conflict. Land which was once part of an abutting tract but was severed therefrom by sale ceases, while so severed, to be riparian for the purpose of use thereon after the sale, since its right of access is lost.[24] But that the boundary at times of use governs to *include* contiguous land then owned by the bank owner, being one of several contiguous parcels in a chain reaching to the stream but acquired at different times, is a point upon which the authorities do not agree.

(3d ed.)

§ 770. **Same.**—Upon this point the Nebraska court has held that riparian land stops at the end of a single original entry of

[24] Stockport W. W. v. H. Potter (1864), 3 Hurl. & C. 300, 10 Jur. N. S., 1005; Alta L. Co. v. Hancock, 85 Cal. 229, 20 Am. St. Rep. 217, 24 Pac. 645; Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748.

"If the owner of a tract abutting upon a stream conveys to another a part of the land not contiguous to the stream, he thereby cuts off the part so conveyed from all participation in the use of the stream and from riparian rights therein." Mr. Justice Shaw, in Anaheim W. Co. v. Fuller, 150 Cal. 327, 88 Pac. 798, 11 L. R. A., N. S., 1062. What the effect of a declaration in the conveyance to the contrary would be, see *infra*, sec. 847. As against the grantor, his successors and privies, a water-right may be conveyed with the severed portion, but not as against other riparian owners strangers to the transaction.

the land from the government when the land was taken up from the public domain, and that subsequent entries or purchases of contiguous land cannot extend the riparian character thereto.[25] The court relied for this on Lux v. Haggin.[1]

The passage in Lux v. Haggin[2] is: "If, however, lands have been granted by patent, and the patent was issued on the cancellation of more than one certificate, the patent can *operate by relation* (*for the purpose of this suit*) to the *date* of those certificates only, the lands described in which border on the stream." This was said "*for the purpose of this suit,*" namely, relating back against *an appropriator* to determine the dates of priority between the rival land grants and the water appropriation. Some land entries had been made before, and some after, Haggin's appropriation. The court in Lux v. Haggin distinctly limited the statement to the purpose of the case, which was, that only riparian land in private title at the date of an appropriation of water could claim priority for its riparian right, being merely a reaffirmance of the principle discussed in Osgood v. Water Company, cited and relied on, Lux v. Haggin saying:[3] "It was there held that . . . . the rights of the pre-emption claimant, as against an appropriator, date only from his patent or certificate of purchase." Some of plaintiff's land entries which did not border on the stream had been joined to the stream by entry of the intervening land, such junction being effected *after* the water had already been diverted while the intervening land was yet public. The question was as to the *date* of the entries, not as to their extent. Lux v. Haggin consequently was not at all holding as to the extent of riparian land at common law between riparian proprietors, but holding that the riparian right as against a subsequent appropriator relates back only for the purpose of the land bordering on the stream whose certificates (or entry[4]) existed at the date of the appropriation; a prior appropriation prevailing against a later entry. This is, of course, a proper holding.[5] It

[25] Crawford v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647, 93 N. W. 781, 60 L. R. A. 889.

[1] 69 Cal. 255, 425, 10 Pac. 674.

[2] We quote the concluding sentence, which sums up the whole passage.

[3] At page 438. In regard to the Osgood case see *supra*, sec. 261.

[4] See *supra*, sec. 261, prior settlers.

[5] Lux v. Haggin says: "Here the plaintiffs have patents which relate back to the certificates (the contracts of the plaintiffs and their assignors having been fully performed), so as to protect them in their title to the lands, with all their incidents. Assuming that the rights of these parties *are to be determined by the decision of the question*, Did the plaintiffs acquire a right to their lands *before* the defendant appropriated the waters? the patents of the

decides nothing as to the extent of riparian land at common law, but only enforces the right of the prior appropriator on public land against later entries of the land. It held that the entry of new riparian land by Lux could not thereafter affect Haggin's appropriation, but decided or said nothing about Lux's right to use water on such new land as against other riparian proprietors.[6] For the court says in Lux v. Haggin: "This cause was not tried on the theory that defendant was a riparian owner," adding that there was not even a pretense of such claim by defendant.[7]

The Kansas court, upon the same authorities as the Nebraska court, decided that the extent of riparian land as between riparian proprietors is not controlled by government subdivisions.[8] Nor does the California court accept the rule that a governmental entry bounds riparian lands where the rights of appropriators intervening between successive entries are not involved.

This test of governing riparian character by governmental entries arose from a plain misunderstanding of Lux v. Haggin and is indefensible on principle. It is not a common-law test at all, for in most common-law jurisdictions governmental entries are unknown.

(3d ed.)

§ 771. **Same.**—The California decisions, while not controlled by governmental subdivisions, lean toward holding the extent of riparian land to the smallest parcel touching the stream in the history of the title while in the hands of the present owner. Purchase of contiguous land does not, thus, make it riparian, whether of new land never before owned, or of land formerly part of the same parcel severed by sale and then bought back. Thus, in Boehmer v. Big Rock Irr. Dist.[9] it is said, "Mere contiguity cannot extend a riparian right." This, of course, is unsound, if the riparian right arises from access to the stream, since contiguity

plaintiffs related to the certificates of purchase *as against the defendant's appropriation.*" Lux v. Haggin, 69 Cal. 430, 10 Pac. 674.

[6] See 69 Cal. 311, 10 Pac. 674.

[7] 69 Cal. 311, 10 Pac. 674. The matter arose as a question of evidence. In his case in chief the riparian owner showed land titles of a certain date, and the question was whether, after the appropriator had showed an earlier diversion on public land, the riparian owner *in reply* could offer certificates of a still earlier *date;* and the court held that he could, but that an earlier certificate not touching the stream would not prevent the diversion, if not joined to the stream until after the diversion had already taken place.

[8] Clark v. Allaman, 71 Kan. 206, 80 Pac. 571, 70 L. R. A. 971.

[9] 117 Cal. 27, 48 Pac. 908.

does not extend, but gives and founds the right. The court viewed it as a question of extending the right of the originally owned land to that newly bought, when, on the contrary, the newly bought land has an original right of its own just because of its acquiring access or contiguity to the stream. The opinion also cited the passage from Lux v. Haggin above quoted, and makes the same mistake as to its meaning; namely, the passage referred to priority between successive entries of public land by a riparian owner as against an intervening appropriator on public land, and had no reference to riparian owners between themselves.[10]

The same view is taken in a more recent case,[11] saying that land conveyed and severed from a stream can never again be regarded as riparian, although it may thereafter be reconveyed to the person who owns the part abutting on the stream so that the two tracts are again held in one ownership, citing again the passage from Lux v. Haggin above referred to. The reconveyance in the case was made after the suit was brought, which probably distinguishes the case from the rule it lays down. Such a rule would impede the settlement and irrigation of lands, enforcing a restriction which may make it impossible ever to put the full capacity of a stream to use where subdivision and sale and repurchase have cut up the historical continuity of title of tracts, so as to leave merely narrow strips alone riparian. The quantity of riparian land in the State would be continually and irrevocably dwindling. Whether land is riparian could never be told without an abstract of title. It would work in restraint of alienation. It is not demanded in reason, since the riparian use must not be unreasonable in its character, whatever the extent of the riparian land. It is not consistent with the views expressed in the opinion in Alta etc. Co. v. Hancock,[12] where it is said that the riparian right extends "to each and every tract [1280 acres in that case] *held as an entirety,* bordering upon the stream, whatever its extent," subject to the restriction of reasonable use with due regard to the use required by the other proprietors. It is not consistent with the simple principle that the riparian right arises out of access and extends, as concerns title,

[10] In Lux v. Haggin, the appropriation intervened between the various entries, but in Boehmer v. Big Rock Co. the appropriation was subsequent to *all* the land entries. How could *an appropriator* properly question ***how much*** riparian land belonged to the riparian owner? See *infra,* sec. 814 et seq.

[11] Anaheim Water Co. v. Fuller, 150 Cal. 327, 88 Pac. 978, 11 L. R. A., N. S., 1062.

[12] 85 Cal. 230, 20 Am. St. Rep. 217, 24 Pac. 645.

to all land having access to the stream. It is founded on a misinterpretation of Lux v. Haggin. It is emphatically rejected in Oregon in the well-considered case quoted at length in a succeeding section [13] (and approved by the supreme court of Kansas),[14] where the rule is laid down as set forth at the beginning of this section; viz., that all land may, so far as title is the test, be riparian, which is part of a tract in one ownership abutting upon a stream and having access to it exclusively through land of the same owner (subject, always, to the use thereon being reasonable in degree).

The following is a statement of the general common law: "If riparian property becomes divided between two owners, so that one portion no longer adjoins the stream, that portion no longer retains any riparian rights.[15] *Conversely, land which adjoins riparian land may become itself riparian by becoming united therewith in ownership.*" [16]

Summing up the authorities: the new land, with the old, is held riparian during the union as one entire holding, in California,[17] Kansas,[18] and Oregon.[19] Such is stated as the common law of England,[20] and is the civil law. It is said not to be riparian, though during the union into one, in some cases in California [21] and Nebraska,[22] and Texas.[23] In these latter, however, the point was but *dictum*, and founded upon a misunderstanding of a passage in Lux v. Haggin; and a very recent California case now lays down the rule in general terms that all whose lands have access to the stream in its natural situation have a right to make a reasonable use of the water "*upon the lands so situated.*" [24]

As the same question arises in the civil law, a statement of the civil law may be of some interest. The French law is: "To solve the question what is contemplated by riparian land, one must look

[13] Jones v. Conn, 39 Or. 30, 87 Am. St. Rep. 634, 64 Pac. 855, 65 Pac. 1068, 54 L. R. A. 630.

[14] Clark v. Allaman, 71 Kan. 206, 80 Pac. 571, 70 L. R. A. 971.

[15] Citing Stockport W. W. v. Potter (1864), 3 Hurl. & C. 300, 10 Jur., N. S., 1005.

[16] Salmond on Torts, p. 252. (An English authority.)

[17] Alta etc. Co. v. Hancock, 85 Cal. 230, 20 Am. St. Rep. 217, 24 Pac. 645.

[18] Clark v. Allaman, 71 Kan. 206, 80 Pac. 571, 70 L. R. A. 971.

[19] Jones v. Conn, 39 Or. 30, 87 Am. St. Rep. 634, 64 Pac. 855, 65 Pac. 1068, 54 L. R. A. 630.

[20] Salmond on Torts, p. 252.

[21] Boehmer v. Big Rock Irr. Dist., 117 Cal. 27, 48 Pac. 908; Anaheim W. Co. v. Fuller, 150 Cal. 327, 88 Pac. 978, 11 L. R. A., N. S., 1062.

[22] Crawford Co. v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647, 93 N. W. 781, 60 L. R. A. 889.

[23] Watkins L. Co. v. Clements, 98 Tex. 578, 107 Am. St. Rep. 653, 86 S. W. 733, 70 L. R. A. 964.

[24] Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748.

to the state of things at the time the claim of use is made. Consequently, when the proprietor of a riparian estate has increased it by new acquisitions, or the owner of an estate separated from the flow of a stream has acquired the intervening land joining this estate with another one bordering on the stream, the right to use the water may be claimed for all the parcels thus united into one."[25]

(3d ed.)

§ 772. **Same.**—That augmentation of a riparian estate should permit a reasonable use on the new land, having always in mind the requirements of other riparian owners, is a part of the common-law foundation of the riparian right, viz., that the rights of riparian owners between themselves each to make a reasonable use of his entire land having natural access to the stream depend upon the surrounding circumstances and vary with the conditions. That riparian land varies by diminution when part is sold off, is established; and so it expands by adjacent purchase. In both cases this leads to uncertainties from time to time, but as much so in the former, where the rule is not doubted, as in the latter. The objection upon the ground of making the right vary by increase is of no more force than in cases of decrease. The variation being to secure equality and reasonable use, the objection disappears in view of the fact that use on the new land (though riparian) would be permitted only if the court (or jury) is convinced that such enlarged use is not unreasonable, and only in clearest cases that no unreasonable damage is done to other owners or their estates. For example, an apportionment may have been made between riparian owners where one riparian owner owns fifty acres and another five hundred acres, all irrigable, and, other things being equal, the latter was given five hundred inches of water and the former only fifty. A year later the former buys four hundred and fifty acres

[25] Droit Civile Francais, by Aubrey & Rau, 4th ed., vol. III, p. 48: ("Pour resondre la question de ce qu'il faut entendre par fonds riverains, on doit s'attacher à l'état des lieux tel qu'il existe au moment ou est formée la réclamation tendant à l'usage des eaux. Ainsi, lorsque le proprietaire d'un fords riverain l'a augmenté par de nouvelles acquisitions, ou que le propriétaire d'un fonds séparé de cours d'eau en opéré la jonction avec un fonds qui y touche, le droit à l'usage des eaux peut etre réclamé pour l'ensemble des héritages ainsi réunis et en seul.") Citing authorities, viz.: Daviel II, 586; Bertin, Code des Irrigations, Nos. 70 to 74; Demolombe, XI, 152; Limoges, 9 Aout 1838; Dalloz, 1839, 2, 37; *contra*, Duranton, V, 235; Prudhon, Du Domaine Public IV, 1426; Du Curroy, Bonnier et Roustam, II, 271. Other civil-law authorities are quoted *infra*, sec. 1627.

adjoining and both now own the same amount of land and have the same needs. Is it in consonance with the principle of equality to permit the one to practically monopolize the whole stream, when their needs are now equal? It would clearly not be reasonable in all cases to redivide the stream by halves, for expenditures or change of position in reliance upon the former division becomes an important factor in deciding what is reasonable under the new conditions. But that is a matter for the trial judge or jury to consider, and if he is still convinced on all the facts that a larger share can be apportioned for the other owner's now larger area without doing unreasonable detriment, then, if we are correct, both justice and the law require that he should so adjudge.[1]

(3d ed.)

§ 773. Within the Watershed.—Whether the riparian land extends to all that contiguous tract in one ownership extending back from the stream, and having access to it, at the time of use, or only to the smallest such tract in the history of the claimant's title, in either case the tract may recede far from the stream, and then a further restriction arises. While the boundary line (however computed) is the outside limit, it is not the sole test.[2] As the land recedes from the stream under the same ownership, it is a somewhat unsettled question when it ceases to be riparian inside of the above considered boundary line. There are two rules held by different courts (which, for convenience, we call the California Rule and the Oregon Rule), viz.: (1) *The California Rule*, that it ceases within his boundary at the top of the watershed. (2) *The Oregon Rule*, that it remains a question of fact in each case depending upon the reasonableness of effect of use thereon upon other proprietors.

The rule stated by the California court is that riparian land stops with the watershed. Water used within a watershed surely finds its way back to the stream.[3] The court says:[4] "The principal reasons for the rule confining riparian rights to that part of lands bordering on the stream which are within the watershed

1 See *supra*, sec. 752.

2 Bathgate v. Irvine, 126 Cal. 135, 77 Am. St. Rep. 158, 58 Pac. 442; Boehmer v. Big Rock etc. Co., 117 Cal. 19, 48 Pac. 908; Gould v. Stafford, 77 Cal. 66, 18 Pac. 879. See Alta etc. Co. v. Hancock, 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. 645.

3 Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. 1113, per Henshaw, J.

4 Anaheim etc. Co. v. Fuller, 150 Cal. 327, 88 Pac. 978, 11 L. R. A. N. S., 1062.

are that where the water is used on such land it will, after such use, return to the stream, so far as it is not consumed, and that as the rainfall on such land feeds the stream, the land is, in consequence, entitled, so to speak, to the use of its waters." Consequently, under the California rule, land beyond a watershed, though within the continuous boundary, is nonriparian.[5] In the recent case of Anaheim Water Co. v. Fuller[6] the court says: "Land which is not within the watershed of the river is not riparian thereto, and is not entitled as riparian land to the use or benefit of the water from the river, although it may be a part of an entire tract which may extend to the river." And in a still later case says:[7] "Moreover, it is without dispute in the case, and so declared upon the appeal in the 144 Cal. *supra*, that the lands upon which the waters are derived are valueless for agricultural purposes, and the waters are carried for use to cities, towns and fertile lands beyond the watershed. A riparian proprietor's claim to make such use of the waters of a stream is of course without legal foundation."

The Kansas court accepted this same rule,[8] saying: "In 3 Farnham on Waters, 1903, it is said: 'All conceptions of riparian land lead to the conclusion that it is land which is tributary to and lying along a watercourse, and as soon as the "divide" is passed and the watershed of another stream is reached, the land cannot be regarded as riparian with reference to the former stream, and since the right to water depends upon the land being riparian, the destruction of the riparian character destroys the right to irrigate.' Within these limits the principle of equality of right announced above should control the use of water for irrigation purposes by those whose land is affected by the presence of the stream irrespective of the incidental matter of governmental subdivision of the land."

[5] Chauvet v. Hill, 93 Cal. 407, 28 Pac. 1066; Silver Creek etc. Co. v. Hayes, 113 Cal. 142, 45 Pac. 191; Wiggins v. Muscupiabe Water Co., 113 Cal. 182, 54 Am. St. Rep. 337, 45 Pac. 160, 32 L. R. A. 667; Bathgate v. Irvine, 126 Cal. 136, 77 Am. St. Rep. 158, 58 Pac. 442; Southern Cal. etc. Co. v. Wilshire, 144 Cal. 68, 77 Pac. 767; Pomona W. Co. v. San Antonio W. Co. (*dictum*), (1908), 152 Cal. 618, 93 Pac. 881; Miller v. Bay Cities Co., 157 Cal. 256, 107 Pac. 115,

[6] 150 Cal. 327, 88 Pac. 978, 11 L. R. A., N. S., 1062.

[7] Montecito etc. Co. v. Santa Barbara, 151 Cal. 377, 90 Pac. 935.

[8] Clark v. Allaman, 71 Kan. 206, 80 Pac. 571, 70 L. R. A. 971. See, also, McCarter v. Hudson W. Co., 70 N. J. Eq. 695, 118 Am. St. Rep. 754, 65 Atl. 489.

In the case of Anaheim W. Co. v. Fuller [9] a distinction was made between the major watershed of a stream system, and the minor watershed of any individual tributary. It was held that watersheds of branch streams must be considered separately from each other and from the watershed below their junction. Water taken in the watershed of a branch must be used within the watershed of that branch. It will not fulfill the rule for use within the watershed to use it within the watershed of the major stream system if the surplus would not flow back to other owners on the branch from which taken, but flow to the main stream through other branches. Mr. Justice Shaw said: "Where two streams unite, we think the correct rule to be applied, in regard to the riparian rights therein, is that each is to be considered as a separate stream, with regard to lands abutting thereon above the junction, and that land lying within the watershed of one stream above that point is not to be considered as riparian to the other stream. The fact that the streams are of different size, or that both lie in one general watershed, or drainage basin, should not affect the rule, nor should it be changed by the additional fact that the two watersheds are separated merely by the summit or crown of a comparatively low table-land, or mesa, as it is called in the evidence, and not by a sharp or well-defined ridge, range of hills, or mountains. The reasons for the rule are the same in either case." [10]

[9] 150 Cal. 327, 88 Pac. 978, 11 L. R. A., N. S., 1062.

[10] The limitation to the watershed probably got into the California law from the English case of Swindon W. W. Co. v. Wilts etc. Co., L. R. 7 H. L. 697, which is cited in a number of the California cases. Lord Cairns, Chancellor, said in the Swindon case: "But the use which has been made by the appellants of the water, and the use which they claim the right to make of it is not for the purpose of their tenements at all, but is a use which virtually amounts to a complete diversion of the stream, as great a diversion as if they had changed the entire watershed of the country, and in place of allowing the stream to flow toward the north, had altered it near its source, so as to make it flow toward the south. My lords, that is not a user of the stream which could be called a reasonable user by the upper owner; it is a confiscation of the rights of the lower owner; it is an annihilation, so far as he is concerned, of that portion of the stream which is used for those purposes; and that is done, not for the sake of the tenement of the upper owner, but that the upper owner may make gains by alienating the water to other parties who have no connection whatever with any part of the stream. . . . . It is a matter quite immaterial whether, as riparian owners of Wayte's tenement, any injury has now been sustained, or has not been sustained, by the respondents. If the appellants are right, they would, at the end of twenty years, by the exercise of this claim of diversion, entirely defeat the incident of property, the riparian right of Wayte's tenement. That is a consequence which the owner of Wayte's tenement has the right to

(3d ed.)

§ 774. Bounded by Reasonableness in Each Case.—The Oregon court in a well-considered case held that, within the outside limit of the owner's last boundary line (and placed that line where his contiguity to the stream stops, regardless of the history of his title or subdivision of his tract into parcels acquired at different times) the rule as to the watershed as an inside limit is but one of reasonableness depending upon the effect, under the evidence in each case, of the use upon complaining proprietors, and not a hard-and-fast rule. Within the boundary of single abutting ownership, what land the water may be used upon is held subordinate to what is reasonable use in each case. All such land is considered riparian, but even riparian use must be reasonable, so that the fixing of an inside limit is held not a question of what lands are riparian, but of what use on even riparian lands is a reasonable use. Consequently, under the Oregon rule, how far back from the stream a continuous tract may be irrigated depends entirely upon the question whether the use complained of is unreasonable on the proof, in its effect upon the land of the complaining proprietor. This is also undoubtedly the rule laid down in some California cases, and in general terms has been approved in other jurisdictions also.[11]

come into the court of chancery to get restrained at once by injunction or declaration as the case may be."

It is evident that the decision turned, not on the fact of use beyond the watershed, but on the fact of sale of the water and use *on the lands of other persons*. It did not involve nor say anything about use beyond a watershed upon the taker's own land constituting part of a continuous tract touching the stream.

[11] *California.*—Alta Co. v. Hancock, 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. 645; Charnock v. Higuerra, 117 Cal. 471, at 477 et seq., 44 Pac. 171.

Kansas.—See Clark v. Allaman, 71 Kan. 206, 80 Pac. 571, 70 L. R. A. 971.

New York.—Standen v. New Rochelle Co., 91 Hun, 272, 36 N. Y. Supp. 92, holding that the relative amount of watershed owned by adjoining riparian owners will not affect their individual rights to a proper use of the stream.

Texas.—Watkins Co. v. Clements, 98 Tex. 578, 107 Am. St. Rep. 653, 86 S. W. 733, 70 L. R. A. 964.

In a Wisconsin case it is said: "*The place where it may use* the water for power is *restricted only by its duty to refrain from injuring others.* The court is satisfied of the correctness and justice of its judgment. It is not deemed to be inconsistent with anything previously said or decided by this court, or with the decision of any other court to which attention has been called. It is believed to be grounded impregnably upon that widely applied mandate of the law, "*Sic utere tuo ut alienum non laedas.*" Green Bay C. Co. v. Kaukanna W. P. Co., 90 Wis. 370, 48 Am. St. Rep. 945, 61 N. W. 1121, 63 N. W. 1019, 28 L. R. A. 443. In the United States supreme court, Mr. Justice Holmes said in Hudson W. Co. v. McCarter (1908), 209 U. S. 349, 28 Sup. Ct. Rep. 529, 52 L. Ed. 828, that "a riparian proprietor has no right to divert waters for more than *a reasonable distance* from the body of the stream."

We quote at length from this Oregon decision.[12] Mr. Chief Justice Bean (now upon the Federal bench) delivered the opinion. The court says: "But as we understand the law, lands bordering on a stream are riparian, without regard to their extent. After a considerable search, we are unable to find any rule determining when part of an entire tract owned by one person ceases to be riparian." And on rehearing: "The plaintiffs insist that the court erred in not holding that the right of a riparian proprietor to use the waters of a stream for irrigating purposes does not extend beyond the watershed, or to lands not first segregated and sold by the government. This question was examined with great care before the opinion was formulated. No authorities are cited or arguments advanced in the petition for rehearing not then fully examined and considered, and therefore the conclusion heretofore reached will be adhered to."

It is not clear, on the facts of the case, whether the land, though over a low ridge, was or was not within the major watershed of the stream; but under the recent California case cited above, it would have made no difference in California. It would have been held nonriparian in either case. The court discusses the California decisions as follows:

"It would seem, therefore, that any person owning land which abuts upon or through which a natural stream of water flows is a riparian proprietor, entitled to the rights of such, without regard to the extent of his land, or from whom or when he acquired his title. The fact that he may have procured the particular tract washed by the stream at one time, and subsequently purchased land adjoining it, will not make him any the less a riparian proprietor, nor should it alone be a valid objection to his using the water on the land last acquired. The only thing necessary to entitle him to the right of a riparian proprietor is to show that the body of the land owned by him borders upon a stream. This being established, the law gives to him certain rights in the water, the extent of which is limited and controlled less by the area of his land than by the volume of water and the effect of its use upon the rights of other riparian proprietors. By virtue of the ownership of land in proximity to the stream, he is entitled to a reasonable use of the water, which is defined as 'any use that does not work actual, material and substantial damage to the common right

[12] Jones v. Conn, 39 Or. 30, 87 Am. St. Rep. 634, 64 Pac. 855, 65 Pac. 1068, 54 L. R. A. 630.

which each proprietor has, as limited and qualified by the precisely equal right of every other proprietor.'[13] In the determination of what will be considered such a use in a particular case the character and extent of the land, its location, and the time of acquiring the title may all become, and are, no doubt, important factors to be considered; but they are not controlling, and each case must depend entirely upon its own facts and circumstances. The case of Boehmer v. Irrigation Dist.[14] would seem to make the extent of riparian rights depend upon the source of title, rather than the fact of title; but in Water Co. v. Hancock,[15] it was expressly held that all land bordering upon a stream which is held by the same title—in that instance consisting of 1,280 acres—is riparian, and no distinction was made on account of the source of title. Again, in Wiggins v. Water Co.[16] and Bathgate v. Irvine,[17] the right of a riparian proprietor to use the waters of a stream for irrigation was limited to the watershed. But, as we understand these cases, the court in each instance was determining the rights of the parties then before it, and not attempting to lay down an inflexible rule as a guide in all cases. Nothing more was held or decided than that under the claim alone of riparian rights the owner of land cannot, to the injury of another riparian proprietor, take the water beyond the watershed, or onto lands held by a title different from the title of those through which the stream flows; and this all will concede. The right to make a reasonable use of the water of a stream is a right of property, depending on the ownership of the land abutting on or through which the stream flows; and whether a given use is reasonable or not is a question of fact to be determined under the circumstances of each particular case. The right to use the water belongs to the owner of the land, and the extent of its exercise is not to be determined by the area or contour of his land, but by its effect upon riparian proprietors."

This Oregon rule naturally follows from the doctrine of the riparian right as one arising out of access, to take the water as a privilege belonging to the owner of all land having access to the stream, where the taking does damage which is *damnum absque injuria* if done in the reasonable riparian use of another proprietor, or where the taking does no damage at all to the possibility of

[13] Citing Kinney on Irrigation, sec. 276.

[14] 117 Cal. 19, 48 Pac. 908.

[15] 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. 645.

[16] *Supra.*

[17] 126 Cal. 135, 77 Am. St. Rep. 158, 58 Pac. 442.

use by complaining proprietors. The California watershed rule may be regarded as based upon the same principle, and, as a matter of practice, fixing a convenient rule of fact, drawn from experience of what is unreasonable in its effect, since water taken beyond a watershed will not flow back to the stream and necessarily excludes *pro tanto* all use thereof by others. The character of riparian land arises out of the fact of access to the stream through the land; the limitation to the watershed arises rather out of consideration of reasonable use by a riparian owner, even though his land be riparian by virtue of his access through it.

(3d ed.)

§ 775. Conclusions as to Riparian Land.

(*a*) Water cannot be used on nonriparian land to the detriment of the riparian estate of a riparian proprietor.

(*b*) To be riparian, land must touch the stream.

(*c*) The riparian character of the land as it recedes from the stream stops when the continuity of ownership of the land is broken, because the proprietors of all land beyond have no access to the stream through such other land. *Vice versa,* all land is riparian in title which at the time of use is one tract held in one ownership abutting the stream.

(*d*) The extent of riparian land shifts with the boundary, contracting with a sale of part, and expanding with a purchase of contiguous land, since the right of access shifts correspondingly. The decisions upon this conflict, however.

(*e*) If the boundary line is beyond a watershed, the riparian character of the land stops at the summit of the watershed.

(*f*) Within the watershed the land must not be so distant that use thereon will be unreasonable in its effect upon the possibility of use of other riparian proprietors, under all the surrounding circumstances, such as extent of area, time of acquisition of land, and the various other aspects of each case.

Shortly put, land to be riparian must at time of use be a continuous tract under one ownership (regardless of the history of that ownership), touching the stream on one side and within the watershed on the other, and such that use thereon will not unreasonably interfere with the equally beneficial riparian use of other riparian proprietors.

§§ *776–794. (Blank numbers.)*

CHAPTER 34.

PROTECTION OF THE RIGHT—AGAINST OTHER RIPARIAN OWNERS.

§ 795. Damage between riparian owners.
§ 796. Possible damage to use of complainant's land must be shown.
§ 797. Authorities quoted.
§ 798. *Reductio ad absurdum.*
§ 799. Damage to a reasonable degree not wrongful.
§ 800. Damage to excess of reasonable degree.
§ 801. Where the damage is during complainant's nonuse.
§ 802. Declaratory decree.
§ 803. Conclusions.
§§ 804–813. (Blank numbers.)

(3d ed.)

§ 795. **Damage Between Riparian Owners.**—We now discuss the right of a riparian owner in the commonest form in which it has produced litigation; that is, with regard to the question when, if at all, must a complaining riparian owner show damage, and what kind or how extensive damage, to secure either legal or equitable relief. In this chapter we consider this solely between riparian owners among themselves, leaving to the next chapter the consideration as between a riparian and a nonriparian owner.

(3d ed.)

§ 796. **Possible Damage to Use of Complainant's Land must be Shown.**—The riparian proprietor does not make a *prima facie* case against another riparian proprietor where the former does not show any possibility of damage of any kind to the value of his estate or to the use thereof. It was once insisted that the stream must remain in its natural state undisturbed even by one riparian owner himself, and that *any* abstraction or diversion by one proprietor was wrongful to all below him. As to this it is said in Kent's Commentaries, in a well-known passage:[1] "Streams of water are intended for the use and comfort of man; and it would be unreasonable and contrary to the general sense of mankind, to debar any riparian proprietor from the application of water for domestic, agricultural or manufacturing purposes, provided the use of water

[1] 3 Kent's Commentaries, 429. Italics ours.

be made under the limitation that he do no material injury to his neighbor below him, who has an equal right to the subsequent use of the same water." In Lux v. Haggin[2] this is commented upon as follows: "It seems to us that the foregoing (although a very distinct statement of the general proposition) ought not to be taken literally, unless the words 'material injury' be impressed with a signification the equivalent of a *substantial deprivation of capacity* in a lower proprietor to employ the water for useful purposes." And this passage in Kent is restated in the supreme court of the United States,[3] further saying: "No one can set up a claim to an exclusive flow of all the water in its natural state, and that what he may not wish to use shall flow on till lost in the ocean." Justice Story said: "The true test of the principle and extent of the use is, whether it is to the injury of the other proprietors or not. . . . . The law here, as in many other cases, acts with reasonable reference to the public convenience and general good, and is not betrayed into narrow strictness subversive of common sense, nor into an extravagant looseness which would destroy private rights. The maxim is applied, '*Sic utere tuo ut alienum non laedas.*' "[4]

(3d ed.)

§ 797. Authorities Quoted.—Some other authorities may be quoted from numerous jurisdictions. In a late California case:[5] "In support of this position plaintiffs invoke the *alleged* common-law rule that a riparian owner upon a stream is entitled as of right to the full flow of the stream in its natural course through his land. The cases are numerous wherein the right of a riparian proprietor to have the stream flow to his land undiminished by any diversion made by an appropriator for use on *nonriparian* land has been declared.[6-8] It is obvious, of course, that, if this *supposed* rule were strictly enforced against riparian owners, as well as appropriators,

2 69 Cal. 255, 10 Pac. 674.

3 Howard v. Ingersoll, 13 How. 381, 14 L. Ed. 189, Nelson, J.

4 Tyler v. Wilkinson, 4 Mason, 397, Fed. Cas. No. 14,312.

5 Turner v. James Canal Co. (1909), 155 Cal. 82. 132 Am. St. Rep. 59, 99 Pac. 520, 22 L. R. A., N. S., 401, 17 Ann. Cas. 823 (italics inserted). Counsel filed a petition for rehearing on the ground that they did not make this contention referred to in the quotation, as against another riparian owner, knowing, they said, how untenable it was; but only because they claimed that defendant was a *nonriparian* owner (in which, on the facts, the court held against plaintiff).

6-8 Citing Lux v. Haggin, 69 Cal. 396, 10 Pac. 674; Heilbron v. Last Chance etc. Co., 75 Cal. 121, 17 Pac. 65; and Heilbron v. Fowler etc. Co., 75 Cal. 432, 7 Am. St. Rep. 183, 17 Pac. 535.

the waters of the streams in the State could not be used at all, but would flow to the sea, or until they disappeared in the sands and washes, without benefit to anyone, except in the few instances where flood waters might escape naturally and flow upon lands situated similarly to those of the plaintiffs. The rule is evidently not suited to the conditions of a dry climate such as we have in this State. It is accordingly well settled here that each riparian owner has a right to a reasonable use of the water on his riparian land, for the irrigation thereof, and that the *so-called* common-law right of each to have the stream flow by his land without diminution, is subject to the common right of all to a reasonable share of the water."[9]

In a Nebraska case[10] it is said: "As has been seen, the common law does not give to a riparian owner an absolute and exclusive right to all the flow of the water from a stream in its natural state, but only the right to the benefit, advantage and use of the water flowing past his land in so far as it is consistent with a like right in all other riparian owners." In a case in the Federal court of Nevada, before the common law of riparian rights became rejected, it was said, after stating the leading authorities: "From these authorities it appears that the use which is unreasonable is such as works actual, material and substantial damage to the common right; *not to an exclusive right to all the water in its natural state,* but to the right which each proprietor has as limited and qualified by the precisely equal right of every other proprietor."[11]

Likewise in Eastern and other jurisdictions. The supreme court of Georgia recently said: "If the general rule that each riparian owner could not in any way interrupt or diminish the flow of the stream were strictly followed, the water would be of but little practical use to any proprietor, and the enforcement of such rule would deny, rather than grant, the use thereof. . . . . Riparian owners have a common right in the waters of the stream, and the necessities of the business of one cannot be the standard of the rights of another, but each is entitled to a reasonable use of the water with respect to the rights of others."[12] In a Minnesota case: "The right of a party to the uninterrupted and full use of the water as it flows naturally past his land is not an absolute right, but a

9 Citing cases.

10 Crawford Co. v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647, 93 N. W. 781, 60 L. R. A. 889.

11 Union Min. Co. v. Dangberg, 2 Saw. 450, Fed. Cas. No. 14,370, 8 Morr. Min. Rep. 113. Italics ours.

12 Price v. High Shoals Co. (1909), 132 Ga. 246, 64 S. E. 87, 22 L. R. A., N. S., 684.

natural one, qualified and limited by the existence of like rights in others." [13]

(3d ed.)

§ 798. **Reductio ad Absurdum.**—If it were not thus true that the complaining proprietor must show at least a *possibility* of damage to the use or value of his riparian estate, when contesting with another riparian proprietor, there would be absurd results, a *reductio ad absurdum* first suggested by Chief Justice Shaw of Massachusetts: [14] "The instruction requested by the plaintiff is, we think, founded on a misconception of the rights of riparian proprietors in watercourses passing through or by their lands. It presupposes that the diversion of any portion of the water of a running stream, without regard to the fitness of the purpose, is a violation of the right of every proprietor of land lying below on the same stream, so that, without suffering any actual or perceptible damage, he may have an action for the sole purpose of vindicating his legal right." If this were true, the learned judge concludes, and a riparian proprietor could have such an action, "then every proprietor on the brook to its outlet in the Nashua River would have the same; and because the quantity of diminution is not material, every riparian proprietor on the Nashua would have the same right, and so every proprietor on the Merrimac River to the ocean. This is a sort of *reductio ad absurdum* which shows that such *cannot be the rule* as was claimed by the plaintiff." In another leading case it is said: "This right to the benefit and advantage of the water flowing past his land is not an absolute and exclusive right to the flow of all the water in its natural state. If it were, the argument of the learned counsel that every abstraction of it would give a cause of action would be irrefragable; but it is a right only to the flow of the water, and the enjoyment of it, subject to the similar rights of all the proprietors of the bank on each side to the reasonable enjoyment of the same gift of Providence. It is only, therefore, for an unreasonable and unauthorized use of the common benefit that an action will lie; for such a use it will." [15]

[13] Red River Co. v. Wright, 30 Minn. 249, 44 Am. Rep. 194, 15 N. W. 167. See, also, 123 Am. St. Rep. 912, note. See, also, Mason v. Cotton (Colo.), 4 Fed. 792, 2 McCrary, 82; Baily v. Morland (1902), L. R. 1 Ch. D. 649; McNamara v. Taft, (1908), 196 Mass. 597, 83 N. E. 310, 13 L. R. A., N. S., 1044.

[14] Elliott v. Fitchburg Ry., 10 Cush. (Mass.) 191, 57 Am. Dec. 85.

[15] Embrey v. Owen, 6 Ex. 352, 20 L. J. Ex. 212.

Streams flow for the benefit of all persons who have land adjoining, and not simply for those persons only whose lands lie at the mouth of the stream.

(3d ed.)

§ 799. Damage to a Reasonable Degree not Wrongful.—Not only is some showing of damage to complainant's estate, or to its value, a prerequisite to an action between riparian owners, but, further, the interference must be shown to go to an *unreasonable* extent. To a reasonable degree, it is a good defense to the proprietor complained of that he was acting in the use of his own riparian land. "It is a general rule—in fact, a universal principle of law—that one may make reasonable use of his own property, although such use results in injury to another,"[16] and this is but one application of that rule. As discussed in a preceding chapter, what is a reasonable use by one proprietor to which another must submit, though it interferes with the use sought to be made by such other, is a question of fact depending upon the circumstances in each case, and the authorities have there been given at length.

Under the doctrine of appropriation the right, being founded on priority, is exclusive to the extent of the priority, and any material interference with the prior use is wrongful.[17] But under the law of riparian rights no proprietor has an exclusive right against the other proprietors, and no use by another proprietor is wrongful unless it unreasonably exceeds the equality of right among all; in the absence of such excess any damage is *damnum absque injuria*. The fact that one proprietor's use or possibility of use is interfered with by another is not alone a wrong to him; it must be such interference as is in excess of the equal right of the proprietor complained of. "Each must submit to that degree of inconvenience and hardship in the exercise of his rights which results from the existence of like rights in others."[18]

[16] Katz v. Walkinshaw, 141 Cal. 143, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236.

See especially the discussion in this regard under the law of percolating water, *infra*, sec. 1118 et seq.

[17] Hill v. Smith, 27 Cal. 482, 4 Morr. Min. Rep. 597, speaking disparagingly of the other rule as one which "tolerates and winks at some indeterminate amount of injury" by the one to the other.

[18] Parker v. American etc. Co., 195 Mass. 591, 81 N. E. 468, 10 L. R. A., N. S., 584. See McFarland, J., in Fisher v. Feige (1902), 137 Cal. 42, 92 Am. St. Rep. 77, 69 Pac. 618, 59 L. R. A. 333.

Each riparian proprietor is bound to make such a use of running water as to do *as little injury* to those below him *as is consistent with a valuable benefit to himself*. Evans v. Merriweather, 4 Ill. (3 Scam.) 492, 38 Am. Dec. 106.

In a recent California case it is said that "the determination as to what is the reasonable share of each riparian owner is a question of fact, to be decided according to the circumstances of the case," and that "an upper riparian proprietor is entitled to a reasonable use for irrigation, *although it may diminish the flow to a lower proprietor, and put him to substantial inconvenience in his use of the stream.* Thus in [certain cases] it was held that the upper proprietors could be allowed to take the whole stream for certain hours or days, at stated intervals, and that the use of the lower owner could be limited to the intervening periods," and held that the fact that plaintiff's low land would be greatly benefited by its overflow from an abutting stream during flood season does not entitle him to restrain diversion of a reasonable amount of water for irrigation by upper riparian owners, though such diversion would diminish such overflow.[19]

Authorities to this effect from many jurisdictions are here quoted to show that the rule is general, and not confined to California nor to Western jurisdictions. A ruling in an Alabama case puts it: "The defendant had the right, in this form of action, to maintain the dam, *even to the injury of the plaintiff, if there was a reasonable and proper use of the water.*"[20] In a case in Maine: "True, it is sometimes said that there must be no diversion of the waters of a stream; that the riparian proprietors above must allow the water to flow on in undiminished quantities to the riparian proprietors below. But this is not a correct statement of the law. *And the inaccuracy of the statement has often been pointed out.* The true rule is that there must be no unlawful or *unreasonable* diminution or diversion of the water."[21] In Massachusetts: "The right of the owner of land to the use of a stream flowing through his premises, so far as such use is reasonable and conformable to the usages and wants with a like reasonable use by the other proprietors of land on the same stream above and below, is clear and indisputable."[22] Mr. Justice Cooley in Michigan thus states the rule: "The question always is, not merely whether the lower proprietor suffers damage by the use of the water above him, *nor whether the quantity flow-*

[19] Turner v. James Canal Co., 155 Cal. 82, 132 Am. St. Rep. 59, 99 Pac. 520, 22 L. R. A., N. S., 401, 17 Ann. Cas. 823.

[20] But damages at law will be granted if the dam spreads out the water so unreasonably as to cause great loss by evaporation. North Alabama etc. Co. v. Jones, 156 Ala. 360, 47 South. 144.

[21] Auburn v. W. Co., 90 Me. 576, 38 Atl. 561, 38 L. R. A. 188.

[22] Fuller v. Chicopee etc. Co. (1860) 16 Gray (Mass.), 43.

ing on is diminished by the use, but whether under all the circumstances of the case the use of the water by one *is reasonable* and consistent with a correspondent enjoyment of the right by the other."[23] It is laid down in New Hampshire: "It is well-settled law that in the use of a stream for domestic, agricultural, and manufacturing purposes, to which every riparian owner is entitled, *there may of right be diminution, retardation or acceleration of the natural current,* consistently with the common right, and which is implied in the right to use it at all. . . . . From the nature of the case, it is incapable of being defined to suit the vast variety of circumstances that exist; but the rule is flexible, and suited to the growing and changing wants of communities."[24] In New York: "Damage to a riparian owner caused by the erection of a mill dam by another riparian owner *is to a reasonable degree damnum absque injuria,*"[25] and one riparian owner may make a reasonable use of the stream *though it lessens the benefits therefrom* derived by another riparian owner.[26] In Ohio: "No action can be sustained for any such use in the water, *whereby the quantity is diminished in the stream* or the water caused to flow more irregularly, or to flow back on the land of the proprietor on the stream above, unless the damage occasioned be *real, material and substantial,* arising from an *unreasonable* or improper use, appropriation, abstraction, or diversion of the water from its natural course or flow."[27] In South Carolina: "For an injury to one owner incidental to a reasonable use of the stream by another there is no redress. It does not necessarily follow from either the *decrease in the volume of the water* due to its use by the upper proprietor or the increase due to the storage by the upper proprietor that there has been an unreasonable use and therefore a right of action to the lower proprietor for any resulting injury. If it were the rule that the lower proprietor has the right to have the stream flow through his land in exactly its usual volume, the result would be to destroy the equality of right of all the proprietors of the land through which the stream flowed, and give to the lowest proprietor a monopoly of its use."[28]

[23] Dumont v. Kellogg, 29 Mich. 423, 18 Am. Rep. 102.

[24] Norway Co. v. Bradley (1872), 52 N. H. 86.

[25] Palmer v. Mulligan, 3 Caines Rep. 308, 2 Am. Dec. 270.

[26] Thomas v. Brockney, 17 Barb. (N. Y.) 659.

[27] McElvoy v. Goble (1856), 6 Ohio St. 187.

[28] Mason v. Apalache Mills (1908), 81 S. C. 554, 62 S. W. 400, 871.

And yet this is the thing which some California judges have called a "modification" of the common law when applied in California.[29] It is to this, and nothing else, that such California expressions referred (improperly) as the California "modification" of the common law.

(3d ed.)

§ 800. **Damage in Excess of Reasonable Degree.**—We have, in a preceding chapter, quoted from authorities holding that it is all a question of degree, what act of one proprietor is a wrong to another, that unreasonable degree being a question of fact in each case. Such excessive damage is wrongful. This rule is laid down by Mr. Justice Shaw in a recent California case: "Riparian owners have correlative rights in the stream, and neither is a trespasser against the other until he diverts more than his share, and injures and damages the other thereby. . . . . The rights in such cases are correlative, and if an injunction can issue at all therein, it can be only when one owner takes more than his due proportion, and damage to the other ensues from such *excessive* taking."[30]

There is no presumption that use by a riparian owner is excessive. It depends wholly upon the evidence,[31] and complainant has the burden of proof.[32]

(3d ed.)

§ 801. **Where the Damage is During Complainant's Nonuse.**—The riparian right is not affected by nonuse, nor does nonuse by one riparian owner enlarge the rights of other riparian owners against him. If the taking or use complained of is in excess of the share and due proportion which the proprietor, under the principle of equality, is entitled to take or use, then, conversely, he is taking the share belonging to other proprietors, and the damage to them may be excessive so far as it is a substantial deprivation of capacity to make *future use* of one's land though no actual damage to use exist at present, the complaining owner not himself using the water at present. True, the complaining owner suffers

29. *Supra*, sec. 673, and sec. 749a.

30 Anaheim W. Co. v. Fuller, 150 Cal. 327, 88 Pac. 978. Italics ours. "Before plaintiffs could have the aid of the court to enjoin defendant's use they would have to show that such use was in excess of their rights and resulted in plaintiff's injury." Coleman v. Le Franc, 137 Cal. 217, 69 Pac. 1011.

31 Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748.

32 *Ibid.*, and Miner v. Gilmour, 12 Moore P. C. 155, 14 Eng. Reprint, 861.

no *present* damage to use in such case, but present damage to use is not necessary. It is enough that it *excessively* deprives him of the natural advantages of his land, excessively diminishes the value of the riparian estate owing to the loss of the water for use on his land in the future, thereby causing a permanent depreciation of the value of his land. An excessive injury to capacity of use in the future, which would ripen into a prescriptive right, is equally a wrong. For example, if one riparian proprietor consumes the *whole* stream, though on his own riparian land, it is wrongful to a lower proprietor, though the lower proprietor makes no use of the water himself; for in a few years he would finally lose the whole stream by prescription. Besides which the upper owner by so doing immediately deprives the lower of the natural benefit and fertility which the flow of the stream naturally affords, which, as between riparian owners, must not be done to an unreasonable degree.

The following statement is as admirable an exposition of the state of the law upon this matter as the present writer can recall: "Riparian rights are naturally rights depending on the ownership of land situated on the bank (ripa) of a stream. Except for certain natural and ordinary purposes, the rights of one proprietor are not in general superior to those of another. The rights of all for purposes of irrigation or other so-called extraordinary purposes are based on the principle of equality and are correlative and interdependent. Each may take only such an amount of water as is reasonable under all the circumstances. *If one takes more than this amount* under a claim of right, although no damage might for the time being be caused thereby to the others, because they do not choose to exercise their full rights, yet it would be an injury (*injuria sine damno*) for which they could maintain an action, because otherwise the wrongful user might by long continuance ripen into a right. When once it has thus ripened into a right it becomes a superior and absolute right, no longer depending upon the location of the land upon the banks of the stream, or upon the corresponding rights of others."[33]

As is said in Lux v. Haggin: "There can be little doubt, under the authorities, that for a riparian proprietor entirely to consume

[33] Mr. Chief Justice Freer in Wong Leong v. Irwin, 10 Hawaiian Rep. 270, 271. Italics ours. The supreme court of Massachusetts says: "If the use which one makes of his right in the stream is not a reasonable use, or if it causes a substantial and actual damage to the proprietor

water (except ordinarily for domestic uses, etc.) is to use it unreasonably";[34] and "an entire diversion [consumption, or diversion without returning it] of a watercourse by an upper riparian proprietor for irrigation is never allowed";[1] and hence it is that in apportioning the water to allow each riparian owner a reasonable use, the apportionment must be based upon the amount of irrigable land owned by each, and not merely on the amount actually under irrigation.[2] If the riparian owner complained of is making an *excessive* use during the complaining owner's nonuse, the latter is entitled to either nominal damages,[3] or to an injunction.

(3d ed.)

§ 802. **Declaratory Decree.**—While prospective damage is thus equally important with present damage in determining what acts complained of are excessive, there is a tendency to protect such future use (where no present use is made, and hence no actual present damage) by a declaratory decree, protecting the complaining proprietor's right of future use, but refusing a prohibitive injunction during his present nonuse. This is in effect quieting his title to his right of future use, but denying a prohibitive injunction at present because no actual damage occurs to his use at present, and allowing excessive use by the other proprietors during the absence of damage and during the nonuse of the complaining party.

The authorities which the writer has to this effect involved chiefly nonriparian use, in which connection they are given hereafter;[4] but if the decree may be so framed in favor of a nonriparian use, it *a fortiori* may be so framed in favor of an excessive riparian use. Perhaps an instance, as between riparian uses

below *by diminishing the value of his land*, though at the same time he has no mill or other work to sustain present damage, still, if the party then using it has not acquired a right by grant, or by actual appropriation and enjoyment for twenty years, it is an encroachment on the right of the lower proprietor for which an action will lie." Elliott v. Fitchburg Ry., 10 Cush. 191, 57 Am. Dec. 85.

[34] Lux v. Haggin, 69 Cal. 255, at 406, also see pp. 397 and 408, 10 Pac. 674.

[1] *Ibid.* Accord, Stanford v. Felt, 71 Cal. 249, 16 Pac. 900; Learned v. Tangerman, 65 Cal. 334, 4 Pac. 191; Matthews v. Ferrea, 45 Cal. 51; Barneich v. Mercy, 136 Cal. 206, 68 Pac. 589; Harrison v. Harrison, 93 Cal. 676, 29 Pac. 325; Sackrider v. Beers (1813), 10 Johns. 240; Mason v. Hill, 5 Barn. & Adol. 1, 110 Eng. Reprint, 692; Gould on Waters, 3d ed., p. 422, note 4.

[2] *Supra*, sec. 751.

[3] Price v. High Shoals Co., 132 Ga. 246, 64 S. E. 87.

[4] *Infra*, sec. 831.

solely, occurred in Wiggins v. Muscúpiabe etc. Co.[5] It was there decreed (by Judge Shaw, trial judge, now on the supreme bench) that when one proprietor was not using the water it might be *all* consumed by the other; decreeing to the former a right, whenever he desires, to begin use for his irrigable land at the intervals decreed by the court as reasonable, but allowing complete consumption by the other even at those intervals, until the former desires to avail himself of the water. The decree was affirmed on appeal.

(3d ed.)

§ 803. Conclusions.—The following conclusions seem proper *between riparian owners using water upon their riparian lands:*

(a) A riparian proprietor's right is not one to the *corpus* of the water, nor to the stream as a *corpus* in its natural state, nor to an unchanged flow of the water, but is a usufructuary right in the natural resource, a right to the advantages and benefits and uses which his riparian estate derives or may in the future derive from the water, and the value which the presence of the stream as a water supply contributes to the riparian estate, as qualified by the equal right of all other riparian proprietors to share in the same benefits, advantages and uses.

(b) To constitute a wrong by one riparian owner to another there need not be any present damage to use, nor need the complaining proprietor be actually using the water, but if there be no such present damage to use, there must be shown some detriment to the use of the land from impairment of these benefits, advantages and opportunities—in a word, diminution of the value of the estate by loss of future use of the water.

(c) And further, the damage to actual use (if such there be) or to the value of the estate must, to become wrongful, be shown, as a question of fact in each case, to go to a degree such as to be unreasonably in excess of that necessarily resulting from a reasonable use of his own riparian land by the party complained of in conjunction with a like reasonable use by complainant, and thereby in excess of the equality of right among all.

(d) In the absence of such excess, any diminution of flow, or any interference or damage caused in the use of his riparian land by one riparian owner, to another riparian owner, is a reasonable use, and hence is *damnum absque injuria.*

[5] 113 Cal. 194, 54 Am. St. Rep. 337, 45 Pac. 160, 32 L. R. A. 667.

§§ *804–813. (Blank numbers.)*

CHAPTER 35.

PROTECTION OF RIPARIAN RIGHT AGAINST NONRIPARIAN OWNERS.

§ 814. Difficulty of questions involved.

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§ 815. Stated generally, nonriparian owners have no rights in streams.
§ 816. Damage to present use immaterial.
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§ 818. The wrong (where no present damage to use) consists in the deterioration to any degree of the riparian estate.
§ 819. Nonriparian diversion usually held *per se* a detriment.

B. SOME OPPOSING AUTHORITIES.

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C. CAN THESE MINORITY RULINGS BE RECONCILED TO PRINCIPLE.

§ 827. The answer must be made under the common law.
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§ 829. Same.
§ 830. Same.
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§ 832. Same.

D. OTHER RELATED MATTERS.

§ 833. Declaratory decree.
§ 834. Nonriparian use by both parties.
§ 835. Conclusions.
§ 836. Exception where underground water is involved.
§§ 837–843. (Blank numbers.)

(3d ed.)

§ 814. Difficulty of the Questions Involved.—Upon no matter in the law of waters has there been more litigation, diversity of

ruling and intrinsic difficulty than in the matter now to be considered; the questions arising out of protection of the riparian right against nonriparian owners. It has borne most of the fighting in the law of watercourses under the name of the doctrine "*injuria sine damno*." The common law of riparian rights took its shape in upholding that doctrine, and the Colorado law of prior appropriation in denying it with reference to riparian owners. The matter presents intrinsic difficulties under the law of appropriation as well as in the common law, which will probably prevent it ever being absolutely settled to the entire satisfaction of everyone.[1]

It is here considered as a question of common law, which is the California law for streams on private lands.

A. IMPAIRMENT OF RIPARIAN ESTATE TO ANY DEGREE WHATEVER BY NONRIPARIAN USE IS WRONGFUL.

(3d ed.)

§ 815. Stated Generally, Nonriparian Owners have No Rights in Streams.—Stated generally, nonriparian owners have no rights in streams at common law. Though the water itself is not the subject of ownership by anyone (variously expressed as being "*publici juris*," "common to all men," or "belonging to the public" or "a mineral *ferae naturae*"),[2] yet members of the public owning no land bordering on the stream, since they (aside from arrangement with some bank owner) have no access to the natural resource without committing a trespass, are excluded. This exclusion in settled regions (and the common law contemplates no others) throws out, from the means of accomplishing a taking or use, the greater part of the public, leaving only the riparian proprietors as the division of the public whom conditions in settled regions do not exclude. Their situation gives them, not any greater ownership in the substance itself than others, since none can have any at all, but the advantage of position which enables them alone as members of the public to avail themselves of its benefits or the usufruct of the stream.[3]

Another way of putting it is that the law is one of natural resources. While in its natural situation and flow, each adjacent

1 The difficulties which arise in applying the doctrine of *injuria sine damno* between appropriators is considered elsewhere. *Supra*, sec. 642.

2 *Supra*, sec. 2 et seq.

3 *Supra*, secs. 54 et seq., 225, 692. For example, Mr. Justice Shaw lately said in the supreme court of California: "The Martin ranch abutted upon the stream and the

landowner in turn has in it, at common law, a natural right of real property. It is there devoted by nature to public use (or "*publici juris*") a class (in settled regions which the common law contemplates) of the public defined by natural situation. Once permanently diverted from its natural situation no one thereafter receiving the water can have real property rights in the natural resource, nor any right except through the will of the man who has taken it and brought it to the new locality.[4] The common law, contemplating a settled region, will not permit one man to thus gather up in himself alone the whole natural resource by taking it from the riparian public; but only if he takes it from that class of the public for distribution to or use of some other class of the public (that is, condemnation for public use under the law of eminent domain), being then subject to public regulation (under the law of public service).

Another way of putting it is that a nonriparian owner, if he acquired any right by his taking, would have an *exclusive* right, owing no duties to the riparian owners on the stream, in violation of the common-law system of *correlated* rights. "Our law," said Justice Story, "awards to the riparian proprietors the right to the use *in common*, as one incident to the land; and whoever seeks to found an *exclusive* use must establish a rightful appropriation in some manner known and admitted by the law"[5] [that is, by grant, condemnation or prescription]. The system of correlative rights is inconsistent with the idea of rights in nonriparan owners who would not enter into the correlation.

Still another way of putting it is that the California law of "appropriation" of water is confined to the public domain; part

riparian rights attaching to said lands by reason of this contiguity were paramount to the rights of any appropriator. *Being the owners of the land bordering its banks, they could control its flow and prevent others from diverting it at any point on their lands.* There was no evidence or finding that the plaintiffs ever obtained by purchase or grant from the owners of the Martin ranch any right whatever either to maintain the ditch over that ranch, or to use the water of the stream. They could not obtain it in any other way except by prescription or possibly by way of estoppel." Davis v. Martin, 157 Cal. 657, 108 Pac. 866. (Italics ours.) In a still later case the same authority says: "With respect to the Calkins land, all doubts as to the superior rights of the owners thereof to the use of the waters of the creek thereon would seem to be settled by the fact, appearing throughout the evidence and not disputed, that these lands are riparian to the stream and are situated above the point of diversion of the plaintiffs." Perry v. Calkins (Cal.), 113 Pac. 136.

[4] *Supra*, sec. 56 et seq.

[5] Tyler v. Wilkinson, 4 Mason, 397, Fed. Cas. No. 14,312.

of the general idea from the early settlement of the State that the indiscriminate license exercised by the pioneers upon public land must not be carried against private landowners also. While, in the early Colorado cases, "necessity" was accepted as denying to private landowners in this new region the absolute dominion over their estates,[6] the California court has always opposed such ideas as appeared, if extended against private landowners, to be destructive of property rights, and feared lest the peculiar relations and character of rights on the public domain should be invoked as applicable to private property and "result in a system of judicial condemnation of the property of one citizen to answer the assumed paramount necessity or convenience of another citizen."[7] It was the aim of the judges that the law of private land should be the same and as secure in California as in any other part of the country, as the legislature in its first session had declared by adopting the common law as the general rule of decision. And it is merely one application of this attitude that the California courts have always confined the law of free appropriation to waters on the public domain, just as they confined free mining to the metals there.[8] Hence, at the beginning, the law of appropriation, under the California doctrine, must be eliminated from the following discussion; for that system has no application in California to streams flowing over or by private lands. The question is one wholly within the common law of riparian rights itself, entirely irrespective of the public land doctrine of free appropriation.

Any statement that nonriparian owners have rights in streams (except by grant, condemnation or prescription), if meant as a statement of a general principle, is not in harmony with the philosophy of the common law; would be destructive of the system and its aims; and whatever discussion we may enter into below, nothing hereafter said is intended to imply that the common law upholds it.

(3d ed.)

§ 816. **Damage to Present Use Immaterial.**—Entirely immaterial is any inquiry into actual present damage suffered or not suffered by the riparian proprietor to his *present use*. Since the

[6] *Supra*, sec. 223.

[7] Gregory v. Nelson, 41 Cal. 278, at 290, 12 Morr. Min. Rep. 124.

[8] We have elsewhere traced at length this general attitude in the early decisions. *Supra*, secs. 221 et seq., 227 et seq.

riparian proprietor's right is not created by use, but is a right to the undisturbed use of his land, whether present or future, arising out of the natural situation of his property with access to the stream, and he may use the water when he will, the absence of actual damage to use at *the time he complains* does not prevent the act of the nonriparian owner being wrongful; even, in fact, when the complaining proprietor is not himself using, nor contemplating to use, the water at all. The courts will act at law by giving nominal damages,[9] or in equity by injunction, to vindicate his right of *future use* of his land, which right is part and parcel of the land, and prevent its loss by prescription, and which future use is (in marked contrast to the law of appropriation) as secure to him as any present use.[10]

This matter was definitely settled in California in Lux v. Haggin.[11] It had, however, always been the California law, as, for example, the holding in the note, in a case several years before Lux v. Haggin.[12] In a recent California case it is said:[13] "Finding 15, to the effect that a large part of each of the tracts described in the complaint has for twenty-five years been continuously cultivated by means of water taken from the stream is, it is con-

[9] Creighton v. Evans, 53 Cal. 55, 8 Morr. Min. Rep. 123.

[10] Creighton v. Evans, 53 Cal. 55; 8 Morr. Min. Rep. 123; Anaheim etc. Co. v. Semi-tropic etc. Co., 64 Cal. 185, 30 Pac. 623; Moore v. Clear Lake W. Co., 68 Cal. 146, 8 Pac. 816; Stanford v. Felt, 71 Cal. 249, 16 Pac. 900; Heilbron v. W. Co., 75 Cal. 117, 17 Pac. 65; Heilbron v. Fowler etc. Co., 75 Cal. 426, 7 Am. St. Rep. 183, 17 Pac. 535; Heilbron v. Land Co., 80 Cal. 189, 22 Pac. 62; Last Chance etc. Co. v. Heilbron, 86 Cal. 1, 26 Pac. 523; Conkling v. Pac. Imp. Co., 87 Cal. 293, 25 Pac. 399; Walker v. Emerson, 89 Cal. 456, 26 Pac. 968; Spargur v. Heard, 90 Cal. 221, 27 Pac. 198; Mott v. Ewing, 90 Cal. 231, 27 Pac. 194; Hargrave v. Cook, 108 Cal. 72, 41 Pac. 18, 30 L. R. A. 390; Gould v. Eaton, 117 Cal. 539, 49 Pac. 577, 38 L. R. A. 181; Bathgate v. Irvine, 126 Cal. 136, 77 Am. St. Rep. 158, 58 Pac. 442; Southern Cal. etc. Co. v. Wilshire, 144 Cal. 73, 77 Pac. 767; Anaheim W. Co. v. Fuller, 150 Cal. 327, 88 Pac. 978; Duckworth v. Watsonville Co., 150 Cal. 520, 89 Pac. 338; Huffner v. Sawday (1908), 153 Cal. 86, 94 Pac. 424; Miller v. Madera Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A. 391; Miller v. Bay Cities Co., 157 Cal. 256, 107 Pac. 115; San Joaquin etc. Co. v. Fresno etc. Co. (Cal. 1910), 112 Pac. 182. See cases cited in various preceding chapters, such as sec. 117, cases following the "California doctrine"; sec. 221 et seq., regarding appropriations on private land; secs. 498 et seq., 502, 505, regarding changes, on private land, of appropriations made while the land was public.

The leading American case is that of Justice Story in Webb v. Portland Cement Co., 3 Sum. 189, Fed. Cas. No. 17,322. The leading English case is Swindon W. W. v. Wilts etc. Co., 7 H. of L. 697.

[11] 69 Cal. 255, 10 Pac. 674.

[12] Creighton v. Evans, 53 Cal. 56, 8 Morr. Min. Rep. 123.

[13] Huffner v. Sawday, 153 Cal. 86, 94 Pac. 424 (Sloss, J.). Italics ours.

tended, contrary to the evidence. The finding on this point is, so far as concerns the plaintiffs who have riparian rights, not material. Their right to restrain the diversion, by others than riparian owners, of water which would, if undisturbed, flow past their lands, does not rest upon the extent to which they have used the water, nor upon the injury which might be done *to their present use.* Even if these plaintiffs had never made any use of the water flowing past their land, they had the right to have it continue in its customary flow, subject to such diminution as might result from reasonable use by other riparian proprietors. This is a right of property, a 'part and parcel' of the land itself, and plaintiffs are entitled to have restrained any act which would infringe upon this right."

The riparian right is part and parcel of the riparian land, not depending upon actual use, as contrasted with an appropriation which depends on beneficial use.

Upon this rule, that actual present damage to a riparian owner is not necessary to make a nonriparian owner's diversion wrongful, the authorities are emphatic.[14]

(3d ed.)

§ 817. Reasonableness in Its Correlative Sense is Immaterial. *A fortiori,* the term "reasonable use" in the law of riparian rights (denoting an equality of sharing the water's benefits for the equal correlative use of all land having natural access to it by natural situation; that is, an equality in the use of all riparian land) has no place in favor of nonriparian lands or their owners. There can be no question of reasonableness of an impairment of a riparian estate, when that impairment is not for the benefit of another riparian estate, but is instead for exclusive use on nonriparian land or by nonriparian owners. Riparian owners are entitled to a reasonable use of their own lands, though to an interference with a neighbor, because they are equal in right for that purpose; nonriparian lands or owners can never claim this equality with them. "I consider that the rights of a riparian proprietor, with respect

[14] A statute was introduced in the California legislature in 1909 (but failed to pass) "limiting" riparian rights against nonriparian owners to the water reasonably necessary for riparian irrigation, watering stock, domestic uses and other actual beneficial uses, *and only when actually in use therefor.* This would obviously be unconstitutional. Whatever may be urged as to use as bounding the riparian right, it is obvious that future use must be guarded as much as present use. The California water-power act of 1911 expressly declares that it shall not impair rights vested at the time use is sought under the act. Stats. 1911, c. 406, sec. 14.

to the stream, are limited only by those of persons in a similar or analogous position with respect to the stream as himself." [15]

There are, indeed, decisions admitting nonriparian use into such equality with riparian uses, and inquiring whether the nonriparian use was "reasonable," just as between riparian uses. The matter has been one in which great confusion existed. It found its way into some California cases.[16] Likewise in England, it was in one case held that nonriparian use was permissible if it was a "reasonable use" on the same terms as use on the riparian lands themselves,[17] but this was emphatically overruled in a later case in the House of Lords.[18] It has likewise been held to be the law of New Hampshire that water may be taken for sale to nonriparian owners, if only a "reasonable use," [19] and of Vermont,[20] and there is something to the same effect in a Massachusetts case.[21] But, upon principle, they cannot stand upon this ground, and in the law of California, after some confusion, it is now definitely settled that the question of "reasonable use" which governs between riparian owners or uses does not in any way concern a nonriparian owner or nonriparian use. We quote, so far as concerns this matter, the recent opinion of Mr. Justice Sloss upon rehearing in the case of Miller & Lux v. Madera Canal Co.: [22]

"The argument that the method of irrigation adopted by plaintiff, i. e., that of having the annual increased flow of the river spread over its lands, was not a reasonable use of the water, can have no weight in this case. The doctrine that a riparian owner is limited to a reasonable use of the water applies only as between different riparian proprietors. As against an appropriator who seeks to divert water to nonriparian lands, the riparian owner is entitled to restrain any diversion which will deprive him of the

15 Channel, B., in Nuttall v. Bracewell, L. R. 2 Ex. 1.

16 *Infra*, sec. 826 et seq.

17 Earl of Sandwich v. Railway Co., 10 Ch. D. 707. See, also, Norbury v. Earl of Kitchin, 3 Fost. & F. 292, 9 Jur., N. S., 132.

18 McCartney v. Londonderry Ry. Co., [1904] App. Cas. 301.

19 Gillis v. Chase, 67 N. H. 161, 68 Am. St. Rep. 64, 31 Atl. 18; Jones v. Aqueduct, 62 N. H. 488.

20 Lawrie v. Silsby, 76 Vt. 240, 104 Am. St. Rep. 927, 56 Atl. 1106; Same v. Same. 82 Vt. 505, 74 Atl. 94, affirmed in Percival v. Williams (1909), 82 Vt. 531, 74 Atl. 321.

21 Elliott v. Fitchburg Ry., 10 Cush. 191, 57 Am. Dec. 85.

22 (1909), 155 Cal. 59, 99 Pac. 502, 22 L. R. A., N. S., 391. See, also, Miller v. Bay Cities W. Co., 157 Cal. 256, 107 Pac. 115. The same had been laid down in Lux v. Haggin at suit of the same plaintiff, but owing to the unsatisfying results of the rule in an unsettled region, and to the fact that the opinion in Lux v. Haggin was so extremely long that it was seldom read, the point had again come in doubt.

customary flow of water which is or may be beneficial to his land. He is not limited by any measure of reasonableness. If any doubt ever existed on this point, none can remain since the recent decision of this court in Anaheim Union Water Co. v. Fuller.[23] The cases relied on to show that the riparian owner is entitled to only a reasonable use of the water were all cases of controversies between owners of different parcels of land riparian to the same stream. Virtually the same point is presented by the argument that plaintiff is not limiting itself to the most economical manner of using the water. This is not an objection which may be raised by an appropriator who seeks to divert water of the stream to nonriparian lands "

Possibly the law *might* have taken a different course in the West, where a stream is partly on public and partly on private land, so that such dual position of the stream would leave a riparian right in the United States, upon whose great extent of lands any use might (had the law taken that course) have been regarded as riparian, and the question would then have been legitimately one of "reasonableness" between riparian proprietors where the upper use was on lands of the United States. This was urged in the briefs in Lux v. Haggin, but received no consideration from the court. It was again urged only on one occasion, and then the court said: "We see nothing in the suggestion that defendant is presumably the licensee of the United States, and that the United States, being an upper riparian proprietor, could take a reasonable quantity of water as against the lower riparian owner. A riparian proprietor may not authorize, as against a lower proprietor a company to take water from the stream to be conducted at a distance and sold."[24] And this matter must now be regarded as settled by the opinion of Mr. Justice Sloss.

(3d ed.)

§ 818. The Wrong (Where No Present Damage to Use) Consists in the Deterioration, to Any Degree, of the Riparian Estate resulting from loss of *future* use of the water, a deterioration which must be submitted to in favor of other riparian use to a reasonable degree, but to no degree at all in favor of nonriparian use.

[23] 150 Cal. 327, 88 Pac. 978, 11 L. R. A., N. S., 1062.

[24] Heilbron v. Fowler etc. Co., 75 Cal. 426, 7 Am. St. Rep. 183, 17 Pac. 535.

This idea is given in practically all of the important cases giving the reason for the rule allowing relief against nonriparian owners or use without present damage.

In one of the leading American cases it is put by Chief Justice Shaw of Massachusetts, that there is a wrong, "if it causes a substantial and actual damage to the proprietor below *by diminishing the value of his land,* though, at the time, he has no mill or other work to sustain present damage."[25] In other cases, "as will be detrimental to the full enjoyment of the stream by the complainants,"[1] or "the plaintiff's premises would sell for less";[2] or, "They had no property in the water, and it had no value to them independent of their land or real property, and, therefore, its value to them was measured *by the injury which its diversion inflicted upon their real property* to which the water was appurtenant,"[3] or, "It is true, as the plaintiff contends, that to maintain an action he is not obliged to show in his use of the land, actual present damages. It is enough if it appears that an *injurious effect is produced upon his property by the maintenance of the dam, such as to diminish its value,* if the defendant, by lapse of time, should acquire a right to maintain the dam";[4] or, "The plaintiff is not limited in her user of the water as she has been accustomed to use it, but she has a right to bring an action for the impairment of *such prospective use as she might reasonably make of the water.*"[5] Shaw, C. J., in a Massachusetts case,[6] ruled: "And although the plaintiff has sustained no present damage, because she has had no mill on it, or otherwise used it for any agricultural or manufacturing purpose, yet such diversion *would prevent beneficial use of it hereafter,* and *thus* impair the value of the estate." Chancellor Kent expressed it as being that "*he will lose the comfort and use of the stream for farming and domestic purposes.*"[7] In other cases it is put that the wrong lies in that it may "*defeat any subsequent*

[25] Elliott v. Fitchburg Ry., 10 Cush. 191, 57 Am. Dec. 85.

[1] Higgins v. Flemington W. Co., 36 N. J. Eq. 538, framing decree to enjoin nonriparian city supply only to that extent.

[2] Bower v. Hill, 1 Bing., N. S., 549, 2 Scott, 535.

[3] Matter of Thompson, 85 Hun, 438, 32 N. Y. Supp. 897.

[4] Stimson v. Inhabitants of Brookline (1908), 197 Mass. 568, 125 Am. St. Rep. 382, 83 N. E. 893, 16 L. R. A., N. S., 280, 14 Ann. Cas. 907. So it has been actually held that the measure of damages for diversion of a stream for nonriparian use on eminent domain is the depreciation *in value of the riparian land. Infra,* sec. 865. See, also, Cincinnati Co. v. Gillispie, 130 Ky. 213, 113 S. W. 89, measure of damages for pollution.

[5] Standen v. New Rochelle W. Co., 91 Hun, 275, 36 N. Y. Supp. 92.

[6] Newhall v. Iveson, 8 Cush. (Mass.) 595, 54 Am. Dec. 790.

[7] Gardner v. Village of Newburgh (1816), 2 Johns. Ch. 164, 165.

use,"[8] or "which would abridge his present *or potential* use of his property."[9] In an early Scotch case:[10] "No man is entitled to divert the course of a river or of any of its branches, which would be depriving others of their right, viz., the *use* of the water." Or, in more general terms: "There is a present injury to the right of property, if it is impossible to predicate that it may not produce serious damage *in future,* though the complaining party is not yet in a position to qualify present damage."[11]

It should be noted that the question is of impairing the use of the riparian *land,* not a question of directly interfering with the use of the water itself. The riparian right is one to the use of the *land* by means of the water, which draws the use of water to it as an incident; the use of water is not the principal thing.[12] Analogies may be found in other branches of the law. "The owner of land has a right to support from the adjoining soil; *not a right to have the adjoining soil remain in its natural state* (which right, if it existed, would be infringed as soon as any excavation was made in it); but a right *to have the benefit* of support."[1] An excavation which causes no present caving, but which, in a couple of years, after rains, would then cause caving, would probably be actionable from the start. Likewise, in jurisdictions recognizing rights in light, a tree which cuts off no light now, but which in a couple of years would grow so as to cut off *all* light, would also probably be actionable when planted at all.[2] In determining upon an injunction, "regard must be had to the effect of the nuisance *upon the value of the estate,* and upon the prospect of dealing with it to advantage."[3]

(3d ed.)

§ 819. **Nonriparian Diversion Usually Held Per Se a Detriment.**—Having seen that damage to present use need not be shown,

8 Crooker v. Bragg, 10 Wend. (N. Y.) 260, 25 Am. Dec. 555; or, an instruction respecting damage is wrong if it charges the jury to regard only plaintiff's land "as it was, and not with reference to the future." New York Rubber Co. v. Rothery, 132 N. Y. 293, 28 Am. St. Rep. 575, 30 N. E. 841.

9 Clark v. Penn, Ry., 145 Pa. 438, 27 Am. St. Rep. 710, 22 Atl. 989.

10 Magistrates v. Elphinstone (1768), 3 Kames, 331.

11 Lord Blackburn in Orr Ewing v. Colquhoun, 2 App. Cas. 853.

12 See *infra,* secs. 1118 et seq., 1140 et seq., percolating water.

1 Lord Blackburn, in Dalton v. Angus, 6 App. Cas. 808.

2 See Colls v. Home and Colonial Stores, [1904] App. Cas. 179. We refer to this for the principle, though the doctrine of ancient lights is not in force to the same extent in this country as in England.

3 Lord Cranworth, C., in Atty. Gen. v. Sheffield, Gas & Elect. Co., 3 De Gex., M. & G. 304, 43 Eng. Reprint, 119.

and that any question of "reasonable" nonriparian use cannot exist, the common-law ruling has predominantly been that there is no room left for any further inquiry. The usual ruling has been throughout the common law, in California as well as in the East and in England, that any nonriparian diversion whatever is *per se* actionable (unless it be so comparatively insignificant in quantity as to be within the rule, "*de minimis non curat lex*"); and so the general rule of pleading is that a plaintiff riparian owner, as against a nonriparian owner or nonriparian use, need allege, in this regard, nothing more than that the stream flows by or through his land.[4]

A statement representative of the usual ruling is given by Mr. Justice Henshaw in a California case, saying that a riparian proprietor's right is a usufructuary one for the use of his own land, and holding: "If his needs do not prompt him to make any use of them, he still has the right to have them flow onto, and along, and over his land in their usual way, excepting as the accustomed flow may be changed by the act of God, or as the amount of it may be decreased by the reasonable use of upper owners and riparian proprietors."[5] This statement represents the usual holding in California; especially within the last ten years it has been the *almost* universal holding there as elsewhere (with some earlier exceptions hereafter noted).[6] For example, it has been said in recent California cases that the riparian owner has "perhaps, as to other than riparian owners, the right to prevent any substantial diminution *of the amount of water* which would naturally flow to his land";[7] and that a nonriparian owner is *per se* a trespasser upon the rights of a riparian owner *from the beginning*.[8] Again, "being a riparian owner, he has a right to the flow of the entire stream as against *any diminution* thereof by one who is not a riparian owner."[9] In Lux v. Haggin,[10] the California court said: "Undoubtedly, as

4 *Infra*, secs. 883, 884.

5 Hargrave v. Cook, 108 Cal. 72, 41 Pac. 18, 30 L. R. A. 390.

6 Lists of California cases to this effect are given elsewhere, viz., *supra*, sec. 117 (California doctrine); *supra*, secs. 221, 229 (appropriation confined to public land); *supra*, sec. 816 (present damage to use); *supra*, sec. 817 ("reasonableness immaterial"). See especially Creighton v. Evans, 53 Cal. 56, 8 Morr. Min. Rep. 123, decided before Lux v. Haggin, and a model of conciseness.

7 Mr. Justice Shaw, in Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. 338.

8 Mr. Justice Shaw, in Anaheim W. Co. v. Fuller, 150 Cal. 327, 88 Pac. 978.

9 Gould v. Eaton, 117 Cal. 543, 49 Pac. 577, 38 L. R. A. 181. This is expressly disapproved in San Joaquin Co. v. Fresno Flume Co. (Cal. 1910), 112 Pac. 182.

10 69 Cal. 255, 10 Pac. 674.

In Cal. etc. Co. v. Enterprise etc. Co., 127 Fed. 741, at 742, 743, it is

Co. v. Fresno Flume Co.[15] the court, speaking of nonriparian use against a riparian owner, said through Mr. Justice Henshaw: "Even if at common law or under the civil law it was a part of the usufructuary right of the riparian owner to have the water flow by for no purpose other than to afford him pleasure in its prospect, such is not the rule of decision in this State. The lower claimant must show damage to justify a court of equity in restraining an upper claimant from his beneficial use of the water"; and after quoting at length from the Modoc case, defines the term "damage" in this regard as meaning: "Of course the riparian proprietor's rights are not measured by the amount of water which he is actually using at the time of his action. In this sense the actual present damage ceases to be of great consequence, but its place is taken by the necessary and consequential damage which would follow to his land if the unauthorized act of the upper appropriator [nonriparian user] were allowed to ripen into a prescriptive right." [16]

There are other California cases going much further than the Modoc case, and bringing in the untenable ground of "reasonable use" which governs riparian owners between themselves. A riparian proprietor has been held to have a right against an appropriator for nonriparian use only to the extent of the amount necessary for use on the riparian land.[17] In Senior v. Anderson,[18] an appropriation was made against a riparian owner, and was upheld as to the surplus over the quantity that could be beneficially used by the riparian owner.[19] Another case has gone even further. In Riverside

and Mr. Justice Shaw in Katz v. Walkinshaw, quoted *infra*, sec. 1047, and Burr v. Maclay R. Co., 154 Cal. 428, 98 Pac. 260. In Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748, the court said it saw no reason why the law of riparian rights on streams should differ in this matter from the new law of percolating water. See generally the discussion under the law of percolating water, *infra*, sec. 1154 et seq.

15 (Cal. 1910), 112 Pac. 182.

16 Since, however, the opinion closes by saying that both parties in the case at bar were in fact riparian owners making riparian use, the case is not actual authority in regard to nonriparian use.

17 Senior v. Anderson, 130 Cal. 290, 62 Pac. 563; Riverside etc. Co. v. Gage, 89 Cal. 420, 26 Pac. 889; Beatty, C. J. See, also, the dissenting opinion of the Chief Justice in Baxter v. Gilbert, 125 Cal. 580, 58 Pac. 129, 374.

18 130 Cal. 290, at 296, 62 Pac. 563.

19 The court said: "It is contended by respondents that Senior acquired no rights by his notice and the actual diversion of the water in October, 1887; that riparian rights had before that attached to the lands of Mrs. Hines, she having proved up and claimed her final certificate of purchase. There is no merit in this contention. Her riparian rights could only entitle her to a reasonable use of the water upon her riparian lands, but having before she acquired title from the United States appropriated more water than was required for beneficial uses upon said land, she could

W. Co. v. Gage [20] it was held that a riparian owner must, in a suit with the appropriator, actually allege in his pleading the facts showing the quantity necessary for his riparian use, beyond which the surplus may be appropriated; the burden of disproving a surplus was strongly placed upon the riparian owner,[21] and the case has been very recently reaffirmed.[22] There are still other California authorities unconsciously acting upon the same idea,[23] such as those

acquire no right to any additional quantity under the law of riparian rights." (Under the more recent decisions she would have been entitled to the entire flow, irrespective of possible use.)

[20] 89 Cal. 410, 420, 26 Pac. 889.

[21] The court said: "But in addition to the appropriations upon which the defendant seems mainly to have relied, he did allege in his answer that he was the owner of a tract of land containing about twenty-six hundred acres, through and over which the Santa Ana River flowed for a distance of about three miles, and that most of the tract was susceptible of, and would be benefited by, irrigation. He did not, however, allege that he was entitled as a riparian owner to any definite quantity of water for the irrigation of his riparian lands, nor did he allege any facts showing, or tending to show, what proportion of the waters of the stream he could reasonably exhaust for that purpose. Nor is it alleged whether his land was above or below the point of plaintiff's diversion. In short, we think the answer insufficient to raise any issue as to the extent of defendant's right as a mere riparian proprietor to divert and exhaust any portion of the stream." His opponent here relied solely on rights of appropriation; and the more recent decisions would have made the extent of riparian needs immaterial, excepting that two very recent cases have again laid down and approved the rule of the Riverside case. Montecito Co. v. Santa Barbara (second appeal), 151 Cal. 377, 90 Pac. 935, and Wutchumna W. Co. v. Pogue, 151 Cal. 112, 90 Pac. 362. See likewise San Luis W. Co. v. Estrada, 117 Cal. 182, 48 Pac. 1075.

[22] Cases just cited.

[23] See the storm-water cases, *infra*. See, also, Charnock v. Higuerra, 111 Cal. 471, at 477, 52 Am. St. Rep. 195, 44 Pac. 171, 32 L. R. A., 190; Coleman v. Le Franc, 137 Cal. 214, 69 Pac. 1011 (reasonableness adopted as test between a riparian and a nonriparian owner). Professor Pomeroy said: "But the larger and permanent rivers of the State, the San Joaquin, and its affluents like the Merced, the Tuolumne, the Calaveras, and others coming down from the heights of the Sierras, and the Sacramento with its similar branches, the Bear, the Yuba, the Feather, and others, when not polluted by hydraulic mining, if reasonably and properly controlled and utilized, can certainly furnish an adequate and constant supply of water, for the purpose of irrigation, to vast communities of landowners in addition to the riparian proprietors upon their very banks. . . . . Communities of owners at a distance from the larger streams should be entitled to reach and appropriate this excess of their waters after the wants of the riparian proprietors are reasonably satisfied, without any condemnation or payment of compensation, since such a use would not substantially *affect any rights* held by the riparian proprietors on the streams. . . . . After the reasonable needs of the riparian proprietors have been fairly and reasonably ascertained and satisfied, all the excess of the waters of any such stream belongs *of right*, for the purposes of irrigation, to those communities of nonriparian landowners who are so situated, geographically and topographically, that they can in the best manner appropriate and utilize such *surplus* of the waters." Pomeroy on Riparian Rights, secs. 155, 156, 158, 160.

inquiring into the *quantity* of riparian land belonging to the riparian owner;[24] and such as those prohibiting waste by a riparian owner against nonriparian use *below*,[25] especially a recent case where the court *forced* the riparian owner to let the surplus go by in order that it may be taken to nonriparian lands below, and affirmatively *helped* the nonriparian diversion by quieting title to it against the upper riparian use.[1]

[24] In Boehmer v. Big Rock Irr. Dist., 117 Cal. 19, 48 Pac. 908, defendant appears to have been a nonriparian owner, diverting water from an existing riparian owner. Such diversion was allowed after affirming the judgment which "entitles the plaintiff to the reasonable and *necessary* use of water therefrom for domestic and irrigation purposes," and "limits plaintiff's riparian rights to those quarter sections through which the stream runs" (page 24). Yet unless the needs of those quarter sections were material, he would have had an unlimited right to the entire flow, irrespective of what other lands he owned. See *supra*, sec. 771, "riparian land."

[25] In Barneich v. Mercy, 136 Cal. 205, 68 Pac. 589, nonriparian owner enjoined waste by riparian owner, without inquiring whether nonriparian appropriation was acquired while defendant's land was public.

In Mentone Irr. Co. v. Redlands Co. (1909), 155 Cal. 323, 100 Pac. 1082, 22 L. R. A., N. S., 382, 17 Ann. Cas. 1222, the court says: "We have little doubt that plaintiff [a lower nonriparian user] would be entitled to some relief [against a wasting upper riparian owner]."

[1] In this case (Arroyo D. Co. v. Baldwin, 155 Cal. 280, 100 Pac. 874), a corporation making nonriparian use of part of its water was granted an injunction against an upper riparian owner who took three hundred inches more than the upper riparian needs required. The court *limited* the upper riparian owner (Baldwin) to two hundred and eighty-nine inches on the ground that "It is also found that only a part of Baldwin's land is susceptible of irrigation; that some of it is damp and moist land requiring no irrigation; that some needs but slight irrigation; that wells upon Baldwin's land supply water in abundance for domestic use; and that two hundred and eighty-nine inches of water under four-inch pressure is essential for irrigation for the successful cultivation and production of crops on all the said land of the appellant which is susceptible of and requires irrigation;" and said: "It is immaterial to this discussion whether or not some of the water taken from the stream by respondent [plaintiff] is carried beyond the watershed. *Appellant* [defendant riparian owner] *is limited* in his right to the use of water upon his riparian land within the watershed of the stream. He may take his proper proportion of the water. The *surplus* must be returned to the channel of the river at the lower boundary line of his land. After he has thus used his *legitimate* part of the water he cannot object to its diversion to any beneficial use by the lower riparian owners and *appropriators* or their successors in interest."

This case says that a riparian right is *limited* to riparian needs in favor of nonriparian surplus use below. After the water has gone by the riparian owner, he has no concern in it, it is true; but this case *made him let it go by;* enjoined him from acting upon it before it got by him; gave affirmative aid and help (injunction and quieting title) to the nonriparian use which *restricted* a riparian owner. Under it a nonriparian use at a stream's mouth can prevail against all riparian proprietors above, as to the surplus over their needs, in irreconcilable conflict with Miller v. Madera Co., considered *supra*, sec. 817. However, the case of People ex rel. Ricks etc. Co. v. Elk River Co., 107 Cal., at 226, 48 Am. St. Rep. 121, 40 Pac. 486,

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§ 823. **Some Rulings in Other Common-Law Courts.**—The general attitude of the Western Federal courts is to allow *some* nonriparian diversion. In cases of water to which a military or Indian reservation is riparian, surplus nonriparian diversions by private parties have been, to some extent, allowed. To any extent which would impair use of the water on the reservation in the future to its full possibilities (whether now fully or at all used there or not) such nonriparian diversion is absolutely enjoined; but they allow nonriparian diversions of any surplus over the quantity which *could*, at any time even in the future, be put to use on the reservation.[2] Even between private parties solely, the Federal courts have, in effect, upheld nonriparian diversions of such surplus; and, where large communities were involved, have apportioned the water with little regard to whether some were nonriparian owners (appropriators) and some riparian owners.[3] And there are other decisions of the Western Federal courts allowing *some* nonriparian diversion against riparian owners under the common law.[4] A decision of the supreme court of the United States may, perhaps, be cited, holding, in a New Mexico case, that a statute allowing appropriations of surplus water cannot result in infringement of riparian rights even if such rights exist in New Mexico, because the statute expressly limits the appropriation to "surplus" water.[5]

Likewise in State courts, besides the California cases already noted, there are minority decisions to the effect that such a surplus may exist. In South Dakota a nonriparian diversion has been upheld against a riparian owner, after fixing by degree the amount of one hundred inches as the amount necessary for the riparian land.[6] In Washington a nonriparian owner has been allowed to enjoin acts of an existing riparian owner,[7] and it is provided in Washington and Oregon by statute that nonriparian diversions may be

is directly *contra* as to pollution, holding that the nonriparian user below stream cannot restrain pollution by an upper riparian owner. And so is the general English rule *contra*, as discussed below under the topic of "grants for nonriparian use," sec. 847.

2 *Supra*, sec. 207.

3 *Supra*, sec. 310 et seq.; Union Min. Co. v. Dangberg, 81 Fed. 73; Anderson v. Bassman, 140 Fed. 14.

4 Cruse v. McCauley, 96 Fed. 369; Ison v. Nelson Mng. Co., 47 Fed. 179.

5 Gutierres v. Albuquerque etc. Co., 188 U. S. 545, 23 Sup. Ct. Rep. 338, 47 L. Ed. 588, quoted *supra*, sec. 181.

6 Lone Tree D. Co. v. Cyclone D. Co., 15 S. D. 519, 21 N. W. 355; Lone Tree D. Co. v. Cyclone D. Co. (S. D.), 128 N. W. 596. See, also, Redwater etc. Co. v. Reed (S. D.), 128 N. W. 702; Same v. Jones (S. D.), 130 N. W. 85.

7 Northport Brewing Co. v. Perrat, 22 Wash. 243, 60 Pac. 403.

made of surplus over riparian needs.[8] As elsewhere cited, it was once so ruled in England (since overruled) and New England.[9] Accordingly, there are authorities to the general effect that, since there must be depreciation shown to the value of the riparian estate, what constitutes such depreciation is a general question of fact, to be left to a jury without further guide.[10]

Some qualification upon the right of a riparian owner against a nonriparian owner, even at common law, has been said to be "the American rule."[11]

(3d ed.)

§ 824. **Same.**—An argument frequently made is a *reductio ad absurdum* first used by a great American judge, quoted in a preceding section in dealing with the question between riparian owners, but which he there actually applied to a case where defendant, a nonriparian owner, used water upon nonriparian land.[12] It was also used in an English case.[13] And so, also, in Modoc L. & L. Co.

8 Washington, Pierce's Code, sec. 5821; *Oregon*, Stats. 1909, c. 216, sec. 70. In Oregon the decisions were in hopeless confusion until Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728, cut the knot and avowedly acted outside the common law. *Supra*, sec. 129.

See Madigan v. Kougarok M. Co., 3 Alaska, 63, a case of minor authority, since it has been ruled that riparian rights do not exist in Alaska. *Supra*, sec. 118.

9 *Supra*, sec. 817.

10 In a case holding that a railway company may dam a stream and use water for locomotives (i. e., nonriparian use) if lower proprietors are not injured, it was said: "If the use by the railroad causes no material injury to the owner [below], then no recovery can be had, and this is a question of fact for the jury to determine." Anderson v. Cincinnati So. Ry., 86 Ky. 44, 9 Am. St. Rep. 263, 5 S. W. 49. To the same effect is the judgment of Chief Justice Shaw in the Massachusetts case of Elliott v. Fitchburg Ry., 10 Cush. (Mass.), 193, 57 Am. Dec. 85.

11 Note by Mr. Justice Holmes to 3 Kent's Commentaries, 14th ed., p. 689; 24 Am. & Eng. Ency. of Law, 982; Doremus v. City of Paterson, 63 N. J. Eq. 605, 52 Atl. 1107 (but see S. C., 65 N. J. Eq. 711, 55 Atl. 304); Gillis v. Chase, 67 N. H. 161, 68 Am. St. Rep. 645, 31 Atl. 18; Lawrie v. Silsby, 76 Vt. 240, 104 Am. St. Rep. 927, 56 Atl. 1106; Same v. Same, 82 Vt. 505, 74 Atl. 94 (affirmed in Percival v. Williams, 82 Vt. 531, 74 Atl. 321).

12 Chief Justice Shaw in Elliott v. Fitchburg etc. Ry. Co., 10 Cush. (Mass.) 191, 57 Am. Dec. 85, quoted *supra*, sec. 798.

13 Kensit v. Great Eastern Ry. (1884), 27 Ch. D. 122, a case upon which doubts were later cast in McCartney v. Londonderry Ry., [1904] App. Cas. 301, but which has not been expressly disapproved or overruled in England, and on the contrary has been quoted with approval in America. The nonriparian owner in the Kensit case diverted water for use in cooling certain machinery and returned it undiminished and unpolluted in its original condition back to the stream. The plaintiff lower riparian owner claimed this to be a wrong *per se*, but the decision was against him, and an injunction refused. Bagally, L. J., said, "It is impossible that there should be any injury"; and Lord Lindley said: "There is no injury to the plaintiffs, either actual or possible"; and he further said: "It is said that a man *who is not a riparian*

v. Booth,[14] the same argument is used, saying: "If this be not so, it would follow, for example, that an owner of land bordering on the Sacramento River in Yolo County could demand an injunction restraining the diversion of any water from that river for use in irrigating nonriparian lands in Glenn or Colusa County. And yet no one, probably, would expect such an injunction, if asked for, to be granted, or, if granted, to be sustained." And in another case: "A riparian owner on the Mississippi River might seek to enjoin the diversion of the waters of Sage Creek in Wyoming because they eventually reach the Missouri River, and finally through that river flow into the Mississippi. This argument might be classed under the head of *reductio ad absurdum*, which sometimes is very effective as illustrating results which may flow from doing a given thing."[15] It must be noted, however, that regarding this expression in the Modoc case, Mr. Justice McFarland in the Vernon case,[16] concurring specially, said: "Illustrations drawn from supposed riparian rights in such rivers [the Mississippi or Sacramento] are scarcely more pertinent than would be illustrations from supposed riparian rights on the Gulf Stream," which is quoted with approval in the Federal court,[17] and had the approval of recent decisions of the California supreme court, which recently said that the Modoc case must be disregarded unless it can stand on the storm-water

proprietor has no right to take water from a stream at all, and if I, a riparian proprietor, find anybody who is not a riparian proprietor taking water from the stream, although I am not damnified, I can maintain an action for an injunction. Now, this is a very startling proposition, and one would like to see some authority for it. It goes to an extent which is bordering on the absurd. According to that, if I am a riparian proprietor near the mouth of the Mississippi, and somebody a thousand miles up diverts the water, although not to my detriment, I can sustain an injunction. That is ridiculous. . . . . The argument cannot be maintained unless we say that a riparian proprietor cannot allow anybody to take any water out of a stream whether anybody is injured or not. It seems to me it would be monstrous to decide anything of the sort." The injunction was refused, Cotton, L. J., saying: "If there was a reasonable *prospect* that it would produce any damage to the opposite or lower riparian owners, then that would give a right of action, although no actual injury was shown to have resulted from it." But denying injunction because the diversion in the case by a nonriparian owner *could* not in any way produce any injury or loss to plaintiffs, present *or future*, and no prescription would arise. Cotton, L. J., further said: "The plaintiffs, therefore, in my opinion, have not suggested anything upon which we could say that from the act which has been done without legal authority, although not producing any loss to them now, loss may *hereafter* result." (Italics ours.)

[14] 102 Cal. 151, 36 Pac. 431.

[15] Morris v. Beam (Mont.), 146 Fed. 425. See, also, Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. Rep. 655, 51 L. Ed. 956.

[16] 106 Cal. 237, 39 Pac. 762, *supra*.

[17] Cal. etc. Co. v. Enterprise etc. Co., 127 Fed. 241.

principle below considered;[18] but more recently still reaffirmed the Modoc case most emphatically, and quoted the foregoing passages from it as correct doctrine.[19]

(3d ed.)

§ 825. **Storm Waters.**—In a large part of California all the late summer flow is now in full use, and is called the "normal flow." Further irrigation must come from storing the earlier flow from the winter and spring floods, to hold it for use later in the season. Consequently some California cases have, in this connection, distinguished storm or flood waters in a stream from the natural flow thereof. Granting, if necessary, that the riparian proprietor is entitled to the whole natural flow, even if it is shown that it cannot all contribute value to his estate or to its potential use, yet the cases now in view hold that storm waters even after reaching the channel are not part of the natural flow, but a fortuitous foreign body of water that has made its way there, retaining their character as "surface water" even after reaching the channel.[1-6] Consequently, while asserting that impossibility of damage is immaterial where the natural flow is alone concerned, they refuse to recognize any right in the riparian proprietor to this nonnatural flow in the absence of possible damage to his land from loss of it.[7] This is in

[18] Anaheim W. Co. v. Fuller, 150 Cal. 327, 88 Pac. 978; Miller v. Madera Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A., N. S., 391.

[19] San Joaquin Co. v. Fresno Flume Co. (Cal. 1910), 112 Pac. 182.

[1-6] *Supra*, sec. 347.

[7] Edgar v. Stevenson, 70 Cal. 286, 11 Pac. 704; Heilbron v. L. & W. Co., 80 Cal. 189, 22 Pac. 62; Modoc L. & W. Co. v. Booth, 102 Cal. 151, 36 Pac. 431; Fifield v. Spring Valley W. Co., 130 Cal. 554, 62 Pac. 1054; Coleman v. Le Franc, 137 Cal. 214, 69 Pac. 1011; San Joaquin Co. v. Fresno Flume Co. (Cal. 1910), 112 Pac. 182. See, also, dissenting opinion of Chief Justice Beatty in Baxter v. Gilbert, 125 Cal. 584, 58 Pac. 129, 374; and concurring opinion of Shaw, J., in Miller v. Bay Cities Co., 157 Cal. 256, 107 Pac. 115; and opinion of Shaw, J., in Turner v. James Canal Co., 155 Cal. 82, 132 Am. St. Rep. 59, 99 Pac. 520, 22 L. R. A., N. S., 401, 17 Ann. Cas. 823 (a case between riparian owners, but with some indication of a desire to apply the same to nonriparian owners). The case of Edgar v. Stevenson is usually cited to this effect, though it was decided without attention to the fact that plaintiff was a riparian owner, and its citations are cases where both parties claimed as appropriators only. See, also, Miller v. Enterprise Co., 145 Cal. 652, 79 Pac. 439; Anaheim W. Co. v. Fuller, 50 Cal. 334, 88 Pac. 978; Huffner v. Sawday, 153 Cal. 86, 94 Pac. 427; Miller & Lux v. Madera etc. Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A., N. S., 391; Miller v. Bay Cities Co., 157 Cal. 256, 107 Pac. 115; Cal. Pastoral Co. v. Enterprise Co., 127 Fed. 743; Bliss v. Johnson, 76 Cal. 596, 16 Pac. 542, 18 Pac. 785. In 1911 a California statute speaks of storage of flood waters. See Cal. Stats. 1911, c. 406, sec. 17.

A Massachusetts statute provided for condemnation of stream waters that were in excess of the "natural

accord with a similar suggestion in Lux v. Haggin:[8] "We are not prepared to say but that even where the common law prevails, provision may be made for the storing and distribution of waters, the result of extraordinary floods caused by the melting of the snows, or long-continued and heavy rains in the mountains or near the source of a river, since such an extraordinary freshet would not be the ordinary flow of the stream."

As to such storm waters, their taking has been held to be wrongful only when actual or prospective damage is possible to the use of the land of the complaining riparian proprietor. When not so, the taking has been allowed.[9] When damage possible, denied; thus, surplus over ordinary flow cannot be diverted from riparian owners in absence of a showing at what stages, if at all, the surplus could be diverted without damage to the riparian proprietors.[10] This rule has been approved in Nebraska,[11] saying: "Connected with this same question is involved the right of the plaintiff, even as against a riparian owner, to divert the storm or flood waters passing down the stream in times of freshets. Hall at most, as a riparian owner, was entitled to only the ordinary and natural flow of the stream, or so much as was found necessary to propel his mill machinery, and could not lawfully claim, as against an appropriator, the flow of the flood waters of the stream."

flow." Held, this means the ordinary flow when not increased by unusual freshets or rains, such unusual freshets or rains being "surplus water." Nemasket Mills v. City of Taunton, 166 Mass. 540, 44 N. E. 609.

But see Burwell v. Hobson, 12 Gratt. (Va.) 322, 65 Am. Dec. 247; McCarter v. Hudson W. Co., 70 N. J. Eq. 695, 118 Am. St. Rep. 754, 65 Atl. 489; Sparks etc. Co. v. Town of Newton, 57 N. J. Eq. 383, 384, 41 Atl. 385; Dorman v. Ames, 12 Minn. 451 (Gil. 347). See, also, Ames v. Cannon etc. Co., 27 Minn. 245, 6 Atl. 787. Says a Scotch case: "A superior heritor is no more entitled to divert the excess of water in time of flood over the ordinary flow without returning it before the stream reaches the lands of the inferior heritor than he is entitled to appropriate the ordinary flow, and a flood may be of great value for scouring or keeping clean a watercourse." (MacLean v. Hamilton (1857), 19 D. 1006 (Scotch), cited in Ferguson on The Law of Water in Scotland, p. 230.)

[8] 69 Cal. 255, 10 Pac. 674.

[9] Modoc L. & L. Co. v. Booth, 102 Cal. 151, 36 Pac. 431. In Fifield v. Spring Valley Water Works, 130 Cal. 552, 62 Pac. 1054, it is held that a riparian proprietor is not entitled to an injunction to restrain a water company engaged in supplying water for public use from diverting the storm or flood waters of the creek which will not prevent the flowing over his land of the ordinary waters of the stream, nor in any way damage his land, or interfere with the rights appurtenant thereto. Followed in San Joaquin Co. v. Fresno Flume Co. (Cal. 1910), 112 Pac. 182.

[10] *Semble*, Miller v. Enterprise etc. Co., 145 Cal. 652, 79 Pac. 439; Miller v. Madera Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A., N. S., 391.

[11] Crawford v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647, 93 N. W. 781, 60 L. R. A. 889.

But the distinction between a natural and non-natural part of the river has been denied. In an early case it is said: "But the rights of the riparian proprietor do not depend upon the quantity of water flowing in the stream. Nor can that flow be said to be an extraordinary flow which can be counted upon as certain to occur annually and to continue for months."[12] And in defining what may be such extraordinary flow the more recent cases have so narrowed it as almost to destroy it. Thus, some recent California cases explain it as applicable only where "during times of extraordinary floods such diversion will not perceptibly diminish the *stream* below," meaning, apparently, to apply the principle only where the facts show the diversion to be within the rule "*de minimis.*"[13]

The other recent California cases reach a similar result by narrowing the definition in another way and holding it not to include annual or periodical swellings of a stream, even if due to storms, if those storms are seasonal; and this is held where the storm stage of the river continued for several months,[14] or even if the storm stage lasts only a few days at a time, so long as it is regularly recurrent.[15]

[12] Heilbron v. Fowler etc. Co., 75 Cal. 431, 7 Am. St. Rep. 183, 17 Pac. 535.

[13] Anaheim W. Co. v. Fuller, 150 Cal. 327, 88 Pac. 978; Huffner v Sawday, 153 Cal. 86, 94 Pac. 424. See, also, McFarland, J., concurring, in Vernon Irr. Co. v. Los Angeles, 106 Cal. 237, 39 Pac. 762. The same explanation is given in City of Paterson v. East Jersey W. Co., 74 N. J. Eq. 49, 70 Atl. 472 (but holding a diversion of ten per cent not "*de minimis*"). This would not leave the doctrine of great practical importance, since the flood waters constitute the major portion of California streams in winter, and a diversion of them is not only perceptible, but is practically a diversion of the entire winter stream.

[14] Miller v. Madera Canal Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A., N. S., 391, quoted *infra*. In a case in the Federal court for Southern California it was said: "Storm or freshet waters, which any person who can may impound and use, are 'such waters as flow down a stream during and after a rainstorm, and which are in excess of the ordinary flow.' [Citing Fifield case]. I am of opinion, from the evidence submitted on this hearing that the waters which the canal and dam in controversy in this suit were intended to divert, and are capable of diverting, do not fall within said definition, but are a flow which comes every year and *lasts for three or four months.*" Cal. Past. Co. v. Enterprise Co., 127 Fed. 743. In the Edgar case above, the heavy rains relied on continued "during the last winter and spring" (70 Cal. 289, 11 Pac. 704). In the Heilbron cases the floods referred to "continued for months," as is seen by the report in 75 Cal. 117, 17 Pac. 65. In the Modoc case the rise likewise was a matter of four months, viz., June, July, August and September (102 Cal. 158, 36 Pac. 431). In the Fifield case the definition of the extraordinary water was so broad as to include any water "after a rainstorm." In the Coleman case it was the water accumulated during a whole season.

[15] Miller v. Bay Cities W. Co., 157 Cal. 256, 107 Pac. 115.

In the recent case of Miller v. Madera etc. Co.[16] it was held that to constitute such non-natural waters, the rise must be extraordinary and occurring only on very rare occasions. It is not sufficient if an annual overflow, of regular annual occurrence, even if at highest stages overflowing banks and spreading over adjacent low-lying lands, where the overflow continues to move down with the main flow in a continuous body, not becoming vagrant, lost or wasted, but recedes back into the channel when the water stage lowers, and is a condition to be anticipated in every season of ordinary rainfall, failing only in seasons of drought. On rehearing this was emphatically affirmed, the court saying (per Mr. Justice Sloss) that such facts distinguish the case from the Modoc and Fifield cases, and that no storm-water problem is involved upon such facts. This definition of what is such non-natural flow so narrows it as to practically destroy the distinction between different parts of the stream upon any supposed basis of one segment being natural flow overlain by or next to some other kind of a flow in the same channel.[17]

[16] 155 Cal. 59, 99 Pac. 502, 22 L. R. A., N. S., 391.

[17] The court said, per Mr. Justice Sloss, that "such flow was one which occurred in almost every season of normal rainfall, and that it passed the plaintiff's land in a continuous body of water, through a well-defined channel, and eventually emptied into the San Joaquin River and through it into the sea. That the owners of land bordering upon such a flow of water are riparian proprietors, entitled to all the rights pertaining to riparian ownership, is a proposition fully sustained by the authorities cited in the department opinion. It is suggested that a different rule should apply in a semi-arid climate like that of California, where the fall of rain and snow occurs during only a limited period of the year, and, consequently, streams carry in some months a flow of water greatly exceeding that flowing during the dry season, with the result that such increased flow is not, at all points, confined within the banks which mark the limits of the stream at low water. But no authority has been cited, and we see no sufficient ground in principle, for holding that the rights of riparian proprietors should be limited to the body of water which flows in the stream at the period of greatest scarcity. What the riparian proprietor is entitled to as against nonriparian takers is the ordinary and usual flow of the stream. There is no good reason for saying that the greatly increased flow following the annually recurring fall of rain and melting of snow in the region about the head of the stream is any less usual or ordinary than the much diminished flow which comes after the rains and the melted snows have run off. Perhaps other considerations should apply where a river, in times of heavy flow, runs over its banks in such manner that large volumes of water leave the stream and spread over adjoining lands to an indefinite extent, there to stagnate until they evaporate or are absorbed by the soil. But the evidence of respondent, and this was the evidence on which the court below acted, fails to show that the water which defendant seeks to divert was such 'vagrant water,'" etc. Miller v. Madera Canal Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A., N. S., 391.

In the later case of Miller v. Bay Cities W. Co.[18] it was laid down that "there can be no question" but that nonriparian diversion may be made against a riparian owner of water which can serve no useful purpose in its natural situation, but in very emphatic terms denies that flood waters serve no useful purpose to riparian lands. however rapidly they pass by, saying that only when they reach the sea can they be called waste waters serving no useful purpose to neighboring landowners. The facts presented as extreme a type of storm waters as can occur. The opinion is too long to admit of quotation here, especially as it is considered in connection with percolating waters hereafter.[19]

In the still later case of San Joaquin Co. v. Fresno Flume Co.[20] the court reviews the foregoing authorities and says: "It will be found, therefore, that the decisions of this state not only do not deny the right to the use of storm and flood waters, but encourage the impounding and distribution of those waters wherever it may be done without substantial damage to the existing rights of others." [21]

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§ 826. **Same.**—As a whole, these cases have pretty much dropped the flood-water distinction, and proceed instead upon the minority contention already set forth, that possible damage to the complaining proprietor's capacity of use, or loss of possible benefit to his riparian land, prospective if not now present, must be shown before an act is wrongful. This was the way in which the California court explained them without the insertion of the flood-water idea, saying in Miller v. Madera Co.: [22] "But counsel for appellants rely upon the cases of Fifield v. Spring Valley Waterworks [23] and Coleman v. La Franc,[24] in support of their claim that a riparian proprietor cannot restrain the diversion of the storm or freshet waters of a stream when such diversion will not prevent the flowing over his land of the ordinary waters of the stream, or in any way interfere with his rights appurtenant thereto. We do not understand

18 (1910), 157 Cal. 256, 107 Pac. 115.

19 *Infra*, secs. 1057, 1087.

20 (Cal. 1910), 112 Pac. 182.

21 It should be noted in this case that the opinion closes by saying defendant was a riparian owner making riparian use only; and further point is made of the existence of an artificial increment in the stream produced by defendant; which together make the passage in the text to be only *obiter*.

22 155 Cal. 59, 99 Pac. 502, 22 L. R. A., N. S., 391.

23 130 Cal. 352, 62 Pac. 1054.

24 137 Cal. 214, 69 Pac. 1101.

these authorities cited to sustain the proposition as broadly as appellant contends. . . . . All they decide is, that an injunction restraining the diversion of storm or flood waters will not be granted at the instance of a riparian owner when it appears that he will *not be injured in any way* by such diversion." And the later case of San Joaquin Co. v. Fresno Flume Co.,[25] said the same thing.

A point sometimes mentioned in the storm-water cases is that of recapturing *artificial* increments to a stream, as considered in the first part of this book.[1] Where the facts show that the *presence* of such waters *in the channel* is due to the labor of the impounder, it is an artificial increment to the stream produced by the labor of man, and belongs to him who produced it, because a man must be allowed to enjoy the fruits due to his own labor alone. Speaking of a reservoir constructed in a place where there never was a watercourse, it has been said *arguendo:* "The water itself is the property of the company. It was not taken from a running stream nor from a lake. . . . . It was collected by the company as it descended from the heavens. Whatever may be the differences of opinion as to the ownership of running waters, or of waters of navigable streams, or of lakes, it has never been doubted that water collected by individual agency, from the roof of one's house, or in hogsheads, barrels or reservoirs, as it descends from the clouds, is as much private property as anything else that is reduced to possession, which otherwise would be lost to the uses of man."[2] This applies to artificial increment of a stream brought to flow by the works of man alone[3] and it applies to the impounding of storm waters *before they ever reach a stream channel.*[4] In a recent Cali-

[25] (Cal. 1910), 112 Pac. 182.

[1] *Supra*, secs. 38, 61, 279.

[2] Dissenting opinion of Field, J., in Spring Valley W. W. v. Schottler, 110 U. S. 347, 4 Sup. Ct. Rep. 48, 28 L. Ed. 173.

[3] Pomona W. Co. v. San Antonio W. Co., 152 Cal. 618, 93 Pac. 881. "The right of the inferior heritor is only to receive the natural supply of water, and where that is supplemented by artificial operations, he cannot complain if the artificial condition is reduced." Ferguson on The Law of Water in Scotland, p. 231.

[4] In a leading case it is said: "The right to the natural flow of the water in Longwood Brook undoubtedly belongs to the plaintiff; but we think that this right cannot extend further than a right to the flow in the brook itself, and to the water flowing in some defined natural channel, either subterranean or on the surface, communicating directly with the brook itself. No doubt, all the water falling from heaven and shed upon the surface of a hill, at the foot of which a brook runs, must, by the natural force of gravity, find its way to the bottom, and so into the brook; but this does not prevent the owner of the land on which this water falls from dealing with it as he may please, and appropriating it. *He cannot, it is true, do so if the water has arrived at and is flowing in some natural channel already formed.* But

fornia "storm-water" case, point was made, in refusing an injunction, "that the dam actually increases, and certainly does not diminish, the waters of Stevenson Creek."[5]

But the storm-water argument, as a rule, has been one to impound waters already in a channel, when they came there by nature; the claim of artificial agency extending only to the detention or diversion thereof. The principle of recapturing from the channel the fruits of one's own labor consequently does not usually apply.

C. CAN THESE MINORITY RULINGS BE RECONCILED TO PRINCIPLE?

(3d ed.)

§ 827. The Answer must be Made Under the Common Law.—It being long settled that the common law of riparian rights is in force in California, it need hardly be said that to declare these minority rulings to be more to one's liking is not reconciling them to principle. That may be well enough in Colorado, where riparian rights are rejected, but the only legitimate inquiry in a common-law jurisdiction is whether they can have support in the common law of riparian rights itself; and in these minority California cases there is only one having any other idea.[6]

We proceed to an inquiry under the common law alone.

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§ 828. Possible Distinction Between Diminution of Flow and Depreciation of Estate.—For the holding that nonriparian diversion is *per se* wrongful there appear to be distinct grounds taken in different cases.

The usual one is in attributing it to the doctrine of ***injuria sine damno***. That involves defining the riparian right as one to the *flow*, rather than to the use (present or future) of the riparian land. As is said in one of the leading cases in the law of waters, "We by no means dispute the truth of this proposition with respect to

he has a perfect right to appropriate it before it arrives at such a channel. In this case a basin is formed in his land, which belongs to him, and the water from the Heavens lodges there. There is here no watercourse at all" (being a natural pond). Broadbent v. Ramsbotham, 11 Ex. 602.

[5] San Joaquin Co. v. Fresno Flume Co. (Cal. 1910), 112 Pac. 182.

[6] San Joaquin Co. v. Fresno etc. Co. (Cal. 1910), 112 Pac. 182. Heretofore, California "modification" statements uniformly referred only to riparian uses between themselves (*supra*, secs. 673, 699, 749a, 799), and denied "modification" when a nonriparian use stepped in. The minority rulings above never asserted that they were modifying the common law, but, on the contrary, claimed that they were following its true intent.

every description of right. Actual perceptible damage is not indispensable as the foundation of an action; it is sufficient to show the violation of a right, in which case the law will presume damage; *injuria sine damno* is actionable. . . . . But in applying this admitted rule to the case of rights in running water, and the analogous cases of rights to air and light, it must be considered what the nature of those rights is, and what is a violation of them."[7] This authority then proceeds to show that the nature of the riparian right is primarily one to the use of one's land (a usufruct) in a passage we quoted in a preceding chapter.[8] The rule of *injuria sine damno* unquestionably applies without regard to actual damage to present use.[9] But in applying the rule also without inquiry into prospective or future detriment to the use or value of the riparian estate, perhaps such decisions illustrate the result of regarding the right of the riparian proprietor as one to the stream itself as a *corpus* of the freehold, under the "*cujus est solum*" doctrine, instead of as a *usufruct*—a matter concerning which we refer the reader to a previous chapter.[10] The doctrine of *injuria sine damno* cannot itself make nonriparian diversion actionable *per se* unless the riparian right be defined one to the flow as representing the body of the stream, distinguished from the use and benefit of the land, and we believe such definition of the riparian right rests upon the "*cujus est solum*" doctrine, which properly has no application to the water of running streams.

With that laid aside, the question would have to be, not whether there was an interference with the flow of the stream, but whether there was interference with the value of the riparian estate, or (in the absence of present damage) with its possible *future* enjoyment. Then nonriparian use might not be actionable where such loss or detriment is impossible upon the facts, as where the complaining riparian land is an alkali flat, worthless for irrigation.[1]

7 Baron Parke, in Embrey v. Owen, 6 Ex. 352, 20 L. J. Ex. 212.

8 *Supra*, sec. 694.

9 *Supra*, sec. 816.

10 *Supra*, secs. 2 et seq., 34, 696 et seq.

1 "But I do not think it was intended to be decided, and I do not think it is the law, that an erection *in alveo* of a natural stream is illegal *per se*," etc., per Lord Blackburn, in Orr Ewing v. Colquhoun, 2 App. Cas. 853, discussing Bickett v. Morris, L. R. 1 H. L. (Sc.) 47, which had seemed to hold any erection in the bed of a stream to be a nuisance *per se* (*alveo* being the name for "bed" in civil law, these being Scotch cases). For another case discussing Bickett v. Morris unfavorably, see Norway Co. v. Bradley (1872), 52 N. H. 86. Referring to Bickett v. Morris the vice-chancellor in Belfast Ropeworks Co. v. Boyd (1887), 21 L. R. Ir. 565, said: "I

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§ 829. **Same.**—But more difficulty is given by other reasons for holding it wrong *per se*, while admitting that in principle there must be a possibility of damage (present or future) to the riparian estate to put the nonriparian owner in the wrong. One is that *impossibility* of damage is merely a matter of words for the doctrine "de minimis."[2] And so, for example, it is said in effect by Mr. Justice McFarland,[3] that this is all that the *reductio ad absurdum* above mentioned comes down to.

Or, without identifying "impossibility of detriment" with cases of "*de minimis*," it is said that, admitting the necessity of such possible detriment in *principle*, yet in *practice* it is impossible to prove what *may* be a future detriment; that the range of inquiry it opens into the future would be forbidding to riparian owners, and impractical of application.[4] An illustration frequently put is given in some of the California cases saying that "the flow of water of a stream, whether it overflow its banks or not, naturally irrigates and moistens the ground to a great and *unknown* extent, and thus stimulates vegetation, and the growth and decay of vegetation add not

take the law to be as stated by Mr. Shaw in his able and clear argument, that it was not meant that the mere erection of a structure is *per se* a wrong. There must be an erection causing present damage, *or reasonably likely in the future to do so;* and the riparian proprietors who can show that the erection of the structure is reasonably *likely* to cause damage, may bring an action to have the obstruction removed." (But adds, "the mere sale of water itself to anyone not a riparian proprietor is unreasonable and illegal.")

[2] In Bickett v. Morris (*supra*) on appeal to the House of Lords (1 H. L. (Sc. App.) 47, at 59), Lord Cornworth declared: "It was said in argument, 'Then, if I put a stake in the river, am I interfering with the rights of the riparian proprietors?' To this I should answer, *de minimis non curat praetor.* But further, it might be demonstrated in such a case, not that there was an extreme improbability, but that there was an impossibility of any damage resulting to anyone from the act."

[3] Concurring specially in Vernon Irr. Co. v. Los Angeles, 106 Cal. 237, 39 Pac. 762.

[4] "I agree with your Lordship that the idea of compelling a party to define *how* it will operate upon him, or what damage or injury it will produce, is out of the question." Lord Neaves in Morris v. Bickett (1864), 2 M. 1082, 4 M. H. L. 44 (Scotch); Ferguson on The Law of Water in Scotland, p. 200. In an English case it is said: "Lord Westbury concurs in this judgment entirely, and the principle, one sees at once, is applicable to the present case. It is this: 'You, as a riparian proprietor, see something done which is not at all to your detriment now, but *may* hereafter be greatly to your detriment, though you cannot precisely point out how, or to what extent; if you do not interfere, a right will be acquired against you by which you will hereafter be affected; and you have a right to say, things shall remain exactly as they were.'" Crossley v. Lightowler, L. R. 3 Eq. 296. (Italics inserted.)

only to the fertility, but to the substance and quantity of the soil,"[5] which clearly admits the necessity that there be a detriment to the riparian estate rather than merely to the flow, but considers inquiry into its extent to be too problematical and incapable of ascertainment to be entertained in practice.[6]

There may be much force in both of these positions;[7-15] but for California purposes it seems pertinent that the percolating water cases, involving the identical matter, are making the inquiry, and are finding surpluses to exist without invoking the rule *de minimis*. Damage from loss of natural subirrigation was examined into, in a recent case of percolating water, as a question of fact, and held not to exist in fact. It was regarded as a question of fact to be proved in the ordinary way, and not assumed.[16] True, the inquiry in the percolating water cases is opening a wide range, and tends to put a heavy burden upon the small farmer protesting distant use, but so far it has been found practical, and there does not seem to be any difference between the theories of the new percolating water cases and those of riparian rights upon streams. Moreover, does not the inquiry have to be made in measuring damage when the riparian right is condemned upon eminent domain?

(3d ed.)

§ 830. **Same.**—It may be, then, that an interference with the possible use or future value of the estate would (irrespective of the rule "*de minimis*") be a different thing from diminution of flow on larger streams. Upon the smaller streams any nonriparian diminution of flow will *per se* cause such depreciation, and there will, indeed, be no difference between the two as a rule; but upon larger streams it may be that there could be a distinction. It may be that the *reductio ad absurdum* is merely a restatement of the rule *de minimis*. But it may also be that the *reductio ad absurdum* is sound; that diminution of flow by nonriparian use is not a wrong *per se;* that the wrong arises when (and only when) there is proved as a fact a depreciation caused thereby to the value of the riparian

[5] Heilbron cases cited *supra*, sec. 816. The quotation is from Heilbron v. Water Ditch Co., 75 Cal. 117, 17 Pac. 65.

[6] "The truth is that every owner of land on a stream necessarily and at all times is using water running through it, if in no other manner than in the fertility it imparts to his land, and the increase in the value of it." Pugh v. Wheeler, 2 Dev. & B. (N. C.) 55.

[7-15] See especially sec. 367, *supra*.

[16] Newport v. Temescal W. Co., 149 Cal. 531, 87 Pac. 372, 6 L. R. A., N. S., 1098.

estate or to the present or future use of it (wholly irrespective of any question of reasonableness).

It may be noted that in the more recent California cases declaring nonriparian diminution of flow *per se* a wrong, and declaring damage to be entirely immaterial, had a possible prospective damage to use been regarded as material, it would have been found to exist on the facts presented and to have warranted injunction even under the Modoc case. The riparian proprietor in the recent cases showed ability to use all the water diverted from him; he had capacity to use it if he in the future so decided, and, of course, the common law will protect future use as much as present use. As there was thus prospective damage shown, this may possibly be a ground on which to reconcile the later cases with the Modoc case, and have them in no way inconsistent. That there was prospective damage in the recent cases appears, for example, in the Anaheim case, saying the taking of a part of the water, would not leave enough for plaintiff's land;[17] and in the Huffner case, saying that the right to restrain a diversion "does not rest upon the extent to which they have used the water, nor upon the injury which might be done to their *present* use."[18] This may be contrasted with the Modoc case which spoke of there being "no injury to him or his land, present *or prospective.*" Likewise in Miller v. Madera Co.[19] the nonriparian diversion was enjoined because it was water "which is or may be beneficial to his land"; and in Miller v. Bay Cities Water Co.,[20] because the water "served some useful purpose" in connection with the neighboring lands. Of all these cases it might be said, as was said in a Connecticut case frequently cited in support of the rule of *injuria sine damno,* "It does not appear that there was any controversy between the parties on the question whether the stream was *capable* of being beneficially used upon the plaintiff's land. . . . . The case, therefore, is not one where a proprietor bounding on a stream seeks to recover for a diversion of it from his land when the water, if not so diverted, *could not* have been used for any beneficial purpose."[21]

17 Anaheim etc. Co. v. Fuller, 150 Cal. at 335, 88 Pac. 978, saying: "The court finds, on sufficient evidence, that the diversion of the defendants, if allowed, *would render plaintiff's land much less fertile and valuable.*"

18 (Cal.), 94 Pac., at 426. Italics ours.

19 155 Cal. 59, 99 Pac. 502, 22 L. R. A., N. S., 391.

20 157 Cal. 256, 107 Pac. 115.

21 Parker v. Griswold, 17 Conn. 288, 42 Am. Dec. 739.

(3d ed.)

§ 831. Application of the Distinction by Confining the Decision to the Parties Litigant.—The application of the foregoing in practice would lie in the principle of confining the decision to the parties litigant.

If the riparian right is defined as one to the use of the riparian land, now or in the future, by means of the water, then the rule prohibiting any nonriparian diversion is one for the protection of the whole riparian community, whose combined requirements or possible uses in well-settled regions (such as the common law contemplates) will always (except upon the largest rivers) leave no surplus; and when all the riparian owners are joined in suit, or, under statute so permitting, one sues "for the benefit of all," or the attorney general sues on behalf of the riparian public, then the right of the whole community to have the whole flow may come into play.[22] *Any* nonriparian diversion in well-settled regions must necessarily be detrimental to the riparian community *as a whole* except possibly upon large rivers; and it is upon this public reason that the rule excluding nonriparian use even by riparian owners is ultimately based by the common law.

But as a matter of procedure, where one riparian owner alone is seeking to restrain a nonriparian diversion, it may be that he must stand upon its effect upon his own land alone. It would seem no objection to this contention to say that all riparian proprietors, taken collectively, may (and, on small streams usually will) have rights of use which would exhaust the entire stream if exercised, so that any diversion by a nonriparian owner would *ipso facto* result in at least a prospective damage to the complaining proprietor. On very large streams that might not be true; but even on small streams that proceeds upon the rights of all riparian proprietors considered collectively against the nonriparian owner; and yet it is certain that they are not collectively represented in the suit itself. All but the individual complaining proprietor are strangers to the suit unless actually brought into court by proper process; and the argument, considering the rights of all the proprietors collectively, is considering the rights of parties who have not appeared in the litigation, and fixing rights between two individuals by reference to outstanding rights in other persons (strangers to the suit), which a general rule of law inhibits.[23] Such other owners may never seek

[22] *Supra*, sec. 627, parties to actions; *infra*, sec. 881.

[23] *Supra*, sec. 626 et seq. "Then it is put in another way, in an extremely

to use the water, or may be all bought off by the nonriparian owner. To apply such argument is to go out of the record.[24] Take the case of a nonriparian owner condemning a single riparian owner's right on eminent domain. The nonriparian owner will not be allowed to say that the damage to the single riparian proprietor whose right is being condemned is only nominal because of the large number of other riparian proprietors with whom this riparian owner had to share. Yet such would be the result if the collective rights of the whole body of riparian proprietors can be considered with regard to a nonriparian owner at all, when he is litigating with only one of them.

If the rulings which have refused injunction against nonriparian use can be upheld upon this ground that they simply confined the decision to the parties litigant, they would not be in conflict with the undoubted basic principle of the law of riparian rights that nonriparian owners are excluded from rights in streams. The nonriparian owner would be accorded no rights. Permitted to go his way only because the decision is confined to the parties litigant, it confers no right against the outstanding riparian owners, and is not hence a positive right, but remains subject to the paramount title of the others. Although the complaining riparian owner's land suffers no detriment, yet some other riparian owner differently situated may be in a position to say that the same nonriparian diversion may impair the enjoyment of that other riparian land, and then this other owner would be entitled to the action to which the former one was not. Or, again, should a number of riparian owners join together in bringing suit or join all claimants as defendants, the nonriparian owner would be further restricted in favor of all these

ingenious way, in Mr. Barber's argument, to the effect that riparian proprietors in a stream are a class of persons in the nature of a close borough, and that any one of them has a right to object to the introduction, into that class, of persons who have not got property bordering on the stream. Well, where is the authority for that? It is an ingenious suggestion, but no authority has been cited in support of it, and I am very wary of extending to the discussion of the rights of water an analogy drawn from close boroughs or anything of that sort. I distrust the argument; it strikes me as a false analogy altogether." Lindley, L. J., in Kensit v. Great Eastern Ry. (1884), 27 Ch. D. 122, 136.

[24] For example, in Anaheim W. Co. v. Fuller, 150 Cal. 335, 88 Pac. 978, the court said that perhaps it would "take judicial notice" of the rights of outstanding owners, showing that it is necessary to go outside the record to apply the argument. How would such judicial notice avail if all the others *consented* to the nonriparian diversion? Or, if the stream is all, excepting complainant's estate, on public land? Would it not then be that the single complaining riparian owner must stand on his own land alone?

combined, to such an extent that finally no surplus would remain at all. The nonriparian taking we have contemplated is a matter that the individual plaintiff is suffering no legal injury, and not that the nonriparian owner has any vested, freehold, permanent right against the world.

For the same reason, as we have so frequently repeated, any such surplus diversion for nonriparian use (if permitted at all) would not be a permanent right, and hence is in no true sense an "appropriation," any more than such distant diversions of percolating water. Such claims less than freehold, subject to private paramount rights in others (the outstanding riparian owners), who are thereby "disseised," or of possession without actual right, we have considered elsewhere at much length.[25] The term "appropriation," under its historical meaning in California, denotes a much different thing, being a permanent freehold right good "against the whole world" when acquired *on public land,* where riparian owners do not enter the question because they did not exist at the date of the diversion.[1]

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§ 832. **Same.**—Consequently, by confining the decision to the parties litigant, it may be that owing to the distinction between diminution of flow and depreciation of estate, in extreme cases a nonriparian diversion (although without having any actual *right*) cannot always be enjoined unless a substantial number of riparian owners (or a substantial amount of riparian land) join in suit against it; and that the refusal of an injunction might not be in conflict with the established general common-law rule excluding nonriparian owners from rights in streams. So far as these authorities used the term "reasonable use" in its correlative sense, as admitting a nonriparian use into an equal sharing of the water with riparian lands, they cannot be defended upon principle, and are in irreconcilable conflict with Miller v. Madera Co.[2] Something must be accepted as settled if there is to be any law upon the matter at all. But so far as they merely inquired into the honesty and *bona fides* of the asserted benefit of the surplus water to the litigating riparian land, while the use of the word "reasonable" would then be unfortunate, it may be that they could have ground upon which to stand, within the qualification in the Madera case that the water must be such as "is or may be beneficial to the riparian land" be-

[25] *Supra,* secs. 246, 625.
[1] *Supra,* Part II.
[2] *Supra,* sec. 817.

fore its nonriparian diversion will be enjoined, and the similar statement in San Joaquin Co. v. Fresno Flume Co.,[3] that there must be shown a "consequential damage" to the land.

But the weight of recent California decision is against the validity of these authorities even so explained.[4] They could have such a result as the following: Suppose a good-sized stream flowing two thousand inches, upon which a complaining riparian owner owns ten acres, which (at the liberal duty of an inch per acre) can use (even in the future) only ten inches for irrigation. The above cases would permit the nonriparian diversion of the whole stream, leaving only a trickle of ten inches down the dry channel. It is difficult to contend that a substantially complete nonriparian diversion of a stream against the opposition of a riparian owner can be upheld under any interpretation of the common law; for, as a general principle, the common law undoubtedly confines use to riparian lands. And there is further the grave question already mentioned of how "no possible detriment" is to be proved; for the burden of proof would have to be (as, indeed, the supreme court of California has most emphatically held) upon the nonriparian claimant, and is not sustained where (as must too often be the case) the assertion of "no possible detriment" is hypothetical and open to doubt upon the facts.[5]

D. OTHER RELATED MATTERS.

(3d ed.)

§ 833. Declaratory Decree.—As between riparian proprietors, decisions have already been referred to[6] where, during the complaining proprietor's nonuse, a peremptory injunction was refused even against excessive and unreasonable use by another riparian owner, and instead a decree rendered declaring the complaining proprietor's right of future use, to prevent its loss by prescription; in effect quieting title to his right of future use. In some of the cases this was done where the party complained of was using the water on distant nonriparian land,[7] and as to percolating water this was

[3] (Cal. 1910), 112 Pac. 182.

[4] See the opening sections of this chapter. Indeed in Miller v. Madera Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A., N. S., 391, they are said to be explicable only if they referred to riparian uses between riparian proprietors.

[5] Miller v. Bay Cities Water Co., 157 Cal. 256, 107 Pac. 115.

[6] *Supra*, sec. 802.

[7] In one case (Ulbricht v. Eufaula Water Co., 86 Ala. 587, 11 Am. St. Rep. 72, 6 South. 78, 4 L. R. A. 572), a riparian proprietor filed a bill to enjoin the diversion of water from the stream by an upper riparian proprietor, a water company, for the use of its waterworks constructed to supply the inhabitants of a city with water. The testimony in the case established that the diversion of wa-

actually applied in a recent California case, further saying that it is not the law's policy to permit any of the available waters of the country to remain unused, or to allow one having the natural advantage of a situation, which gives him a legal right to use water, to prevent another from using it while he himself does not desire to do so.[8]

Some *dicta* in this line appear in well-known cases.[9]

ter for the purpose mentioned would result in a sensible diminution in the flow of the stream itself in the dry season or summer months, but that the complainant was making no particular use of the stream, and therefore suffered no special damage by the act of the defendant; and it was held that, as the defendant was taking the water for the purpose of supplying the wants of a neighboring town, and not returning it to its natural channel, the plaintiff was entitled to an injunction in vindication of his rights, without any special proof of damages; but, as he was not making any particular use of the water, the injunction should be so framed as only to restrain its use "to the sensible injury or damage of the complainant for any purpose for which he may now or in the future have use for it." In the Oregon case of Jones v. Conn, 39 Or. 30, 87 Am. St. Rep. 634, 64 Pac. 855, 65 Pac. 1068, 54 L. R. A. 630, it was held that where plaintiffs, who were lower riparian owners, sought to restrain defendant's use of the water of a stream for irrigating purposes, on the ground that the land irrigated was nonriparian, and defendant set up in his answer an absolute right to a sufficient amount of water to irrigate his land, plaintiffs, though not entitled to an injunction, should be awarded a decree limiting defendant's use to such as would not materially injure plaintiffs, in order to prevent defendant's right from ripening into an adverse title; but permitting defendant's use until such injury should arise. In Katz v. Walkinshaw, 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, Judge Shaw states the same principle, applying it to percolating water: "If a party makes no use of the water on his own land or elsewhere, he should not be allowed to enjoin its use by another who draws it out, or intercepts it, or to whom it may go by percolation, although, perhaps, he may have the right to a decree settling his right to use it when necessary on his own land, if a proper case is made."

[8] Burr v. Maclay R. Co., 154 Cal. 428, 98 Pac. 260.

[9] In a leading English case it has been said that where a peremptory injunction is asked against a nonriparian proprietor during plaintiff's nonuse, it may, perhaps, not be granted where the continuance of the diversion will not ripen into a right by prescription, as where the nonriparian owner disclaims to be acting as of right, and only intends to use the water at such times when the riparian proprietor does not use it. Swindon W. W. v. Wilts etc. Co., 7 H. of L. 697. But this has never been actually applied in the English cases; it is always held inapplicable upon the facts. See, for example, Roberts v. Gyrfai Dist. Council (1899), 2 Ch. 608, Lindley, L. J.

A similar tentative statement appears in a decision of Justice Story. Webb v. Portland Cement Co., 3 Sum. 189, Fed. Cas. No. 17,322.

In a New Jersey case the injunction against taking the water for sale to a distant city was framed to read that defendant "should be enjoined from abstracting such quantities of water from this stream and *at such times* as will be detrimental to the full *enjoyment* of the stream by the complainants." Higgins v. Flemington W. Co., 36 N. J. Eq. 538. See, also, the *decree* in City of Paterson v. East Jersey W. Co., 74 N. J. Eq. 49, 70 Atl. 472. In a late Texas case it was held that a *temporary* injunction would not lie during plaintiff's

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§ 834. Nonriparian Use by Both Parties.—As between two riparian proprietors neither seeking riparian use and both using the water on nonriparian lands, the lower, it has been held, cannot, while so engaged, assert a riparian right.[10] The matter may possibly be governed by the principle elsewhere set forth,[11] that possession will be protected against one who can show no better right. In other words, the argument would be that both have stepped out of their character as riparian owners, and neither can rely thereon.[12] "Now, if Duckworth was at the time actually diverting water from the lake and using it on such other lands, not riparian, and the defendant company was also diverting water therefrom for use on nonriparian land, which, for the purposes of the discussion to which the passage from the former opinion was devoted, might have been the case as between them, in such a case the law is thoroughly settled that the one first in time is first in right."[13]

However, this treatment of the question has been denied by formidable authority. In an important case in the House of Lords the upper riparian owner was taking the water beyond the watershed to supply a city, while the lower riparian owner was also taking it to nonriparian lands for sale, and the lower owner was none the less granted an injunction against the upper, regardless of who was first in time, on the ground that, even if the plaintiff below stream also had no right to make such use, he had at least a right against the upper nonriparian use to preserve the stream for the use of his own land below should he desire to there use it in the future, and refusal of the injunction would deprive him by prescription of this right of property, even if he was not now exercising it.[14]

nonuse, because the bringing of action itself stops any prescription. Biggs v. Leffingwell (Tex. Civ. App.), 132 S. W. 902.

10 Vernon Irr. Co. v. Los Angeles, 106 Cal. 243, 39 Pac. 762. Compare State v. Superior Court, 46 Wash. 500, 90 Pac. 650.

11 Secs. 246, 625.

12 See Wutchumna W. Co. v. Pogue, 151 Cal., at 112, 90 Pac. 362. See, also, Mentone Irr. Co. v. Redlands Co. (1909), 155 Cal. 323, 100 Pac. 1082, 22 L. R. A., N. S., 382, 17 Ann. Cas. 1222.

13 Concurring opinion of Mr. Justice Shaw in Duckworth v. Watsonville W. Co., 158 Cal. 206, 110 Pac. 927 (second appeal), as to which case see *supra*, sec. 246, appropriation on private land.

14 Speaking of the fact that plaintiff was himself selling the water, Lord Hatherly said: "But what has that to do with their position as regards the appellants? Those lower down the stream than the plaintiffs might possibly, if they thought fit, fairly complain of it as *ultra* the canal proprietors' powers, that any of the water, if it were superfluous, should be diverted from the stream unnecessarily and not handed over and passed on to them, but it could

Since the lower riparian owner can have an injunction against nonriparian use if not using the water at all, perhaps there is force in the argument that actually using it (no matter where) can put him in no worse position.

(3d ed.)

§ 835. **Conclusions.**—Some conclusions may be drawn from the foregoing discussion of the protection of the riparian right against nonriparian owners at common law (which is the law of waters prevailing in California, excepting grant, condemnation or prescription or rights acquired while the waters flowed mainly upon the public domain).

(a) Generally speaking, nonriparian owners have no rights in streams.

(b) A riparian owner may enjoin nonriparian use although not using the water himself, and he is not required to show damage to use; the injunction is granted to prevent impairment of the riparian estate through loss of supply for use in the future.

(c) The riparian owner is limited to no measure of reasonableness based upon any sharing or correlative use with the nonriparian owner or nonriparian use; he is entitled without limit to the full extent to which the natural flow of water does or may in the future contribute benefit to his riparian land, however much he might be forced to forego some thereof in favor of riparian use by other riparian owners.[15]

(d) Storm flow is natural flow.

not infringe on the rights of those in the upper part of the stream"; and also speaks of the water being "disposed of in a way which might not be legitimate as regards the lower proprietors, but which the higher proprietors could have nothing to do with. . . . . My Lords, I think enough has been made out to justify the interference of a court of equity in this case." Swindon W. W. v. Wilts etc. Co., 7 H. of L. 697, at 712. (This case is cited with approval in Gould v. Eaton, 117 Cal. 539, 49 Pac. 577, 38 L. R. A. 181, and by Mr. Justice Shaw in Southern Cal. etc. Co. v. Wilshire, 144 Cal. 68, 77 Pac. 767.) Cf. Sampson v. Hodinott, 1 Com. B., N. S., 611, 3 Jur., N. S., 243, holding that a lower riparian owner may have an action against improper unreasonable irrigation by an upper owner, though the lower owner himself used the water for irrigation in a way that might be improper as to owners still farther down the stream. As to nonriparian use by both parties, Salmond on Torts, page 267, argues that the lower *should* have a right of action against the upper. Upon close analysis, there may be something to the same effect in Mentone Irr. Co. v. Redlands Co. (1909), 155 Cal. 232, and Arroyo D. Co. v. Baldwin, 155 Cal. 280, 100 Pac. 874.

[15] Upon principle this is as true against a nonriparian use below as above.

(e) Beyond the foregoing, the latest California expression [16] is that, irrespective of present damage to present use, and irrespective of "reasonableness," the nonriparian use must, nevertheless, to be wrongful, be such as would be followed by *consequential* damage to the riparian *land* in case of its continuance.[17] This, if it does not follow as a matter of law, would seem to be, after all, a narrow residue.

The exclusion of nonriparian owners is unsatisfying in new regions (and so it is the chief point upon which so much has been said under the *Colorado Doctrine,* rejecting the common law absolutely, "to suit conditions").[18] The exclusion is in the public interest when a large riparian community lives along the stream itself, and as settlement advances upon the many little streams, the opposition to it will almost necessarily decline, but large projects, in California, will be forced by it to rely mainly upon grant, condemnation or prescription (arising where riparian owners do not insist upon their rights), or public-land appropriations, such as have been their basis in the past.[19]

[16] San Joaquin Co. v. Fresno Co. (Cal.), 112 Pac. 182.

[17] Speaking generally upon this matter of nonriparian use, the actual decisions in California tend to regard any possible exception in such direction as without definite form in the California cases. It is variously spoken of as a question of whether the nonriparian diversion is such that "it will deprive the riparian owner of its benefit," or "water which is or may be beneficial to the *land*" (Miller v. Madera Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A., N. S., 391), or whose loss would cause *consequential* damage to the *land* (San Joaquin Co. v. Fresno Flume Co. (Cal. 1910), 112 Pac. 182); or a diversion which "will not perceptibly diminish the *stream* below" (Anaheim W. Co. v. Fuller, 150 Cal. 327, 88 Pac. 978; Huffner v. Sawday, 153 Cal. 86, 94 Pac. 424); or "will not appreciably affect or substantially injure the riparian *rights*." Miller v. Madera Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A., N. S., 391. These are three different things: a diversion may appreciably diminish the *stream* without necessarily affecting the possible benefits to and enjoyment of the *land,* or causing it consequential damage; and a statement that a riparian owner's *rights* must not be infringed gives no aid in discovering wherein such an infringement consists.

[18] *Supra,* secs. 112, 167 et seq.

See, for example, the strong upholding of it on the ground of being *just suited to conditions* in the well-settled Santa Clara Valley, as set forth by the supreme court of California in Miller v. Bay Cities Co., 157 Cal. 256, 107 Pac. 115. Compare this opinion with the opinion in San Joaquin Co. v. Fresno Flume Co. (Cal. 1910), 112 Pac. 182, saying on the other hand that, because of conditions, there is no rule to which the court can adhere, but each case will be treated as one of first impression. See Young v. Hinderlider (N. M.), 110 Pac. 1145, as to how men differ as to what true policy is in water cases.

[19] *Supra,* sec. 112.

(3d ed.)

§ 836. Exception Where Underground Water is Involved.—Under the recent California decisions concerning percolating water, where a stream and ground-water are so intimately connected in nature as to form a single water supply, nonriparian owners (for use upon their own lands) have been admitted to equal rights with riparian owners on the stream.[20]

This matter is left to chapters upon underground water.

[20] Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748; Miller v. Bay Cities W. Co., 157 Cal. 256, 107 Pac. 115.

§§ *837–843. (Blank numbers.)*

CHAPTER 36.

CONTRACTS AND CONVEYANCES BY A RIPARIAN PROPRIETOR.[1]

§ 844. General.
§ 845. Grants and contracts are binding between the parties thereto.
§ 846. Same.
§ 847. But as affecting noncontracting riparian proprietors, grants or contracts or sales of water or of water-right are invalid.
§ 848. Some opposing decisions.
§ 849. How far the opposing cases can be supported upon principle.
§ 850. In the civil law.
§ 851. Conclusions.
§§ 852–860. (Blank numbers.)

(3d ed.)

§ 844. General.—Since the riparian owners do not own the *corpus* of water of the stream, the only private right therein being a usufruct, grants by riparian owners have for their subject matter the incorporeal usufruct, and not the corporeal water.[2] A grant concerning water of a lake extends to the use of the lake and not merely to the *corpus* then standing in the lake. "The claim of the respondents that the grant by Mrs. McKinlay of the rights pertaining to the land described in the deeds, extended only to the water then standing in the lake, and that as soon as that water was exhausted by use, run-off, or evaporation, the rights ceased to exist, is utterly baseless, and needs no discussion further than to deny it."[3] Upon the same distinction, a grant of a right to take water out of another's pond creates a *profit a prendre*,[4] a right in respect of the *corpus* of the water; but not so of the right to take water from his spring,[5] since the landowner owns the *corpus* of water in the pond, being then reduced to possession, but does not own a single drop as such, of the *running water* flowing in or from the spring.[6]

1 See, also, Chapter 24, *supra*, under the law of appropriation.

2 Kidd v. Laird, 15 Cal. 161, at 180, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571; McDonald v. Askew, 29 Cal. 200, at 207, 1 Morr. Min. Rep. 660; Mayor v. Commissioners, 7 Barr. (Pa.) 348.

3 Duckworth v. Watsonville Co., 150 Cal., at 532, 89 Pac. 338, and concurring opinion in S. C. (1910), 158 Cal. 206, 110 Pac. 927.

4 Angell on Watercourses, 7th ed., p. 245; Hill v. Lord, 48 Me. 83, *dictum*.

5 Race v. Ward, 3 El. & Bl. 710.

6 *Supra*, c. 1 *et seq.*

The riparian right passes without mention on a sale of the land as part and parcel of it unless expressly reserved.[7]

If a landowner subdivides, selling the upper half on which the stream rises, retaining the lower half through which it flows, his riparian right as to the lower half remains unaffected, not extinct by unity of possession.[8] Where he sells part not abutting upon the stream, reference is made to other places.[9]

(3d ed.)

§ 845. Grants and Contracts are Binding Between the Parties Thereto.—A grant or contract of or concerning water between riparian owners is binding upon them, their privies and successors. The grant or contract is binding upon the parties to it.[10]

Likewise, between the parties, a grant between a riparian and a nonriparian owner is binding between them.[11] A riparian owner may grant the land but reserve the use of the water, which will be binding *inter se*.[12] Or he may grant all his riparian right to another, reserving only use for domestic purposes. Where a riparian proprietor conveyed his rights to another, reserving only domestic use, the grant was held binding between the parties and privies, and the purchase by the grantor or his successors of other rights below stream thereafter is not material.[13] An exclusive or any other various use may be given to one party by decree on a partition of a riparian tract, which will bind the parties to the partition

7 *Supra*, sec. 711.

8 Shury v. Piggott, Poph. 169, 79 Eng. Reprint, 1263; Worthen v. White etc. Co., 74 N. J. Eq. 647, 70 Atl. 471; City of Paterson v. East Jersey W. Co., 74 N. J. Eq. 49, 70 Atl. 479.

9 *Supra*, sec. 769 et seq; *infra*, sec. 845 et seq.

10 Painter v. Pasadena etc. Co., 91 Cal. 74, 27 Pac. 539; Outhouse v. Berry, 42 Or. 593, 72 Pac. 584; Yocco v. Conroy, 104 Cal. 468, 38 Pac. 107; City of Salem v. Salem etc. Co., 12 Or. 374, 7 Pac. 497; Gould v. Stafford, 91 Cal. 146, 27 Pac. 534; Nichols v. New England etc. Co., 100 Mich. 230, 59 N. W. 155; Churchill v. Baumann, 104 Cal. 369, 36 Pac. 93, 38 Pac. 43; Rose v. Mesmer, 142 Cal. 322, 75 Pac. 905; Fuller v. Azuza Co., 138 Cal. 204, 71 Pac. 98; Wardle v. Brocklehurst, 1 El. & El. 1058; 6 Jur., N. S., 319, and cases *infra*.

11 Yocco v. Conroy, 104 Cal. 468, 38 Pac. 107; Gould v. Stafford, 91 Cal. 146, 27 Pac. 543; Alhambra etc. Co. v. Mayberry, 88 Cal. 74, 25 Pac. 1101; Duckworth v. Watsonville Co., 158 Cal. 206, 110 Pac. 927; Strong v. Baldwin, 154 Cal. 150, 129 Am. St. Rep. 149, 97 Pac. 178; Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748.

12 Walker v. Lillingston, 137 Cal. 401, 70 Pac. 282.

13 Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. 338, saying: "By reason of its purchase of these riparian rights the company possessed the right, so far as that land and its owners were concerned, to use the whole or any part of the waters of the lake except such as were necessary for domestic use and for the watering of stock thereon." See Same v. Same, 158 Cal. 206, 110 Pac. 927.

and their successors and privies.[14] In one case[15] all the land in suit was a part of an original rancho (ranchito), through the entire length of which the river has always flowed, and in the segregation of said rancho by deeds and partition decree among a large number of people, the riparian right of the ranchito was apportioned among the various subdivisions. All the parties to the suit being holders under such deeds or former decrees, they were held to the rights so defined, which rights were held to pass by express mention in all deeds subsequent to the original ones, even though some of the subdivisions were nonriparian to the stream.[16] Likewise, upon subdivision of a riparian tract, there may pass with the subdivided portions (though nonriparian after the subdivision), as against the grantor and his privies and successors in interest of the other portions, water-rights by implication from circumstances, as where some of the subdivided portions had previously been receiving water and there existed, at the time of the subdivision, ditches leading thereto, or other conditions indicating an intention that it should continue to have water, notwithstanding its being now severed from the stream.[17] But these rulings were only as between the parties, their privies and successors. Where a riparian owner subdivides his land and sells a part of it not abutting upon the stream (which thereby becomes *ipso facto*, because of natural situation, nonriparian), but includes a stipulation that the grantee may take water,

[14] Verdugo Canyon W. Co. v. Verdugo (1908), 152 Cal. 655, 93 Pac. 1021; Rose v. Mesmer, 142 Cal. 322, 75 Pac. 905; Strong v. Baldwin (1908), 154 Cal. 150, 129 Am. St. Rep. 149, 97 Pac. 178; Hudson v. Dailey, 156 Cal. 748, 105 Pac. 748; Moore v. Parker (1908), 149 N. C. 288, 62 S. E. 1083.

[15] Strong v. Baldwin (1908), 154 Cal. 150, 129 Am. St. Rep. 149, 97 Pac. 178.

[16] The opinion is not clear upon this question, as to grants purely between the parties, and the other question in the next section, as to grants against riparian owners strangers thereto. The opinion says the grantees owning nonriparian subdivisions "are all riparian owners," and that as to them their right "is still a riparian right, and is in strict technical language 'parcel of the land' conveyed." Such expressions were not intended to give the impression that a rule was being laid down that would bind other riparian owners not parties or privies to nor claiming under the original ranchito or its deeds or partitions. Such "stranger" riparian owners were not involved in the case; as to them, as discussed in the next section, the expressions do not apply. As between the parties and privies themselves alone, it matters little what name be given to their rights; they may bind themselves and their privies and successors in interest as they please.

[17] Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748, *dictum*, holding that where, on a partition of a riparian tract between A and B, an agreement is made concerning the water, the successors of A can claim the benefit thereof against the successors of B; but it will not affect the rights of the successors of A as between themselves alone. (*Quaere*, as to the statute of frauds.)

such grant is binding upon the grantor, his privies and successors.[18]

As against himself or the grantor, the grantee may assign his granted right in gross separate from his land, if expressly so intended.[19]

Where, on the sale of his rights, the riparian owner reserves a use for a limited purpose, such as for a hydraulic ram, the reservation is not lost by nonuser for that purpose.[20]

(3d ed.)

§ 846. **Same.**—With respect to the reason upon which grants are thus binding between the parties, it is sometimes said that a grant between riparian owners is not a transfer of a right, but an extinguishment thereof, as though it were an easement.[21] Section 801, Civil Code of California, declares the right to have water flow is a servitude on land, and section 811 declares the effect of a grant in derogation of this servitude is to extinguish it. The question arises chiefly in connection with the statute of frauds, holding that a parol license does not grant anything within the statute, but rather estops the licensor from asserting any right.[22] But the prevailing view is that the riparian right is not an easement or servitude, and the parol license cases do not, on the better authority, proceed upon such a distinction at law, but rely upon equitable principles of a different kind where acted upon and expense incurred; being irrevocable in equity.[23]

A recent California case reasoning upon the ground of estoppel seems to have given the court much difficulty. A water company organized to supply a town from a lake got deeds from most of the riparian owners thereon for a small riparian strip of land cutting off their frontage. The grant from one of the riparian owners, however, did not convey such a riparian strip, but granted "all his

[18] *Infra*, sec. 847. As to the effect of expansion or contraction of riparian boundaries by purchase or sale of parts, see further the chapter upon riparian land. *Supra*, sec. 765 et seq.

[19] Duckworth v. Watsonville Co., 158 Cal. 206, 110 Pac. 927. See Goodrich v. Burbank, 12 Allen, 459, 90 Am. Dec. 161; Lonsdale Co. v. Moies, Fed. Cas. No. 8496; Rood v. Johnson, 26 Vt. 64; Poull v. Mockley, 33 Wis. 482; Hill v. Shorey, 42 Vt. 614. See *supra*, sec. 550 et seq., "appurtenance;" rights obtained from riparian owners by grant become subject to the rules there discussed, rather than the rules governing original riparian rights.

[20] Walker v. Lillingston, 137 Cal. 401, 70 Pac. 282.

[21] See Lux v. Haggin, 69 Cal. 255, 293, 10 Pac. 674.

[22] Angell on Watercourses, 7th ed., p. 498.

[23] *Supra*, sec. 555, parol sale.

riparian rights." Thereafter defendant, a successor of this riparian owner, sought to take water from the lake. It was held that a grant of a strip of land was not needed to convey the riparian right; and that the defendant was estopped by the grant from taking water for use on that riparian land, and this estoppel was irrespective of any question of quantity. But the court seems to have thought that the grant does not estop him from using water upon some other land.[24]

As considered in another place, the writer is inclined to think that it is not a question of estoppel, but that the grant is binding between the parties to it because, whatever might be the effect thereof upon other riparian owners strangers to it, such question can be raised only by the persons injuriously affected. It allows the grantee, against his grantor, to do acts which are unlawful against the outstanding riparian owners, who are thereby *disseised;* but it is equivalent (to the amount granted) to an out-and-out conveyance of the natural resource—the flow and use of the stream—as between the parties.[25]

Where all the riparian rights on a stream are dealt with together in one contract, a right similar in result to a public-land appropriation may arise, since all who could complain have contracted away their rights. A severance of riparian rights by a sole riparian proprietor hence is a close counterpart of a public-land appropriation. An "appropriation" is, on the other hand, under the California doctrine, a grant of water on public land from the United States so far as it was in pioneer days a sole riparian proprietor.[1]

(3d ed.)

§ 847. But as Affecting Noncontracting Riparian Proprietors, Grants or Contracts or Sales of Water, or of Water-right are Invalid.—A riparian proprietor has, in his riparian right, something

24 Duckworth v. Watsonville Co., 158 Cal. 206, 110 Pac. 927. *Sed qu.* Suppose I grant all my riparian right and before my grantee starts work I divert the whole stream to nonriparian land: Would not this be a clear fraud upon my grantee? See *supra,* sec. 246, appropriation on private land.

25 *Supra,* secs. 246, 626 et seq.

1 *Supra,* Part II. "Where a stream rises, flows, and falls into the sea within the lands of one owner, his right of property is unaffected by any other interest, and his absolute dominion over it is uncontrolled. (Lord Blantyre v. Dunn (1848), 10 D. 509, at p. 529; Fergusson v. Shirreff (1844), 6 D. 1363, at p. 1374.) Where all the owners, if more than one, agree to any dealing with a stream, no question can arise. (Fergusson v. Shirreff, 6 D., at p. 1374)." Ferguson on The Law of Water in Scotland, p. 198.

of value as a part of his land, which is entitled to protection against other riparian proprietors. Can he sever this species of property from his land and give his nonriparian grantee the same right of protection against other riparian owners in the granted use as he himself had?

The rule stated as a general principle is, that he cannot, following the English case of Stockport W. W. v. Potter,[2] where a nonriparian grantee using the water for household consumption and town water supply was not allowed to recover damages from an upper riparian owner who polluted the water with chemicals. The rule against nonriparian use has been likened in this respect to the use of a right of pasture appurtenant to land which cannot be transferred for a purpose not referable to the land to which it was appurtenant. "The right of a riparian owner to the flow of water may, in this respect, be compared to a right of common for cattle levant and couchant upon land; this right cannot be aliened from the land."[3] As laid down in the Stockport case: "It seems to us clear that the rights which a riparian proprietor has with respect to the water are entirely derived from his possession of land abutting on the river. If he grants away any portion of his land so abutting, then the grantee becomes a riparian proprietor and has similar rights. But if he grants away a portion of his estate not abutting on the river, then clearly the grantee of the land would have no water rights by virtue merely of his occupation. Can he have them by express grant? It seems to us that the true answer to this is that he can have them against the grantor but not so as to sue other persons in his own name for an infringement of them."[4] The present English law is clearly settled in support of the Stockport case.[5] In the leading English case the directors of

[2] 3 Hurl. & C. 300.

[3] Bowen, L. J., in Ormerod v. Todmorden Mill Co., 11 Q. B. D. 172. In Jenks on Modern Land Law, page 166, the author says: "These rights [natural rights] are, in simple truth, merely fractions of that complex bundle of rights which we call *ownership*." "They [probably] cannot be severed from the general rights of ownership of which they form part." Citing Stockport W. W. v. Potter, but saying it is a little difficult to reconcile this with Nuttall v. Bracewell, L. R. 2 Ex. 1.

[4] Stockport W. W. v. Potter, 3 Hurl. & C. 300, at 326.

[5] McCartney v. Londonderry etc. Co. (1904), L. R. App. Cas. 301, House of Lords, per Lindley, L. J.: "The railroad company in this case became riparian owners simply by buying a small strip of land crossed by the stream. They thereby acquired the water-rights, whatever they were, of the owners of the lands so bought, but they acquired no greater rights than he could give them in respect to that land. These rights did not include the right to take water from the stream for consumption off the land, the possession of which conferred his rights."

a water company purchased a mill so as to become riparian owners, and used the water not only for the purposes and in the manner allowed by law to every riparian owner, but collected it into a permanent reservoir for *sale* in an adjacent town, and it was held that this was not a use of the stream such as could justifiably be made by an upper riparian owner.[6]

Such, also, is the general rule in American common-law jurisdictions. Water cannot be diverted from riparian owners (except by grant, condemnation or prescription) for *sale* as a city water supply.[7]

The California law has expressly followed the English law. In Gould v. Eaton,[8] it was held: "It is not necessary here to determine the extent to which such uses may be carried, or the purposes to which the water may be applied. They do not in any case include the right as against an inferior proprietor to divert the water to nonriparian lands. Each riparian owner is entitled to the natural flow of the stream through his land, with the limitation, however, that the superior proprietor may take therefrom such an amount as he is entitled to for riparian purposes. The superior proprietor cannot, however, divert to nonriparian lands the water which he would have a right to use for riparian purposes, but which he does not in fact use. His riparian right is appurtenant to the land bordering on the stream, and does not give him the right to divert the water to lands which are not riparian to the stream, and, as he cannot exercise his right himself, he cannot as against an inferior proprietor, confer it upon another. As against himself or his grantee he may contract for the diversion of the water to nonriparian lands,[9] but the rights of the inferior proprietor will not be affected by such contract. If he does not in fact use any of the water himself, the inferior proprietor has a right to the flow of the

[6] Swindon Waterworks Co. v. Wilts & Berks Canal Nav. Co., L. R. 7 H. L. 697; affirming the judgment of the Lords Justices, L. R. 9 Ch. 451. This decision was followed in the case of Owen v. Smith (W. N. (Scotch) 1874, p. 175) where the Master of the Rolls restrained a board of health, who were riparian owners, from diverting the water of a stream into their reservoir for purposes of sale.

[7] A few cases among many are Parry v. Citizens' W. Co., 59 Hun, 199, 13 N. Y. Supp. 471; Standen v. New Rochelle W. Co., 91 Hun, 272, 36 N. Y. Supp. 92; City of Paterson v. East Jersey W. Co., 74 N. J. Ch. 49, 70 Atl. 472; Saunders v. Bluefield W. W. Co. (W. Va.), 58 Fed. 133; Haupt's Appeal, 125 Pa. 211, 17 Atl. 436, 3 L. R. A. 536; Lord v. Meadville W. Co., 135 Pa. 122, 20 Am. St. Rep. 864, 19 Atl. 1007, 8 L. R. A. 202.

[8] 117 Cal. 542, 49 Pac. 577, 38 L. R. A. 181.

[9] Citing Gould v. Stafford, 91 Cal. 146, 27 Pac. 543; Yocco v. Conroy, 104 Cal. 468, 38 Pac. 107.

entire stream."[10] A more recent California case says: "Furthermore, his riparian right is limited to his riparian land. It gave no right to use any of the water of the stream for any purpose, upon land not riparian, nor upon any riparian land other than his own. No one can sell or convey to another that which he does not himself own. Grimmer could not, by a transfer of his riparian rights, sell to the plaintiff, as against third persons having interests in the water, the right to use the water upon any land, riparian or nonriparian, except his own, to which it originally attached. His deed operated to prevent him from complaining of a diversion, but it did not affect other parties," and in the same case, as to a water company which was involved, the court said: "But the mere fact that the company is a riparian owner on the lake gives it no right whatever to the water of the lake, except for actual beneficial use upon the land to which the riparian rights attach."[11]

It is the settled rule in California that water cannot, to the detriment of opposing riparian owners (except by grant, condemnation or prescription or by public land appropriation), be taken from a stream for *sale*. A late California case very emphatically holds that one riparian owner is not entitled to divert the waters of a stream for use at a distant city or for commercial purposes, so as to prevent another riparian owner, to whom the waters would otherwise be available, from using them on his lands.[12] One California case[13] presented facts very similar to the Stockport case, and, without citing that case, reached the same result on principle; namely, that one taking water for sale for nonriparian city supply cannot enjoin pollution by an upper riparian owner.[14] In

[10] Citing Stockport Water Works v. Potter, and Water Works Co. v. Wilts etc. Canal Co., *supra*.

There is nothing in the case of San Joaquin Co. v. Fresno Flume Co. (Cal.), 112 Pac. 182, which affects this point.

[11] Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. 338. Note the words "beneficial use." Upon a second appeal it was said that where a riparian owner used forty inches of water for nonriparian town supply, and another riparian owner later took one hundred and forty-two inches for irrigating his riparian land, if this were the whole case, the former could have no relief. Duckworth v. Watsonville Co., 158 Cal. 206, 110 Pac. 927.

[12] Miller v. Bay Cities W. Co., 157 Cal. 256, 107 Pac. 115. See, also, Logan v. Guichard (Cal. 1911), 114 Pac. 989.

[13] People ex rel. Ricks etc. Co. v. Elk R. Co., 107 Cal. 221, 48 Am. St. Rep. 121, 40 Pac. 486.

[14] See, also, Stoner v. Patten (1909), 132 Ga. 178, 63 S. E. 897. The right of a proprietor to use a due proportion of the waters of a stream upon which his lands border, for irrigation purposes, cannot be affected by the grant of a right to divert the waters of the same stream, made by an adjacent proprietor. Anaheim Water Co. v. Semi-Tropic Water Co., 64 Cal. 185, 30 Pac. 623.

authority to the effect that a riparian owner may pass some right to a nonriparian owner or nonriparian use, enforceable against other riparian owners. These authorities are collected in the note. As they constitute a complete list of all that the writer could find after considerable search (while the decisions opposing them are innumerable), it will be seen that they form a very small minority.[24]

(3d ed.)

§ 849. How Far the Opposing Cases can be Supported upon Principle.—So far as these cases relied (as to some extent they did) upon a contention that the facts showed the nonriparian grantee's use to be a "reasonable use," they are opposed to the weight of authority, and cannot be sustained, either, upon principle; and since the recent decision in Miller v. Madera Co.[25] are

tent that their exercise comes within the limits of the natural riparian rights of the lower owner." Such a grant to a city gives it no right to divert the water, but gives it the same right as its riparian grantor had to restrain a diversion by an upper riparian owner. (The city had near-by lands laid out as a park, and the proximity of the river was important to the park.) City of Paterson v. East Jersey W. Co., 74 N. J. Eq. 49, 70 Atl. 480.

[24] *England.*—Nuttall v. Bracewell, L. R. 2 Ex. 1; Kensit v. Great Eastern Ry., 27 Ch. D. 122, quoted *supra*, sec. 823; Earl of Sandwich v. Great Northern Ry., 10 Ch. D. 707. The last, however, was expressly overruled in McCartney v. Londonderry Ry., quoted in the preceding section; and if the English decisions still have any force in this direction, it is very limited.

California.—Arroyo D. Co. v. Baldwin (1909), 155 Cal. 280, 100 Pac. 674, and see cases cited *supra*, sec. 822 et seq.

Indiana.—Bristol etc. Co. v. Boyer, 67 Ind. 236.

Massachusetts.—Elliott v. Fitchburg Ry., 10 Cush. 191, 57 Am. Dec. 85. But in this matter the later Massachusetts cases have a contrary tendency.

Michigan.—Hall v. City of Ionia, 38 Mich. 493.

Minnesota.—St. Anthony Co. v. City of Minneapolis, 41 Minn. 270, 43 N. W. 56.

New Hampshire.—Gillis v. Chase, 67 N. H. 161, 68 Am. St. Rep. 645, 31 Atl. 18; Jones v. Aqueduct, 62 N. H. 488.

New Jersey.—See cases in preceding note.

Oregon.—"Riparian rights may become the subject of a grant or dedication, and may be severed from the soil." Coquille Mill etc. Co. v. Johnson, 52 Or. 547, 132 Am. St. Rep. 716, 98 Pac. 132; Montgomery v. Shaver, 40 Or. 244, 66 Pac. 923; Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728. Cf. Jones v. Conn, 39 Or. 30, 87 Am. St. Rep. 634, 64 Pac. 855, 65 Pac. 1068, 54 L. R. A. 630.

Pennsylvania.—City of Reading v. Althouse, 93 Pa. 400.

Rhode Island.—Matteson v. Wilbur, 11 R. I. 545.

Vermont.—Lawrie v. Silsby (1904), 76 Vt. 240, 104 Am. St. Rep. 927, 56 Atl. 1106; Same v. Same (1909), 82 Vt. 505, 74 Atl. 94; Percival v. Williams, 82 Vt. 531, 74 Atl. 321.

Miscellaneous.—24 Am. & Eng. Ency. of Law, 982; note by Justice Oliver Wendell Holmes to 3 Kent's Commentaries, 14th ed., p. 689; Decker v. Pac. etc. Co. (Alaska), 164 Fed. 977; note in 40 L. R. A. 393.

Some of these cases are positive upon the point under consideration, but most of them show confusion, citing cases decided only between parties or privies to the contract itself.

[25] 155 Cal. 59, 99 Pac. 502, 22 L. R. A., N. S., 391.

not authority in California. But whether, by confining the decision to the parties litigant, there may, while casting out all thought of "reasonableness," nevertheless be some principle to support them in extreme cases—this is a question so closely involved with the previous chapter that the reader is referred there for further discussion.[1]

(3d ed.)

§ 850. **In the Civil Law.**—Some interest may be taken by the reader in the civil-law authorities quoted in a later chapter upon this matter. As a general statement their rule is the same as the common-law rule; grants are invalid as to noncontracting riparian owners. Nevertheless some expressions exist to the contrary in the civil law also, which shows that the matter has given rise to the same differences in the civil law as in the common law, and that it is a question of inherent difficulty.[2]

(3d ed.)

§ 851. **Conclusions.**—(a) A riparian owner may contract with other riparian owners or with nonriparian owners as he sees fit, which will bind himself, his privies and successors.

(b) He can make no contract which will abridge any right of any noncontracting riparian owner and be valid against such owner; which, as a general rule, prevents any contract by one riparian owner being valid against any noncontracting riparian owner.

(c) If there is any exception, it depends upon the same considerations as those set forth in the two preceding chapters regarding nonriparian use or excessive riparian use.

1 We there concluded that the prohibition of nonriparian use arises out of two considerations: (a) that nonriparian owners have no access to the water; and (b) that the riparian owner (who has access) can excuse damage to the land of a neighbor only by the reasonable use of his own (the riparian) land. Applying these principles, a grant of access to another removed the first ground of the prohibition. The second ground (reasonable use of the riparian land through which the right is derived) is material only in excuse of possible damage, and perhaps disappears also in the *extreme* case upon large streams where it is shown (the nonriparian use having the burden of proof) that no damage to complainant's capacity of use of his land at any time, or to its value or enjoyment, can possibly (even in the future) accrue. The question arises, however, whether this is not simply a roundabout definition of the rule "*de minimis non curat lex.*"

2 *Infra*, sec. 1027, under the civil law.

§§ *852–860. (Blank numbers).*

CHAPTER 37.

LOSS OF RIPARIAN RIGHT.

A. ABANDONMENT AND ADVERSE USE.—AVULSION.

§ 861. No abandonment.
§ 862. Avulsion.
§ 863. Adverse use.

B. EMINENT DOMAIN.

§ 864. Riparian right may be condemned.
§ 865. Clark v. Nash.
§ 866. Procedure on eminent domain.
§§ 867–879. (Blank numbers.)

A. ABANDONMENT AND ADVERSE USE—AVULSION.

(3d ed.)

§ 861. No Abandonment.—Riparian rights cannot be lost by abandonment, wherein they differ in an essential element from appropriations. The latter depend on continued beneficial use; but in the riparian right, future possible use stands as high as actual present use. Riparian rights remain both against other riparian owners and against nonriparian owners, though the water is put to no use at all.[1]

The fact that a riparian owner does not use the water, not only gives nonriparian owners no rights, but does not even enlarge the rights of other riparian owners against him; for the riparian right is primarily to the use of one's own land, and a failure to make such use does not affect the right to use the land when desired; just as the failure for a long time to build a house on the land does not, of itself, deprive the owner of the right to build one when

[1] Hargrave v. Cook, 108 Cal. 72, 41 Pac. 18, 30 L. R. A. 390; Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Bathgate v. Irvine, 126 Cal. 140, 77 Am. St. Rep. 158, 58 Pac. 442; Cave v. Tyler, 133 Cal. 568, 65 Pac. 1089; Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. 336; New York etc. Co. v. Rothery, 132 N. Y. 293, 28 Am. St. Rep. 575, 30 N. E. 841; Corning v. Troy Iron etc. Factory, 40 N. Y. 191. See, also, cases cited *supra*, sec. 117, in support of the California doctrine. Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748 (thirty years' nonuse not cause loss of riparian right). "Le droit d'usage concédé par l'art 644 [Code Napoleon, affirmative of riparian rights] . . . . ne se perd pas par le nonusage," but may be lost by prescription. Droit Civile Francais, by Aubrey & Rau, 4th ed., vol. III., p. 52. Likewise the Spanish law in Eschriche, "Aguas," sec. 1.

he sees fit.[2] Should a nonriparian owner divert the water above the riparian owner, the nonriparian owner will be enjoined so far as the water is or may be beneficial to the riparian land, though the riparian owner is not himself using it;[3] and should the nonriparian owner be diverting the water below the riparian owner who is not using it, the nonriparian owner cannot complain when the riparian owner above takes it from him thereafter for his own use upon his own land.[4]

Nonuse does not affect the riparian right. The rule of the common law as stated in the frequently quoted passage from Creswell, J., in Sampson v. Hoddinott,[5] is: "All persons having land upon a flowing stream have, by nature, certain rights to the use of the stream, whether they exercise them or not, and they may begin to exercise them whenever they will."[6] Another case says: "Use does not create the right, and disuse cannot destroy or suspend it."[7] The Washington court has, however, said in this connection:[8] "It is not to the State's interest that the water of a non-navigable stream should be idle or going to waste because one of its citizens having a preference right to its use, unjustifiably neglects to avail himself thereof, while others stand ready and willing, if permitted, to apply it to the irrigation of their arid lands."[9] This fear of the rule permitting the nonuse is well justified in new regions, but becomes less as the riparian lands are well settled up, for to that may be applied what Judge Henshaw said (speaking of percolating water):[10] "For it is not to be supposed that with an abundance of water . . . . if the soil itself was fit for cultivation those waters

[2] Tenney v. Miners' Ditch Co., 7 Cal. 339, 340, 11 Morr. Min. Rep. 31.

[3] *Supra*, sec. 815 et seq.

[4] *Supra*, note 1. See, also, Redwater Co. v. Reed (S. D.), 128 N. W. 702; Same v. Jones (S. D.), 130 N. W. 85.

[5] 1 Com. B., N. S., 590, 3 Jur., N. S., 243.

[6] Accord Weiss v. Oregon etc. Co., 13 Or. 496, 11 Pac. 255; Gray v. Ft. Plain, 105 App. Div. 215, 94 N. Y. Supp. 698; Rogers v. Overacker, 4 Cal. App. 333, 87 Pac. 1107.

[7] Lux v. Haggin, 69 Cal. 255, 390, 10 Pac. 674. "It probably never occurred to anyone that the owners, by neglecting to appropriate the grasses and trees naturally growing on such lands to some useful purpose, left them open and subject to a rightful appropriation by anyone else." Lux v. Haggin, 4 Pac. 919, at 922 (not officially reported).

[8] State ex rel. Liberty Lake etc. Co. v. Superior Court, 47 Wash. 310, 91 Pac. 968.

[9] Cf. Smith v. Hawkins, 110 Cal. 122, in another connection, calling any rule permitting nonuse "a mischievous perpetuity." As to percolating water, see Burr v. Maclay R. Co., 154 Cal. 428, 98 Pac. 260, *speaking* the same way, but voluntarily as a new matter *deciding* in favor of the landowner who was not using the water.

[10] In Newport v. Temescal etc. Co., 149 Cal. 531, 87 Pac. 372, 6 L. R. A., N. S., 1098.

would not long since have been used to transform the desert of Perris valley into a fruitful garden." That is, upon the well-settled streams, self-interest will induce the fullest use of all the water by the riparian owners themselves; and when that stage is reached, the advantage of the limitation to the "reasonable use of one's own land" outweighs the disadvantage of having to wait for full settlement to secure the benefits of the system to the public.

In adjusting rights between riparian owners themselves, the riparian owner must be left enough for reasonable riparian use, though no evidence of an intent to make such use appears.[11]

Not only is nonuse no abandonment, but nonuse raises no estoppel in the absence of additional matter showing active misconduct as discussed heretofore on the question of estoppel.[12] The magnitude of a hostile investment is not properly enough *per se* to raise an estoppel. "Before locating the plant the owners were bound to know that every riparian proprietor is entitled to have the waters of the stream that washes his land come to it without obstruction, diversion or corruption, subject only to the reasonable use of the water by those similarly entitled . . . . and to determine for themselves, and at their own peril, whether they should be able to conduct their business upon a stream of the size and character of Brandywine Creek without injury to their neighbors; and the magnitude of their investment, and their freedom from malice furnish no reason why they should escape the consequences of their own folly."[13]

After water passes the lands of a riparian proprietor, so long as it is not thrown back upon him, nothing which can be done to or with it would bind him or require action on his part. It is true that lower down the stream some person, either as appropriator or a lower riparian proprietor, may use and claim to be entitled to the whole of the water, but nothing that can be done with it by another afterward can prejudice the upper proprietor. His inaction does not create any inference that he intends to abandon any right he may have, nor is it regarded as an encouragement to the appropriator or user to proceed in his course or to make the expenditures which it may necessitate. It, therefore, does not

11 Wiggins v. Muscupiabe etc. Co., 113 Cal. 194, 54 Am. St. Rep. 337, 45 Pac. 160, 32 L. R. A. 667.

12 *Supra*, secs. 593, 594.

13 Weston Paper Co. v. Pope, 155 Ind. 394, 57 N. E. 719, 56 L. R. A. 899, granting injunction against pollution. Concerning estoppel, see the discussion under the law of appropriation, *supra*, secs. 593, 616, 651.

give any right either by prescription or estoppel which will prevent the upper proprietor, whenever he sees proper, from making such use of the water while on his land as he would be entitled to had no use ever been made of it at some point farther down the stream.[14]

In some Nebraska cases the court has greatly weakened upon this rule.[15] But the point chiefly involved in those cases was one of eminent domain, in which connection they are already considered. The doctrine that the riparian right is not affected by nonuse is modified also in Washington in regard to eminent domain proceedings.[16]

(3d ed.)

§ 862. **Avulsion.**[17]—The right may be lost by a natural change in the channel, making the stream flow elsewhere; the riparian proprietor has no right to ditch it back.[18] If the change is sudden instead of gradual, it is known as "avulsion."[19] In case of such sudden change it has been held, however, that the riparian proprietor may ditch it back if he does not delay beyond a reasonable time.[20] At all events, he has a right to take precautions by strengthening the banks against sudden changes by freshets and washouts,[21]

[14] 93 Am. St. Rep. 717, note, citing Hanson v. McCue, 42 Cal. 305, 10 Am. Rep. 299; Anaheim etc. Co. v. Semi-Tropic etc. Co., 64 Cal. 192, 30 Pac. 623; Lakeside etc. Co. v. Crane, 80 Cal. 181, 22 Pac. 76; Alta etc. Co. v. Hancock, 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. 645; Bathgate v. Irvine, 126 Cal. 135; Walker v. Lillingston, 137 Cal. 401, 70 Pac. 282; Crawford Co. v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647, 93 N. W. 781, 60 L. R. A. 889; Mud Creek etc. Co. v. Vivian, 74 Tex. 170, 11 S. W. 1078. Eschriche "Aguas," sec. 4 (Spanish law), translated in Hall's Irrigation Development, pp. 378, 379. But see Arroyo D. Co. v. Baldwin, 155 Cal. 280, 77 Am. St. Rep. 158, 58 Pac. 442, holding upper riparian owner *bound* to let water go by for lower *nonriparian* use.

[15] *Supra*, secs. 616, 651.

[16] *Infra*, secs. 864, 865, State ex rel. Liberty Lake etc. Co. v. Superior Court, 47 Wash. 310, 91 Pac. 968.

[17] See, also, *infra*, sec. 901 et seq.

[18] Paige v. Rocky Ford etc. Co., 83 Cal. 84, 21 Pac. 1102, 23 Pac. 875; Wholey v. Caldwell, 108 Cal. 95, 49 Am. St. Rep. 64, 41 Pac. 31, 30 L. R. A. 820. Dalloz, "Jurisprudence," vol. 40, word "Servitude," saying (translated from the French): "To exercise the right of irrigation, it is necessary to be a riparian proprietor. If, then, a watercourse comes to change its bed, the proprietors who are no longer on the new bed no longer preserve upon it the right of taking water for irrigation, nor, consequently, of making constructions to conduct the waters upon their properties." Likewise Pardessus on Servitudes, vol. 1, p. 262.

[19] Missouri v. Nebraska, 196 U. S. 23, 25 Sup. Ct. Rep. 155, 49 L. Ed. 372; Fowler v. Wood, 73 Kan. 511, 117 Am. St. Rep. 534, 85 Pac. 763, 6 L. R. A., N. S., 162.

[20] York County v. Rollo, 27 Ont. App. 72; Morton v. Oregon Ry. Co., 48 Or. 444, 120 Am. St. Rep. 827, 87 Pac. 151, 1046, 7 L. R. A., N. S., 344.

[21] Cox v. Barnard, 39 Or. 53, 64 Pac. 860.

if he can do so without trespassing upon the land of another.[22] Where a river suddenly changes its course and abandons its former bed, the respective riparian owners are entitled to the possession and ownership of the soil formerly under its waters, as far as the thread of the stream.[23] If the change is gradual instead of sudden, the right is not lost, because the accretion belongs to him with his own land and preserves his right of access.

The law of accretion is considered in chief below, having been here mentioned only as affecting loss of riparian right to flow and use of the stream.[24]

(3d ed.)

§ 863. Adverse Use.—Riparian rights may be lost by adverse use; and this claim is the favorite last resort of claimants to the use of water; it will be found discussed in innumerable cases. In general, the requisites are the same as those elsewhere discussed.[25]

The distinction between the upper and lower use must be kept in mind. A lower use, since it in no way interferes with the natural flow above, is no invasion of a right above. No action would lie, and so no prescriptive right nor estoppel can arise in favor of a *nonriparian* owner below stream against an upper riparian owner.[1] Likewise, there is no such thing as a prescriptive right of a lower *riparian* owner to receive water as against upper owners. Receiving the full flow of a stream for over ten years was held[2] not to give a prescriptive right that will prevent reasonable use of its waters by an upper owner, saying: "On the arguments of the case at bar it is suggested that defendant Hall had acquired a pre-

22 Wholey v. Caldwell, 108 Cal. 95, 49 Am. St. Rep. 64, 41 Pac. 31, 30 L. R. A. 820.

23 Kinkead v. Turgeon, 74 Neb. 573, 104 N. W. 1061, 1 L. R. A., N. S., 762, 109 N. W. 744, 7 L. R. A., N. S., 316, 13 Ann. Cas. 43.

24 *Infra*, sec. 901 et seq.

25 Sec. 579 et seq. See Gallagher v. Montecito etc. Co., 101 Cal. 242, 35 Pac. 770; Bathgate etc. Co. v. Irvine, 126 Cal. 135, 77 Am. St. Rep. 158, 58 Pac. 442; Oregon etc. Co. v. Allen etc. Co., 41 Or. 209, 91 Am. St. Rep. 701, 69 Pac. 455.

1 Hargrave v. Cook, 108 Cal. 72, 41 Pac. 18, 30 L. R. A. 390; Bathgate v. Irvine, 126 Cal. 135, 77 Am. St. Rep. 158, 58 Pac. 442 (even if a notice of appropriation be posted); Cave v. Tyler, 133 Cal. 566, 65 Pac. 1089; Davis v. Martin, 157 Cal. 657, 108 Pac. 866; Perry v. Calkins (Cal.), 113 Pac. 136; Clark v. Allaman, 71 Kan. 206, 80 Pac. 571, 70 L. R. A. 971; Magistrate v. Elphinstone, 3 Kames Dec. 331; Stockport W. W. v. Potter, 3 Hurl. & C. 300. "In case the party against whom such adverse user is asserted is an upper riparian owner, it is difficult to conceive of a case where the use of the water by a lower diversion can be adverse." Davis v. Chamberlain, 51 Or. 304, 98 Pac. 154. See, also, Beers v. Sharpe, 44 Or. 386, 75 Pac. 717.

2 Crawford v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647, 93 N. W. 781, 60 L. R. A. 889.

scriptive right to the full flow of the stream by ten years' user. There cannot be, in the very nature of things, any such thing as a prescriptive right of a lower riparian owner to receive water of a stream as against upper owners."[3]

It has been held that nonriparian use of the surplus above over the possible present or future needs of the riparian proprietor will not be adverse to him, and that appropriation of considerable quantities of water in seasons when that may be done without sensible injury to the value of the estates of lower owners does not give a prescriptive right to divert the whole stream in dry seasons.[4] This is the line of minority decisions given in discussing damage; that is, the decisions holding that in the absence of the possibility of damage, present or future to the value or use of the lower riparian land, no wrong is done the lower owner. If no wrong is done, no prescription can arise. We refer to that discussion, without repeating it further here. On the other hand, there are strong decisions that even if no possible damage, yet the upper use of the surplus may be an injury and adverse and a prescriptive right may arise. That is, they say, there is an injury because a prescriptive right will arise, and that a prescriptive right arises because there is an injury. The decisions conflict.[5]

An upper use which does actual damage to a lower proprietor or impairs the value of his land or his capacity of future use thereon, and which (if the upper user is a riparian proprietor) is also in excess of the reasonable use to which the upper proprietor is entitled, will start the running of a prescription immediately, since it is an immediate wrong.[6]

It has been suggested that beneficial use is not necessary to acquire a prescriptive right against a riparian owner, but the question of beneficial use in prescription is probably one of color of title, and hence involved with regard to the one in whose favor prescription is invoked, and not with regard to the party against whom invoked.[7]

[3] Accord Perry v. Calkins (Cal.) 113 Pac. 136; Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748 (nonuse for thirty years); Walker v. Lillingston, 137 Cal. 401, 70 Pac. 282; Dunn v. Thomas, 69 Neb. 683, 96 N. W. 142; Mud Creek etc. Co. v. Vivian, 74 Tex. 170, 11 S. W. 1078.

[4] Meng v. Coffey, 67 Neb. 500, 108 Am. St. Rep. 697, 93 N. W. 715, 60 L. R. A. 910; Clark v. Allaman, 71 Kan. 206, 80 Pac. 571, 70 L. R. A. 971; Fifield v. Spring Valley Water Co., 130 Cal. 552, 62 Pac. 1054.

[5] *Supra*, sec. 815 et seq.

[6] Heilbron v. W. Co., 75 Cal. 117, 17 Pac. 65; Alta etc. Co. v. Hancock, 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. 645. See *supra*, secs. 801, 816, concerning present damage.

[7] See *ante*, sec. 586, color of title.

demnation proceedings, we are unable to perceive it." And consequently it seems clear that condemnation can affect only the defendants to the suit, and cannot affect other riparian owners, just as a grant by one riparian owner is of no validity against noncontracting riparian owners.[23]

In Washington,[24] the riparian owner must submit to the condemnation of the riparian right to the natural flow of the water, with the limitation, however, that water that is used by said person himself for irrigation, or that is needed for that purpose by any such person, may not be condemned. This reservation from condemnation of use for irrigation was held [25] to cover only present use, and only such future use as is in present contemplation and is actually accomplished with reasonable diligence within reasonable time—about two or three years, the court said.[1] The decision, however, is limited strictly to a construction of the statute, and is to the effect that the exemption from condemnation does not extend to the full common-law right to irrigate. That right is independent of present use, or of diligence, or of intent to make future use; all possible future use, intended or not, however long in accomplishment, is preserved by the common law. In denying this full extent to the exemption, the Washington court in effect construes the statute not to exempt the full riparian right to irrigate, but only a restricted right is exempted, analogous rather to the law of "future needs" in appropriation.[2] In a later case under the same statute it

[23] *Supra*, sec. 847, grant; and sec. 625 et seq., unrepresented interests.

[24] Under sec. 4156, Ballinger's Ann. Codes and Stats. Pierce's Code, secs. 5869, 5871.

[25] State ex rel. Liberty Lake etc. Co. v. Superior Court, 47 Wash. 310, 91 Pac. 968. See, also, State ex rel. Kettle Falls etc. Co. v. Superior Court, 46 Wash. 500, 90 Pac. 650; Nesalhous v. Walker, 45 Wash. 621, 88 Pac. 1032.

[1] In the opinion it is said: "The question, then, turns upon the meaning and intention of the legislature by the expression 'needed,' as employed in section 4156, Ballinger's Annotated Codes and Statutes. We think it means the water necessary to irrigate the land of the littoral or riparian owner which he now has under irrigation, and also that which he intends to, and will, place under irrigation within a reasonable time. It cannot be supposed that the legislature intended that a riparian owner could prevent an irigating company from appropriating water not then in use, but which the riparian owner might need and use upon his land at some distant, indefinite time in the future. Such a construction would be in the interest of the speculator, rather than for the encouragement of the land improver and home builder. The statute gives the riparian owner a preference right, upon the theory that he needs and will avail himself of the privilege thus given him. If he is not using the water, and does not purpose to use it as soon as practicable in the ordinary and reasonable development or cultivation of his lands, then there is no reason why the water should be withheld from others who need and will promptly use it if permitted."

[2] *Supra*, sec. 483 et seq.

was held that the condemnor water company may prove the number of irrigable acres of the riparian proprietor on a lake, and the quantity sufficient per acre, and it is then no objection to the condemnation that it will result in a joint user of the water of the lake between the riparian proprietor and the condemnor.[3]

(3d ed.)

§ 865. **Clark v. Nash.**—Under the decision in Clark v. Nash,[4] States, under certain conditions, may pass statutes giving a nonriparian owner the right to condemn rights of way for ditches over riparian lands for his private nonriparian irrigation, where certain peculiar conditions make this inferentially a public use.[5] In the French law, based fundamentally upon the law of riparian rights, an extensive use of this principle is made to establish a system for acquiring nonriparian uses by condemnation.[6] Upon the same lines, the States following the Colorado doctrine, recognizing no right in the riparian owner as to the water, recognize his right to the exclusive possession of his *land*, and provide a system for acquiring rights of way for ditches for nonriparian owners over the riparian *land*, by condemnation.[7]

When the riparian lands are all settled upon, condemnation will, as a rule, have to be resorted to by nonriparian appropriators even in Colorado, the only difference between Colorado and California after full settlement being that the nonriparian appropriator must pay for the water as well as the right of way in California, while in Colorado, only for the right of way.

Reference is made to a preceding chapter.[7a]

(3d ed.)

§ 866. **Procedure on Eminent Domain.**—In Nebraska the law[8] authorizes the condemnation of the right of a private riparian proprietor to the use and enjoyment of a natural stream flowing past his land, or its impairment by an appropriation of such water for irrigation purposes; and such riparian proprietor may recover damages in the same way and subject to the same rules as a person

3 Spokane Co. v. Arthur Jones Co., 53 Wash. 37, 101 Pac. 515.

4 198 U. S. 361, 25 Sup. Ct. Rep. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1171 (already considered).

5 *Supra*, sec. 608. See, for example, Pierce's Washington Code, sec. 5127, sec. 5848.

6 *Supra*, sec. 614 et seq.

7 *Supra*, secs. 225, 232.

7a *Supra*, sec. 607 et seq.

8 Comp. Stats. 1901, sec. 41, art. 2, c. 93a, and of section 21, article 1, of the Constitution.

whose property is affected injuriously by the construction and operation of a railroad.[9] In Texas [10] it is held that while, in that State, the irrigation act provides for the condemnation of a right of way only for an irrigation canal, still, under Sayles' Civil Statutes,[11] authorizing canal companies to condemn any land necessary for their use, an irrigation company [12] may divert water which a riparian proprietor had the right to have flow in a certain channel, and to the use thereof as such owner.

The damages on eminent domain are usually held to be the loss in value of the riparian land consequent upon loss of the use of the water, future possible use being of equal importance with use actually being made (or if no use is being made at all).[13] The damages are measured by depreciation in value of the land, and cannot be figured at so much a front foot on the stream.[14] The Nebraska rule is to figure damage on the analogy to one whose property value is decreased by smoke from a railway, saying: "The right of the property owner to the benefit and advantage of a street and highway adjacent to his land and the right of the riparian owner to the reasonable use and enjoyment of the water in a flowing stream over or adjoining his land are not without features rendering them in a measure analogous." [15] And gives loss of future use little weight where no present use, contrary to a cardinal principle of the common law.[16] In Nebraska it has been held: "In consequence, if a reasonable use of the water consistent with a like use by other riparian owners cannot be made in a particular case, the injury of the riparian owner by reason of appropriation [and condemnation] of the water by an irrigation enterprise is nominal only." [17]

This violates the rule that the rights of strangers to a suit cannot be considered. At common law only riparian proprietors can take water, and one not such cannot defend his trespass by saying that

9 Crawford v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647, 93 N. W. 781, 60 L. R. A. 889; McCook Irr. Co. v. Crews, 70 Neb. 115, 102 N. W. 249.

10 McGee Irr. Co. v. Hudson (Tex. Sup.), 22 S. W. 967.

11 Art. 628, sec. 6.

12 Formed under the act of 1889 of the laws of Texas.

13 Lux v. Haggin, 69 Cal. 255, 10 Pac. 674. See Cal. Code Civ. Proc., sec. 1248.

14 Hercules W. Co. v. Fernandes, 5 Cal. App. 726, 91 Pac. 401.

15 Crawford v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647, 93 N. W. 781, 60 L. R. A. 889. Cf. Olympia L. & P. Co. v. Harris (Wash.), 108 Pac. 940.

16 McCook v. Crews, 70 Neb. 109, 996. See *supra*, secs. 616, 651 et seq.

17 McCook etc. Co. v. Crews, 70 Neb. 109, 96 N. W. 996. Cf. Tacoma etc. Co. v. Smithgall (Wash.), 108 Pac. 1091, also improperly admitting consideration of the outstanding riparian owners.

there are other riparian proprietors having as good (or better) right to the water as plaintiff. The same principle should apply to damages on eminent domain. The other proprietors may never seek to use the water, in which case the one who does can take, against a wrongdoer, all he could ever possibly put to use, though it might be the whole stream, unlimited by the like use of others who do not insist on their rights. The condemnor should not be allowed to set up their rights for them (unless he joins all as defendants).[18]

Reference is also made to the general chapters upon procedure and upon eminent domain.[19]

(3d ed.)

§§ 867–870. Some footnote cross-references have been made to these numbers. The matter referred to will be found in other sections.[20]

[18] *Supra*, secs. 616, 626 et seq., 651 et seq., 753.

Condemnation of riparian right of wharfage and access. See Columbia etc. Co. v. Hutchinson (1909), 56 Wash. 323, 105 Pac. 636; State ex rel. McIntosh v. Superior Co. (1909), 56 Wash. 214, 105 Pac. 637.

[19] *Supra*, cc. 26, 27.

[20] See *supra*, secs. 616, 651, et seq.

§§ *871–879. (Blank numbers.)*

CHAPTER 38.

PROCEDURE.[1]

§ 880. General.
§ 881. Parties.
§ 882. Equitable remedies.
§ 883. Pleading and proof—Between riparian owners themselves.
§ 884. Same—Between a riparian and a nonriparian owner.
§ 885. Pleading (continued).
§ 886. Actions at law.
§ 887. Judgment or decree.
§§ 888–896. (Blank numbers.)

(3d ed.)

§ 880. General.—We have elsewhere considered the criterion of wrongfulness or legal injury to the complaining proprietor, which criterion is the same whatever form the injury may take. It may be by diminution or diversion, by retardation or acceleration, by backing the water and flooding the upper proprietor, or by polluting the water and deteriorating its quality. In all, the test between riparian proprietors is whether the act done by the proprietor complained of does unreasonable present damage, or, in the absence of present damage, unreasonably impairs the future capacity of the complaining proprietor to make an equally beneficial use of his land; between a riparian and a nonriparian owner, whether the act has or may in the future have any impairing effect at all upon the use or value of the riparian land, irrespective of any question of "reasonableness."

Concerning diminution or diversion, that is so closely connected with the previous discussion that further consideration here would be repetition. Concerning retardation or acceleration, much will be found in the Eastern decisions where steadiness of flow for mill power is the chief use of water instead of irrigation as in the West; but the writer's notes contained no Western decisions worth noting where an injurious retardation or acceleration aside from a diversion was involved. Concerning backing the water upon an upper proprietor, the writer has considered a discussion of the law of flooding or its converse, drainage, foreign to the field of this book.[2]

1 See also, *supra*, c. 27.

2 A few sections dealing therewith are *supra*, secs. 347, 348 (surface water); sec. 461 et seq. (damage from floods); *infra*, sec. 1140 (drainage of ground water).

As an example, however, of backing: If a railroad company, in build-

Questions of pollution are considered in a previous chapter.[3]

(3d ed.)

§ 881. **Parties.**—Throughout this book we have shown the fundamental rule that a case must be decided upon the relative rights of the parties before the court, without regard to the rights of strangers to the suit.[4] The rule of procedure set forth under the law of appropriation, that the rights of strangers to a suit cannot be considered, applies with equal force here. In a suit between a riparian owner and a wrongdoer, the rights of other riparian owners cannot be set up. Consideration for other riparian owners may limit the use of one of them at their complaint, but a wrongdoer is not entitled to be substituted to such consideration, nor to get the benefit of it, nor use the rights of other riparian owners, strangers to the suit, in his own defense. A defendant may be a wrongdoer to plaintiff though plaintiff be himself a wrongdoer as to other persons who are not parties to the action. Nor can a riparian owner contest an appropriation upon the basis of the rights of the other riparian owners when they are not parties to the suit. A repetition of the authorities need not be made here.

A reversioner may sue.[5] A lessee of riparian proprietor may maintain injunction suit against a wrongdoer.[6]

Other questions will be found considered in the general chapter upon procedure.[7]

(3d ed.)

§ 882. **Equitable Remedies.**—The right to an injunction has been sufficiently covered by the discussion of injunction under the law of appropriation.[8] The formal requisites are the same, though the application of them to the rights of a riparian proprietor in-

ing a bridge across a stream, fails to leave ample passageway for so much water as might reasonably have been anticipated would flow in the stream, and the bridge dams the water back on the riparian owner to his injury, the railroad company will be liable for the resulting loss. Atchison etc. Co. v. Herman, 74 Kan. 77, 85 Pac. 817. As an example of drainage: One proprietor cannot build a ditch to drain his land if thereby he diverts from a stream water in which another proprietor is entitled to a reasonable use, if thereby the possibility of such reasonable use is prevented. Bauers v. Bull, 46 Or. 60, 78 Pac. 757.

3 *Supra*, sec. 523.

4 *Supra*, secs. 83, 246, and especially 625 et seq.

5 Gould v. Stafford, 91 Cal. 146, 27 Pac. 543.

6 Crook v. Hewitt, 4 Wash. 749, 31 Pac. 28, California etc. Co. v. Enterprise etc. Co., 127 Fed. 741, quoted *supra*, sec. 819, note 10.

7 *Supra*, sec. 624 et seq.

8 *Supra*, sec. 641 et seq.

volve other considerations, sufficiently set forth in a preceding chapter.[9]

The right of a riparian proprietor to the flow of water through his land is inseparably annexed to the soil, not as an easement, or appurtenance thereto, but as a part or parcel of the land,[10] and an action to quiet his title to such water must, under the California constitution, be commenced in the county where the land or some part of it is situated.[11]

Other questions will be found considered in the general chapter upon procedure.[12]

(3d ed.)

§ 883. Pleading and Proof—Between Riparian Owners Themselves.—In a suit in equity for apportionment of water between riparian owners the plaintiff must plead the amount of his irrigable riparian lands (if claiming for irrigation) and the amount of water reasonably necessary for his use upon such lands.[13] He must also, on the trial, furnish evidence upon the volume of the stream, the character of the soil, the number of proprietors, and the various surrounding circumstances from which the question of reasonableness is to be determined in each case.[14]

This should not necessarily apply to injunction between riparian owners, since plaintiff is entitled to be protected against excessive

[9] *Supra*, secs. 795, 814 et seq. A recent Texas ruling is that, unless using water, a riparian owner is not entitled to a *preliminary* injunction. Biggs v. Leffingwell (Tex. Civ. App.), 132 S. W. 902. But in California that rests in the discretion of the trial court. Miller v. Madera etc. Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A., N. S., 391.

[10] Lux v. Haggin, 69 Cal. 255, 391, 10 Pac. 674.

[11] Miller & Lux v. Madera etc. Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A., N. S., 391.

[12] *Supra*, c. 27.

[13] Wutchumna Water Co. v. Pogue, 151 Cal. 105, 90 Pac. 362; citing Riverside Water Co. v. Gage, 89 Cal. 420, 26 Pac. 889; Wiggins v. Muscupiabe L. & W. Co., 113 Cal. 194, 54 Am. St. Rep. 337, 45 Pac. 160, 32 L. R. A. 667; San Luis Water Co. v. Estrada, 117 Cal. 182, 48 Pac. 1075; Strong v. Baldwin, 137 Cal. 432, 70 Pac. 288; Strong v. Baldwin (1908), 154 Cal. 150, 129 Am. St. Rep. 149, 97 Pac. 178; Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748; Perry v. Calkins (Cal.), 113 Pac. 136.

[14] *Ibid.*, and Coleman v. La Franc, 137 Cal. 214, 69 Pac. 1011; Jones v. Conn, 39 Or. 30, 87 Am. St. Rep. 634, 64 Pac. 855, 65 Pac. 1068, 54 L. R. A. 630; Riverside etc. Co. v. Gage, 89 Cal. 410, 26 Pac. 889; Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728. In Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728, it is held that where the testimony before the appellate court is not ample for a determination of the quantity to be left in the stream properly to supply the domestic and other natural wants and necessary requirements of the riparian owners along the controverted stream, the appellate court may determine other points upon which the testimony is adequate for the purpose, and remand the cause to the court below with permission to take further evidence.

injury to his rightful use now or hereafter, whatever the extent of that use may be. For an injunction plaintiff must plead that defendant's taking is excessive.[15] But that should seem to be enough where no apportionment is asked. The bill for an apportionment is distinct from one for an injunction. "It is suggested that the court ought to ascertain and determine the rights of the respective parties, and fix them in the decree, so that hereafter there may be no controversy concerning the matter. In the very nature of things, however, it is impossible in a case of this character to make such a decree. The rights of the several riparian proprietors are equal, each being entitled to but a reasonable use of the water for irrigating purposes, and what constitutes such use must necessarily depend upon the season, the volume of water in the stream, the area and character of the land which each riparian proprietor proposes to irrigate, and many other circumstances; so that it seems to us there is no basis upon which the court could frame any other decree than one enjoining and restraining the defendant from diverting the water from the stream to the substantial injury of the present or future rights of the plaintiffs, and, as the decree of the court below is to that effect, it will be affirmed."[16] The rule that the riparian right, as between riparian owners, is one to be protected against unreasonable interference, leaves it an ultimate question of fact in each case what that may be, so that the allegation and proof of unreasonableness of defendant would appear to be sufficient where no apportionment is asked.[17] If more pleading and

[15] Perry v. Calkins (Cal.), 113 Pac. 186.

[16] Jones v. Conn, 39 Or. 30, 87 Am. St. Rep. 634, 64 Pac. 855, 65 Pac. 1068, 54 L. R. A. 630.

[17] A recent California case is to the same effect. Mr. Justice Angellotti said (Strong v. Baldwin, 154 Cal. 150, 129 Am. St. Rep. 149, 97 Pac. 178): "Complaint is made of the failure of the court to find and decree the quantity of water the respective parties were entitled to use as riparian owners. . . . . The case is manifestly one where the pleading of the party complaining was not presented for the purpose of obtaining an apportionment of certain waters among the riparian owners. It was not drawn on any such theory, and does not recognize the cross-defendants as riparian owners at all. The real object was to obtain a decree declaring the other parties to be without any right whatever in such waters. It may be conceded that the allegations of the pleadings were broad enough to have permitted the determination of this matter if sufficient evidence had been presented thereon. The court was not compelled, however, to determine this question in the absence of evidence sufficient to enable it to do so. . . . . The extent of the riparian rights of the parties to this action could not be determined without taking into consideration the rights of these other riparian proprietors, as to which there was no evidence whatever, and concerning which there could, of course, be no binding determination in the absence of such owners. But even if there were no such other owners, our ex-

proof are required, it would mean that the court refuses injunctions between riparian owners in all cases except where apportionment is asked; which is obviously a position no court has intended to take.

The burden of proving that a use by one riparian owner is unreasonable to another riparian owner rests upon the complaining riparian owner.[18]

(3d ed.)

§ 884. Same—Between a Riparian and a Nonriparian Owner. Where a nonriparian owner diverts water flowing by or over private riparian land, the right of a riparian owner against him has been discussed in another chapter.[19] As there is no question of "reasonableness" (in its correlative sense denoting sharing) involved, there can be no apportionment in the nonriparian owner's favor, and hence an injunction may be granted without evidence or pleading of what would be a "reasonable use" by the riparian owner had he been contesting with another riparian owner.[20]

"In Brown v. Best,[20a] Lord Chief Justice Lee is reported to have said that a watercourse is *jure naturae*, and therefore a declaration stating merely the possession of the place through which the water used to run is good. And Denison, Justice, said that in natural watercourses that was the most proper mode of declaring";[21] and such is the generally established rule of pleading. An allegation "that defendant is the owner of lot 25, through which the creek runs, and of all dams, ditches and water-rights thereon," is enough to raise an issue as to his riparian rights.[22] Ownership of land

amination of the record has satisfied us that the evidence introduced was not sufficient to enable the court to intelligently determine the relative rights of Baldwin on the one hand, and those of the remaining parties on the other, in the waters of this river. Under such circumstances, the trial court did all that it properly could do, by determining that the various parties were riparian owners and leaving the question of the proportions of the water to which each is entitled to be determined in the future." See, *contra*, Rogers v. Overacker, 4 Cal. App. 333, 87 Pac. 1107, overlooking the distinction between apportionment and other relief for a riparian owner.

18 Miner v. Gilmour, 12 Moore P. C. 155, 14 Eng. Reprint, 861, a leading case. But see *contra*, Red River Co. v. Wright, 30 Minn. 249, 44 Am. Rep. 194, 15 N. W. 167, holding the upper owner to have burden of proving his use to be reasonable.

19 *Supra*, sec. 814 et seq.

20 Miller v. Madera etc. Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A., N. S., 391.

20a 1 Wils. 174, 95 Eng. Reprint, 557.

21 Chasemore v. Richards, 7 H. L. Cas. 349, 11 Eng. Reprint. 140, Lord Wensleydale. See, also, Richards v. Hill, 5 Mod. 206, 87 Eng. Reprint, 611.

22 Smith v. Hawkins, 127 Cal. 119, 59 Pac. 295.

through which a stream flows sufficiently alleges riparian rights.[23] The complaint or declaration must allege that lands are riparian or that a stream passes by or through them.[24] Averments of ownership and possession of riparian land or of land by or through which the stream flows, sufficiently allege the riparian right.[25] The riparian owner need not allege that he is using the water,[1] nor that the nonriparian use is unreasonable.[2]

There are decisions to the contrary. The chief of these is Riverside W. Co. v. Gage,[3] quoted elsewhere.[4] So far as such decisions hold that a riparian owner must plead and prove against a nonriparian owner the same things as in a suit for apportionment with another riparian owner, they are superseded by the decision in Miller v. Madera Co. on rehearing.[5] So far, however, as they require the riparian owner only to allege and prove what quantity of water "is or may be beneficial to his land," it may be that they do not necessarily, as already discussed, conflict with that case.[6]

There is, then, this same conflict in procedure which we set forth above as to substantive law. If the qualification that the riparian owner can have an action only for water "which is or may be beneficial to his land," is correct, then Riverside W. Co. v. Gage is not necessarily incorrect, though it would seem that the burden of alleging and proving such qualification would be properly upon the nonriparian owner,[7] and therefore matter for answer and proof by defendant, not the plaintiff.

[23] Leigh v. D. Co., 8 Cal. 323, 12 Morr. Min. Rep. 97.

[24] Silver Creek etc. Co. v. Hayes, 113 Cal. 142, 45 Pac. 191.

[25] Shotwell v. Dodge, 8 Wash. 337, 36 Pac. 254; Rincon etc. Co. v. Anaheim etc. Co., 115 Fed. 543. *Contra*, Lobdell v. Simpson, 2 Nev. 274, 90 Am. Dec. 537.

[1] *Supra*, sec. 816.

[2] *Supra*, sec. 817.

[3] 89 Cal. 410, 26 Pac. 889.

[4] *Supra*, sec. 822. For example, where a riparian owner was contesting with a nonriparian owner, it has been held: "Appellant's claim to the waters as a riparian owner is not pressed with much seriousness, and this is natural, considering that there is no pleading as to his riparian need for use of these waters, either as to quantity or amount of land upon which they are to be employed." Montecito etc. Co. v. Santa Barbara (1907), 151 Cal. 377, 90 Pac. 935, citing Riverside Water Co. v. Gage, 89 Cal. 410, 26 Pac. 889. See likewise Wutchumna W. Co. v. Pogue, 151 Cal. 105, 90 Pac. 362; San Luis W. Co. v. Estrada, 117 Cal. 168, 48 Pac. 1075. For other cases seeming to apply this rule between a riparian and a nonriparian owner as well as between riparian owners, see Morris v. Bean (Mont.), 146 Fed. 431; McCook Irr. Co. v. Crews, 70 Neb. 115, 102 N. W. 249.

[5] 155 Cal. 59, 99 Pac. 502.

[6] *Supra*, sec. 827 et seq.

[7] Miller v. Bay Cities Co., 157 Cal. 256, 107 Pac. 115; Huffner v. Sawday, 153 Cal. 86, 94 Pac. 424. See *supra*, sec. 832.

Our conclusion is that allegation and proof that a stream runs by plaintiff's land is sufficient against a nonriparian owner, but that the nonriparian owner may set up in his answer as an affirmative defense (of which the burden of proof is emphatically upon him) that the water diverted is not, and cannot be in the future, beneficial to the riparian land, in the extreme case upon large streams where the facts may support such claim.

(3d ed.)

§ 885. **Pleading (Continued).**—One's right as riparian proprietor cannot be considered when not alleged in the pleadings.[8] But it is sufficient to allege the facts showing that one is a riparian owner, from which the claim as riparian owner may be inferred, without using that specific term.[9] The acts of a defendant *riparian* proprietor must be alleged to be unreasonable.[10] How far the above is insufficient in bills in equity for apportionment, see preceding sections; likewise as to how far it applies at all to *nonriparian* owners.

Whatever may be the rule as to alleging possibility or capacity for future use, it is well settled that averments of actual present use are surplusage both in suits between riparian owners and in suits against a nonriparian owner. As against a nonriparian owner, the plaintiff riparian owner is entitled to the whole flow which is or may be beneficial to his land; as against another riparian owner, to a reasonable proportion thereof; in both cases, whether actually using the water or not.[11]

(3d ed.)

§ 886. **Actions at Law.**—As damages at law are compensatory only, where the water is not used by the complaining riparian owner, his damages from an excessive use of another riparian owner (or for use by a nonriparian owner) will be nominal only,[12] for he suffers no actual damage and the action stops the running of any

8 Smith v. Hawkins, 127 Cal. 119, 59 Pac. 295; Riverside W. Co. v. Gage, 89 Cal. 410, 26 Pac. 889; Wutchumna W. Co. v. Pogue, 151 Cal. 105, 90 Pac. 362; Montecito Co. v. Santa Barbara, 151 Cal. 377, 90 Pac. 935; San Luis Co. v. Estrada, 117 Cal. 168, 48 Pac. 1075.

9 Strong v. Baldwin (1908), 154 Cal. 150, 129 Am. St. Rep. 149, 97 Pac. 178.

10 Swift v. Goodrich, 70 Cal. 103, 11 Pac. 561.

11 *Supra*, secs. 801, et seq., 816 et seq., 861.

12 Creighton v. Evans, 53 Cal. 55, 8 Morr. Min. Rep. 123.

prescription and prevents the wrong from ripening into a right. This is a principle well recognized.

The riparian proprietor cannot recover damages for injury the diversion does to his nonriparian land.[13] Nor can a nonriparian proprietor recover for injury done to his use by riparian use of a riparian owner.[14]

To the fuller presentation of the matter of damages given in a preceding chapter,[15] we add that while a riparian owner is entitled to an injunction or nominal damages, in certain cases elsewhere set forth, though he is not using the water,[16] yet he can recover no special damage when not using the water,[17] nor can he sue for the value of the water at so much per inch or gallon.[18]

(3d ed.)

§ 887. **Judgment or Decree.**—A count alleging a right as appropriator will not support a judgment as riparian owner.[19] If a decree assigns use on nonriparian lands, it shows that the court was dealing with rights of appropriation and not riparian rights.[20] The decree may enforce the distinction between natural and artificial uses, and be drawn accordingly.[21] "It must be remembered that no injunction can be awarded which can deprive the defendant of the reasonable use of the water for domestic purposes and for the support of life."[22] A decision under the law of appropriation does not necessarily have any bearing under the law of riparian rights.[23] Where a decree restraining defendant's predecessor in interest from diverting water from a creek above plaintiff's land was based on the latter's riparian rights, it would not protect any rights based on prior appropriation now claimed by him against defendant.[24]

Where it did not appear that the defendant therein owned any land, or as to what land he was restrained from diverting

[13] Heinlein v. Fresno etc. Co., 68 Cal. 35, 8 Pac. 513.

[14] *Supra*, secs. 847. 861.

[15] *Supra*, secs. 637, 638.

[16] *Supra*, secs. 801, 816.

[17] Clark v. Pennsylvania Ry. Co., 145 Pa. 438, 27 Am. St. Rep. 710, 22 Atl. 990.

[18] *Ibid.*, and Stock v. City of Hillsdale (1909), 155 Mich. 375, 119 N. W. 435, at 438, 439.

[19] *Supra*, sec. 634.

[20] Wutchumna Water Co. v. Pogue, 151 Cal. 105, 90 Pac. 362.

[21] For such a decree, see Union etc. Co. v. Dangberg, 81 Fed. 73.

[22] Stanford v. Felt, 71 Cal. 249, 16 Pac. 900. See, also, Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

[23] Turner v. James Canal Co. (1909), 155 Cal. 82, 132 Am. St. Rep. 59, 99 Pac. 520, 22 L. R. A., N. S., 401, 17 Ann. Cas. 823.

[24] Davis v. Chamberlain (1909), 51 Or. 304, 98 Pac. 154.

the water, the decree was personal, and there could be no successor in interest of the defendant therein whom it could affect.[25]

Other matters will be found in the general chapter upon procedure.[1]

[25] *Ibid.*

[1] *Supra*, sec. 639 et seq.

§§ *888–896. (Blank numbers.)*

CHAPTER 39.

MISCELLANEOUS RIPARIAN RIGHTS.

§ 897. Introductory.

A. NAVIGABLE WATERS.

§ 898. Shores and bed of navigable waters.
§ 899. Public rights in navigable streams.
§ 900. Public authority over navigation.

B. ACCRETION AND BOUNDARIES.

§ 901. Accretion.
§ 902. Islands.
§ 903. Boundaries.

C. WHARFAGE AND OTHER RIPARIAN OR LITTORAL RIGHTS.

§ 904. Access.
§ 905. Wharfage, etc.
§ 906. Other riparian rights in navigable waters.
§ 907. Fishing.
§§ 908–1006. (Blank numbers.)

(3d ed.)

§ 897. In the following chapter such matters and authorities are presented as were collected in preparing the other parts of the book.

A. NAVIGABLE WATERS.

(3d ed.)

§ 898. Shores and Beds of Navigable Waters.—In the civil law, the shores of the sea and the beds of navigable streams were "common" and ports (or navigation) were "public."[1] In England, though Lord Hale observed that in exceptional cases the beds of navigable streams may be private,[2] yet it is the rule that they belong *prima facie* to the crown.[3]

[1] Authorities quoted *supra*, sec. 2 et seq.; *infra*, sec. 1025. "Et quidem naturali jure, communia sunt omnium haec; aer et aqua profluens, et mare, et per hoc, littora maris." Institutes of Justinian, lib. 2, tit. 1, sec. 1. Another passage in the Institutes says, "Flumina autem omnia et portus publica sunt."

[2] Lord Cairns in Lyon v. Fishmongers' Co., *supra*, sec. 698.

[3] Hale's De Jure Maris, cap. III, a work which has been said "to have exhausted the learning on the subject" of which it treats. Wholey v. Caldwell, 108 Cal. 95, at 100, 49 Am. St. Rep. 64, 41 Pac. 31, 30 L. R. A. 820. The work is reprinted in 16 Am. Rep.

In this country the English rule usually prevails; the title to the bed of navigable streams being *prima facie* in the State in trust for the public in navigation and other uses, as public highways.[4] And also as to tide waters.[5] However, in some States the riparian owners are held to own *ad medium filum* even on navigable streams, subject to the public right of navigation.[6]

Which rule prevails in any given jurisdiction is a matter of local law. In a case of wharfing out, the United States supreme court said: "The rights of a riparian owner upon a navigable stream in this country are governed by the law of the State in which the stream is situated. These rights are subject to the paramount public right of navigation."[7] This was established in Pollard v.

54. In another work Lord Hale says: "Those things that are *juris publici* are such as, at least in their own use, are common to all the King's subjects; and are of these kinds, viz., common highway, common bridges, common rivers, common ports, or places for arrival of ships. And this lets in the various learning touching those things." Analysis of the Civil Part of the Law, by Sir Matthew Hale.

4 Cal. Pol. Code, secs. 2349, 2875, 3479; Cal. Civ. Code, sec. 670; Green v. Swift, 47 Cal. 536; Wright v. Seymour, 69 Cal. 122, 10 Pac. 323; Packer v. Bird, 71 Cal. 134, 11 Pac. 873; Cardwell v. Sacramento, 79 Cal. 347, 21 Pac. 763; Foss v. Johnstone, 15A Cal. 119, 110 Pac. 294; Messenger v. Kingsbury (Cal. 1910), 112 Pac. 69; Kregar v. Fogarty, 78 Kan. 541, 96 Pac. 847; Mont. Rev. Stats. 1907, sec. 4840; State v. Portland etc. Co., 52 Or. 502, 95 Pac. 722, 98 Pac. 160; Johnson v. Knott, 13 Or. 308, 10 Pac. 418; Coquille Co. v. Johnson, 52 Or. 547, 132 Am. St. Rep. 716, 98 Pac. 132; Palmer v. Peterson (1909), 56 Wash. 74, 105 Pac. 179. "The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment," says Mr. Justice Field in Illinois C. R. Co. v. Illinois, 146 U. S. 387, 13 Sup. Ct. Rep. 110, 36 L. ed. 1018. The title is not in the United States. United States v. Bevan, 3 Wheat. 391, 4 L. Ed. 417.

5 The State of California has absolute property in the soil under tide water within her limits. United States v. Mission Rock Co., 189 U. S. 391, 23 Sup. Ct. Rep. 606, 47 L. Ed. 865. And likewise as to the soil under navigable rivers such as the Sacramento. Packer v. Bird, 137 U. S. 661, 11 Sup. Ct. Rep. 210, 34 L. Ed. 819. By an exception in Massachusetts, by the old colonial ordinance of 1647, still in force, the owner of the upland owns the foreshore to low-water mark (if not over one hundred rods from high-water mark), and in Rhode Island the law is similar by a statute passed in 1707. Shively v. Bowlby, 152 U. S. 1, 14 Sup. Ct. Rep. 548, 38 L. Ed. 331. See, also, Head v. Amoskeag Mfg. Co., 113 U. S. 9, 5 Sup. Ct. Rep. 441, 28 L. Ed. 889. Rundle v. Delaware & Raritan Canal Co., 14 How. 81, 14 L. Ed. 335; Home of Aged v. Commonwealth (1909), 202 Mass. 422, 98 N. E. 124.

6 Bed of navigable streams above tide ebb and flow, is in riparian proprietor *ad medium filum* and not in the State, in Nebraska, subject to public easement of navigation. Kinkead v. Turgeon, 74 Neb. 580, 104 N. W. 1061, 109 N. W. 744, 1 L. R. A., N. S., 762, 13 Ann. Cas. 43. Likewise in Idaho. Johnson v. Johnson, 14 Idaho, 561, 95 Pac. 499, 24 L. R. A., N. S., 1240; Lattig v. Scott, 17 Idaho, 506, 107 Pac. 47.

7 Weems etc. Co. v. People's etc. Co. (1909), 214 U. S. 345, 29 Sup. Ct. Rep. 661, 53 L. Ed. 1024. Accord, Whitaker v. McBride, 197 U. S. 510, 25 Sup. Ct. Rep. 530, 49 L. Ed. 857, Los Angeles etc. Co. v. Los Angeles, 217 U. S. 217, 30 Sup. Ct. Rep. 452.

Hagan, a case involving the question of title to certain lands in Mobile, Alabama, which had originally been below high-water mark, but had been reclaimed and improved.[8] The case aroused high feeling in the North at the time, having been taken as a decision in favor of the doctrine of "State rights," which was then, prior to the war, at its height.[9] Pollard v. Hagan was approved in Shively v. Bowlby,[10] and has been repeatedly reaffirmed since and become settled law.[11]

[8] Pollard v. Hagan, 3 How. 212, 11 L. Ed. 565.

[9] Upon similar lines the supreme court decided in favor of "State rights" in Kansas v. Colorado, *supra*, sec. 182; but the question in the latter case involving public land had a history of its own independent of the present one, which half the Western States regard as making it a different question.

[10] Mr. Justice Gray, in Shively v. Bowlby (152 U. S. 1, 26, 27, 14 Sup. Ct. Rep. 548, 38 L. Ed. 331), says: "In Pollard v. Hagan (1844), this court, upon full consideration (overruling anything to the contrary in Pollard v. Kibbe, 14 Pet. 353, 10 L. Ed. 490, Mobile v. Eslava, 16 Pet. 234, 10 L. Ed. 948, Mobile v. Hallett, 16 Pet. 261, 10 L. Ed. 958, Mobile v. Emanuel, 1 How. 95, 11 L. Ed. 60, and Pollard v. Files, 2 How. 591, 11 L. Ed. 391), adjudged that upon the admission of the State of Alabama into the Union the title in the lands below high-water mark of navigable waters passed to the State."

[11] The title and rights of riparian or littoral proprietors in the soil below high-water mark are governed by the laws of the various States. Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. Rep. 655, 51 L. Ed. 956; Hardin v. Jordan, 140 U. S. 371, 11 Sup. Ct. Rep. 808, 838, 35 L. Ed. 428; Withers v. Buckley, 20 How. 84, 15 L. Ed. 816; United States v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 19 Sup. Ct. Rep. 770, 43 L. Ed. 1136; Gutierres v. Albuquerque Land Co., 188 U. S. 545, 23 Sup. Ct. Rep. 338, 47 L. Ed. 588; Martin v. Wadell, 16 Pet. 367, 10 L. Ed. 997; Huse v. Glover, 119 U. S. 546, 7 Sup. Ct. Rep. 313, 30 L. Ed. 487; St. Louis v. Meyers, 113 U. S. 566, 5 Sup. Ct. Rep. 640, 28 L. Ed. 1131; Barney v. Keokuk, 94 U. S. 324, 24 L. Ed. 224; Strader v. Graham, 10 How. 82, 13 L. Ed. 337; The Montello, 20 Wall. 430, 22 L. Ed. 391; Boquillas Cattle Co. v. Curtis, 213 U. S. 339, 29 Sup. Ct. Rep. 493, 53 L. Ed. 822; St. Anthony Falls Water Power Co. v. Water Commissioners, 168 U. S. 349, 18 Sup. Ct. Rep. 157, 42 L. Ed. 497; Goodlittle v. Kibbe, 9 How. 471, 13 L. Ed. 220; Packer v. Bird, 137 U. S. 661, 11 Sup. Ct. Rep. 210, 34 L. Ed. 819; Kean v. Calumet Canal Co., 190 U. S. 452, 23 Sup. Ct. Rep. 651; Kaukauna Water Power Co. v. G. B. & M. Canal Co., 142 U. S. 254, 12 Sup. Ct. Rep. 173, 35 L. Ed. 1004; Whitaker v. McBride, 197 U. S. 510, 25 Sup. Ct. Rep. 530, 49 L. Ed. 857; Weems etc. Co. v. People's etc. Co. (1909), 214 U. S. 345, 29 Sup. Ct. Rep. 661, 53 L. Ed. 1024; Lowndes v. Huntington, 153 U. S. 30, 14 Sup. Ct. Rep. 758, 38 L. Ed. 623; Jackson v. Chew, 12 Wheat. 168, 6 L. Ed. 589; Green v. Neal, 6 Pet. 296, 8 L. Ed. 404; Webster v. Cooper, 14 How. 504, 14 L. Ed. 517; Carrol Co. v. United States, 18 Wall. 82, 21 L. Ed. 775; McArthur v. Scott, 113 U. S. 340, 5 Sup. Ct. Rep. 652, 28 L. Ed. 1015; St. Louis v. Rutz, 138 U. S. 226, 11 Sup. Ct. Rep. 337, 34 L. Ed. 941. In McKeen v. Delancy, 9 U. S. (5 Cranch) 22, 3 L. Ed. 25, Marshall, C. J., said: "But in construing the statutes of a State on which land titles depend, infinite mischief would ensue should this court observe a different rule from that which has been long established in the State." Martin v. Waddell, 16 Pet. 367, 10 L. Ed. 997, has been said to be the first case in which it was contended in the United States supreme court that the decisions of the State courts should control.

Streams floatable for logs are public highways.[12]

(3d ed.)

§ 899. Public Rights in Navigable Streams.—The right of the public in navigable streams is to use them as highways; that is, an easement. "The right of navigation is simply a right of way."[13] Only the State or someone injured in navigation can object to acts done upon a navigable stream on the ground of interference with the navigation.[14] Such acts are a public nuisance, and no prescriptive right can arise to impede navigation.[15] Deposit into a navigable stream, by a hydraulic mining company, of debris consisting of gravel, sand and other refuse to the impairment of navigation constitutes a public nuisance, the right to continue which cannot be acquired by priority or prescription, so as to bar a proceeding instituted by the attorney general in the name of the people to compel a discontinuance of the acts which constitute the nuisance;[16] or at suit of a private person suffering special damage.[17] So of sawdust, chips, bark, and other sawmill refuse deposited in a harbor.[18]

[12] Kamm v. Normand, 50 Or. 9, 126 Am. St. Rep. 698, 91 Pac. 448, 11 L. R. A., N. S., 290; Falls Mfg. Co. v. Oconto etc. Co., 87 Wis. 134, 58 N. W. 257. As to what is a navigable stream, see Kregar v. Fogarty, 78 Kan. 541, 96 Pac. 845; State ex rel. Pealer v. Superior Ct. (Wash.), 109 Pac. 340. Regarding logging, see, also, Potlach Co. v. Peterson, 12 Idaho, 769, 118 Am. St. Rep. 253, 88 Pac. 426; Flinr v. Vaughan (Or.), 106 Pac. 642; State ex rel. United Tanners etc. Co. v. Superior Court (Wash.), 110 Pac. 1017.

[13] Orr Ewing v. Colquhoun, 2 App. Cas. 846.

[14] Miller v. Enterprise Co., 142 Cal. 208, 75 Pac. 770; Davenport v. Renwick, 102 U. S. 180, 26 L. Ed. 51; United States v. Rio Grande etc. Co., 174 U. S. 690, 19 Sup. Ct. Rep. 770, 43 L. Ed. 1136.

[15] *Supra*, sec. 528, pollution. See Cal. Stats. 1909, c. 93; Trullinger v. Howe, 53 Or. 219, 97 Pac. 548, 99 Pac. 880, 22 L. R. A., N. S., 545. A dam or any other obstruction to navigation is a public nuisance, and no lapse of time will bar the right of the public to remove it. Charnley v. Shawana Water Power & Imp. Co., 109 Wis. 563, 85 N. W. 507, 53 L. R. A. 895; Southern Ry. Co. v. Ferguson, 105 Tenn. 552, 80 Am. St. Rep. 908, 59 S. W. 343; Vooght v. Winch, 2 Barn. & Ald. 662; Renwick v. Morris, 7 Hill, 575; Olive v. State, 86 Ala. 88, 5 South. 652, 4 L. R. A. 33; Crill v. Rome, 47 How. Pr. 406; Dyer v. Curtis, 72 Me. 181. Obstruction of the passage of fish to an inland lake, State v. Franklin Falls Co., 49 N. H. 240, 6 Am. Rep. 513; or up a stream, State v. Roberts, 59 N. H. 256, 47 Am. Rep. 199; or a dam and mill or refuse therefrom preventing the floating of logs down a stream capable thereof, Collins v. Howard, 65 N. H. 190, 18 Atl. 794; Knox v. Chanoler, 42 Me. 150; Veazie v. Dwinel, 50 Me. 497.

[16] People v. Gold Run Ditch & Mining Co., 66 Cal. 138, 56 Am. Rep. 80, 4 Pac. 1152.

[17] Debris Cases, 18 Fed. 752; *supra*, sec. 528.

[18] Ogdensburg v. Lovejoy, 2 Thomp. & C. 82, 58 N. Y. 662. But see Atty. Gen. ex rel. Mann v. Revere Copper Co., 152 Mass. 444, 25 N. E. 605, 9 L. R. A. 510; Chicago v. Laflin, 49 Ill. 172.

California was admitted into the Union in 1850 and the act for admission of September 9th[19] provides: "That navigable waters are declared common highways and forever free to the inhabitants of the State and citizens of the United States without any tax, impost, or duty therefor."

(3d ed.)

§ 900. **Public Authority Over Navigation.**—Congress has, under the interstate commerce clause of the Federal constitution, complete power over navigable waters of the United States in the interest of commerce, and may declare what structures or obstructions may be permitted or prohibited.[20] Congress can authorize a bridge across navigable waters without concurrence of the State,[21] or the construction of a bridge within the limits of a State which has not consented to but has protested;[22] or can order the removal of a bridge as an obstruction to navigation although wholly within the limits of a State, which State authorized its construction.[23] An act of Congress may legalize a bridge so far as concerns a contract between two States that the navigation of the river shall remain free and unobstructed,[24] or a similar provision in a treaty with a foreign power.[25] The Federal Dam Act of 1910 is given in the collection of statutes in Part VIII, below.

In the absence of action by Congress, the State has the right to improve a navigable river for the purpose of navigation. It may do this itself or it may delegate to another the authority to do so. No private party or company can acquire the right, by filing articles of incorporation without express delegation of authority from the State, either to improve navigation or to collect tolls for the use of such improvements, even when such a purpose is specified in those articles.[1] The State may impose charges on the franchise.[2]

19 9 Stat. 453.

20 United States v. North Bloomfield M. Co., 81 Fed. 243; Pennsylvania etc. Co. v. Wheeling etc. Bridge Co., 18 How. 421, 15 L. Ed. 435; Miller v. New York, 13 Blatchf. 469, Fed. Cas. No. 9585; United States v. Milwaukee etc. Co., 5 Biss. 410, Fed. Cas. No. 15,778; New Port etc. Co. v. United States, 105 U. S. 470, 26 L. Ed. 1143; Luxton v. North River etc. Co. 153 U. S. 525, 14 Sup. Ct. Rep. 891, 38 L. Ed. 808.

21 Stockton v. Baltimore & N. Y. R. Co., 1 Inters. Com. Rep. 411, 32 Fed. 9.

22 Pennsylvania R. Co. v. Baltimore & N. Y. R. Co., 37 Fed. 129.

23 United States v. City of Moline, 82 Fed. 592.

24 Pennsylvania etc. Co. v. Wheeling etc. Bridge Co., 18 How. 421, 15 L. Ed. 435.

25 The Clinton Bridge, Fed. Cas. No. 2900, 1 Woolw. 150.

1 State v. Portland etc. Co., 52 Or. 502, 95 Pac. 722, 98 Pac. 160. See Wash. Stats. 1911, c. 95.

2 *Ibid.*

B. ACCRETION AND BOUNDARIES.

(3d ed.)

§ 901. Accretion.—Accretion is the slow and unperceptible addition of alluvial deposit on the margin of a body of water; avulsion is the formation of dry land by a sudden and quick change in the permanent position of the body of water.[3] These distinctions have come into the common law from the civil law. It has been expressly said: "Our law may be traced back through Blackstone,[4] Hale,[5] Britton,[6] Fleta,[7] and Bracton,[8] to the Institutes of Justinian,[9] from which Bracton evidently took his exposition of the subject." [10]

Accretions must be the imperceptible or gradual additions to the plaintiff's lands, or the gradual receding of the river therefrom. If the accretions were to an island on the south side, and to the main land on its north side, and by a change of the river they were thus brought together, such a union of the two tracts did not make the island an accretion to the main land.[11] "An accretion to land is the imperceptible increase thereto on the bank of a river by alluvion occasioned by the washing up of sand or earth, or by dereliction as when the river shrinks back below the usual water mark; and land so formed by addition belongs to the owner of the land immediately behind it." [12]

The change must be permanent; the doctrine of accretion does not apply to land alternately above and under water, so long as the water substantially retains its old boundaries.[13] A riparian owner

[3] See, as to accretions, alluvion, and boundaries, Cal. Civ. Code, secs. 830, 1014, 1015, and Code Civ. Proc., sec. 2077. See article in Journal of American Engineering Societies, vol. 44, p. 215, for April, 1910, containing an article by Mr. Otto Von Geldern. For a discussion of the law of accretion, see McBride v. Steinweden, 72 Kan. 508, 83 Pac. 822; Fowler v. Wood, 73 Kan. 511, 117 Am. St. Rep. 534, 85 Pac. 763, 6 L. R. A., N. S., 162.

[4] Vol. II, c. 16, pp. 261, 262.

[5] De Jure Maris, cc. 1, 6.

[6] Bk. II, c. 2.

[7] Bk. III, c. 2, sec. 6, etc.

[8] Bk. II, c. 2.

[9] Just. II, 1, 20.

[10] Lindley, L. J., in Foster v. Wright, 4 C. P. D. 438.

[11] Hahn v. Dawson, 134 Mo. 581, 590, 36 S. W. 233.

[12] Lammers v. Nissen, 4 Neb. 245. "All the authorities agree that in order that a shore owner take land by way of accretion or reliction, it must appear that the addition was to his shore either by the deposit of earth or by the receding of the water from his land, and that such addition must be by slow and imperceptible processes." Hammond v. Shepard, 186 Ill. 235, 78 Am. St. Rep. 274, 57 N. E. 867.

[13] "Lacus et stagna, licet interdum crescant, interdum exarescant, suos tamen terminos retinant ideoque in his jus alluvionis non adgnoscitur." Just. Digest, lib. 41, tit. 1 (Sec. 12 Callistratus, lib. 2 Institutionum).

has no vested right to have conditions maintained such that accretions will continue to be formed in the future.[14]

Accretions on navigable and non-navigable rivers or other waters belong to the owner of the bank to which they attach;[15] and if they are formed upon the banks of two opposite owners, are to be divided between them.[16] If one bank is public land, the government is entitled to its share with the opposite private owner.[17]

The right to accretions is one of the numerous riparian rights founded upon the riparian owner's right of access to the river, which carries with it the right to any formations which would destroy the right of access if not regarded as his property,[18] and for the same reason the riparian owner is entitled likewise to artificial formations upon his bank wrongfully produced by strangers to him by artificial means.[19]

In Western jurisdictions rejecting the common law of riparian rights *in toto* in favor of the law of appropriation, the riparian right of accretion remains so long as the stream has not been diverted by any appropriator.[20]

(3d ed.)

§ 902. Islands.—Islands rising in a river unconnected with the bank belong to the owner of the bed at that place.

In jurisdictions where the State owns the bed of innavigable streams, islands formed therein belong to the State, though by later

[14] Western Pac. Co. v. Southern Pac. Co., 151 Fed. 376, 80 C. C. A. 606.

[15] Kinkead v. Turgeon, 74 Neb. 580, 104 N. W. 1061, 109 N. W. 744, 1 L. R. A., N. S., 162, 13 Ann. Cas. 43; Hathaway v. Milwaukee, 132 Wis. 249, 122 Am. St. Rep. 975, 111 N. W. 570, 112 N. W. 455, 9 L. R. A., N. S., 778; Judson v. Tidewater Co., 51 Wash. 164, 98 Pac. 377; Ami Co. v. Tidewater Co., 51 Wash. 171, 98 Pac. 380. "The doctrine is well settled that when lands border on navigable rivers, and the banks are changed by that gradual and imperceptible process known as 'accretion' the boundaries of the riparian proprietor still remain the river, although as a consequence of such change in the shore line the area of the possession may change. A boundary on a river implies a boundary changing as the shore line changes by accretion or erosion, in the absence of definite intention to the contrary." Stockley v. Cissna, 119 Fed. 822, 56 C. C. A. 324.

[16] And if accretion continues until the opposite banks come together, the line of contact will be the division line. Buse v. Russell, 86 Mo. 209–214.

[17] Bigelow v. Hoover, 85 Iowa, 161, 39 Am. St. Rep. 296, 52 N. W. 124.

[18] Dietrich v. Northwestern Ry. Co., 42 Wis. 262, 24 Am. Rep. 399.

[19] Steers v. City of Brooklyn, 101 N. Y. 51, 4 N. E. 7.

[20] Sternberger v. Seaton etc. Co. (1909), 45 Colo. 401, 102 Pac. 168; Hutchinson v. Watson D. Co. (1909), 16 Idaho, 484, 133 Am. St. Rep. 125, 101 Pac. 1059.

accretions joined to the bank. "Additions to the land of a littoral proprietor by the action of the water become a part of the land, and belong to the owner, where they are so gradual as to be imperceptible; but if an island arises out of the water, and afterward becomes connected to the land of the littoral proprietor, it belongs to the State."[21]

(3d ed.)

§ 903. **Boundaries.**—Owing to the law of accretion, water boundaries, at common law, shift with the water, and are not fixed.

The California Civil Code provides:[22] "Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on tide water, takes to ordinary high-water mark; when it borders upon a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream, at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream."[23] This boundary shifts with the water, at common law. "Suppose the Crown, being the owner of the foreshore—that is, the space between high and low water mark—grants the adjoining soil to an individual; and the water gradually recedes from the foreshore, no intermediate period of the change being perceptible; in that case, the right of the grantee of the Crown would go forward with the change. On the other hand, if the sea gradually covered the land so granted, the Crown would be the gainer of the land. The principle laid down by Lord Hale, that the party who suffers the loss shall be entitled also to the benefit, governs and decides the question."[24] As stated in another authority, "The question is well settled at common law that the person whose land is bounded by a stream of water, which changes its course gradually by alluvial formations, shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose

[21] People v. Warner, 116 Mich. 228, 74 N. W. 705. Accord, Cooley v. Golden, 117 Mo. 33, 49, 23 S. W. 100, 21 L. R. A. 300; Holman v. Hodges, 112 Iowa, 714, 84 Am. St. Rep. 367, 84 N. W. 950, 58 L. R. A. 673; Perkins v. Adams, 132 Mo. 131, 139, 33 S. W. 778; Tatum v. City of St. Louis, 125 Mo. 647, 28 S. W. 1002; Chinn v. Naylor, 182 Mo. 583, 81 S. W. 1109; Wallace v. Driver, 61 Ark. 429, 435, 33 S. W. 641, 31 L. R. A. 317. See South Dakota Stats. 1911, c. 189, p. 231.

[22] Section 830 of the California Civil Code.

[23] See Drake v. Russian River Co., 10 Cal. App. 654, 103 Pac. 167.

[24] Alderson, B., in The Matter of the Hull and Selby Railway, 7 Mees. & W. 327. To the same effect, Adams v. Frothingham, 3 Mass. 352, 3 Am. Dec. 151; Phillips v. Rhodes, 7 Met. (Mass.) 322.

land is thus bounded is subject to loss, by the same means which may add to his territory, and as he is without remedy for his loss, in this way, he cannot be held accountable for his gain."[25] A strip of land having both its lateral boundaries upon water may hence become a movable freehold when both boundaries shift.[1]

Where, however, a grant clearly intends a fixed boundary and contains words expressly negativing the common-law rule, then the boundary will not shift, nor will the grantee be entitled to accretions.[2] Where an owner of land plats the land both upland and shallow, and sells both separately, he in effect disassociates his riparian rights from the upland estate, and the owner of the upland cannot prevent a purchaser of submerged land from re-filling land which has been covered by the advancing landward of the shore line.[3] So, where by statute an artificial harbor line is established, riparian rights whether of accretion or wharfage, do not extend beyond that statutory line. This was early settled as to San Francisco harbor.[4] In another early case it was held: "We do not consider that the plaintiff is a riparian proprietor in the sense in which the term is used in the law of tide waters. He is not an owner upon the 'shore,' but upon a 'waterfront' of statute creation. The waterfront established by the act of March 5, 1851, is what that act has made it to be, and the rights of the plaintiff as the owner of a beach and water lot abutting upon it exist only in subordination to that act. It is provided in the fourth section of the act that the boundary line described in the first section shall be and remain a permanent waterfront of said city; and special provision is made for keeping it free and clear of all obstructions. . . . . 'Shore' is the space between high and low water mark. Against the plaintiff's water lot there is no such space. The waterfront at the point is below low water mark, and there can be no riparian right to build a wharf or pier beyond

[25] New Orleans v. United States, 10 Pet. 717, 9 L. Ed. 595. See, also, Scratton v. Brown, 4 Barn. & C. 485, 107 Eng. Reprint, 1140; Camden etc. Co. v. Lippincott, 45 N. J. L. 415, 417 (citing cases); Wallace v. Driver, 61 Ark. 432, 33 S. W. 641, 31 L. R. A. 317 (citing cases); De Lancey v. Wellbrock, 113 Fed. 103.

[1] East Hampton Trustees v. Kirk, 84 N. Y. 218, 38 Am. Rep. 505, citing Scratton v. Brown, 4 Barn. & C. 485, 107 Eng. Reprint, 1140.

[2] Cook v. McClure, 58 N. Y. 437, 17 Am. Rep. 270.

[3] Gilbert v. Eldridge, 47 Minn. 210, 49 N. W. 679, 12 L. R. A. 411.

[4] Eldridge v. Cowell, 4 Cal. 80, holding that one who took with knowledge of the San Francisco Beach and Water Lot plan takes without riparian rights, and cannot object to filling in in front of him.

it; and it follows that if a wharf should be built by a stranger below the line of low water, that the owner of the adjacent upland would have no right of entry upon it on which he could maintain ejectment."[5] And in the supreme court of the United States: "But in this case no inquiry as to the rights of a riparian proprietor, by either the common law or local usage or regulation, is needed. The complainant is not the proprietor of any land bordering on the *shore* of the sea, in any proper sense of that term. His land is situated nearly half a mile from what was the shore of the bay of San Francisco, at the time California was admitted into the Union, and over it the water at the lowest tide then flowed at a depth sufficient to float vessels of ordinary size. There is, therefore, no just foundation for the claim by the complainant as riparian proprietor of a right to wharf out into the bay in front of his land."[6]

C. WHARFAGE AND OTHER RIPARIAN OR LITTORAL RIGHTS.

(3d ed.)

§ 904. **Access.**—As elsewhere set forth, all riparian rights are founded upon the natural situation of riparian lands, giving access to the natural resource.[7] The right to preserve and enjoy this natural situation—the right of access—is the essence of all, and is in itself a right of property. The right of access is his only, and exists by virtue and in respect of his riparian property. It is distinct from title to the bed of the water. It exists in the case of tide waters, even where the shore is the sovereign's property, both when the tide is out and when it is in. It is distinct from the public right of navigation, and an interruption of it is an encroachment upon a private right, whether caused by a public nuisance or authorized by the legislature. In Lyon v. Fish-

[5] Dana v. Jackson St. Wharf Co., 31 Cal. 121, 89 Am. Dec. 164.

[6] Weber v. Harbor Commrs., 18 Wall. (U. S.) 65–67, 21 L. Ed. 802. So of the statutory waterfront of New York harbor it is held: "In the absence of an express grant of wharfage, or of such manifest intention, the city or the State, as the case may be, may make successive grants of its lands under water, each in front of the former, to different grantees, without any violation of the rights of either, and neither the first nor the last grantee will acquire any exclusive riparian privileges. None of such grantees are in any proper sense riparian owners at all, and riparian rights do not attach to such grants." Turner v. People's Ferry Co., 21 Fed. 93, 94. See Hoboken v. Pacific Ry. Co., 124 U. S. 690, 8 Sup. Ct. Rep. 643, 31 L. Ed. 543.

[7] *Supra*, sec. 692 et seq.

mongers' Co.[8] it was said that the rights of a riparian proprietor, so far as they relate to natural streams, exist *jure naturae*, because his land has by nature the advantage of being washed by the stream, and as the facts of nature constitute the foundation of the right, the law should recognize and follow the course of nature in every part of the stream.

The owner of land bounded by a navigable river has the right to free communication between his premises and the navigable channel of the river.[9] Acts of a boom company obstructing navigation of a river may be enjoined in an action by persons whose use of the river, ordinarily affording them ingress to and egress from their lands, is thereby interfered with.[10] A railroad being built between a wharf and the water, compensation must be made to the wharf owner.[11] An embankment for a road along the shore is such an injury to the riparian owner as to entitle him to damages.[12] Special damages are sustained by one whose means of access to his cottage on the banks of a navigable river is cut off by an obstruction of the stream with logs (there being no other highway leading thereto), so as to entitle him to recover damages for the obstruction.[13]

In most States, this right of access cannot be taken from the riparian owner without compensation, even for the improvement of navigation. If the acts done or structures built in the improvement of navigation destroy the right of access or other ripa-

[8] L. R. 1 App. Cas. 673, 10 Ch. 679, 44 L. J. Ch. M. S. 747, 33 L. T., N. S., 146, 24 Week. Rep. 1, see *supra*, sec. 698.

[9] Case v. Toftus, 37 Fed. 730, 5 L. R. A. 684; Paine Lumber Co. v. United States, 55 Fed. 854; Hedges v. West Shore R. Co., 80 Hun, 310, 30 N. Y. Supp. 92; Yates v. Milwaukee, 10 Wall. 497, 19 L. Ed. 984; Shepard v. Coeur d'Alene Co., 16 Idaho, 293, 101 Pac. 591.

[10] Hulet v. Wishkah Boom Co. (1909), 54 Wash. 510, 132 Am. St. Rep. 1127, 103 Pac. 814.

[11] Bell v. Hull & S. R. Co., 6 Mees. & W. 699, 2 Ry. Cas. 279. See Attorney General v. Conservators of the Thames, 1 Hem. & M. 1, 8 Jur., N. S., 1203, 11 Week. Rep. 163; 71 Eng. Reprint 1.

[12] Buccleuch v. Metropolitan Bd. of Works, L. R. 3 Ex. 306. See, also, Metropolitan Bd. of Works v. McCarthy, L. R. 7 H. L. 243, 43 L. J. C. P., N. S., 385, 31 L. T., N. S., 132; Original Hartelpool Collieries Co. v. Gibb, L. R. 5 Ch. D. 713; Bell v. Quebec, L. R. 5 App. Cas. 98, 49 L. J. P. C., N. S., 1, 41 L. J. 451, Atty. Gen. v. Wemyss, L. R. 13 App. Cas. 192; Rose v. Groves, 5 Man. & G. 613, 6 Scott N. R. 645, 1 Dowl. & L. 61, 12 L. J. C. P., N. S., 251, 7 Jur. 951; Kearns v. Cordwainers Co., 6 Com. B., N. S., 388, 28 L. J. C. P., N. S., 285, 5 Jur., N. S., 216. Regarding wharfage and riparian rights on navigable streams, see 127 Am. St. Rep. 50, note.

[13] Smart v. Aroostook Lumber Co., 103 Me. 37, 68 Atl. 527, 14 L. R. A., N. S., 1083.

rian rights of a riparian owner, the riparian owner is entitled to damages as for taking of private property for a public purpose, for the rule in the majority of the States recognizes his right of access to navigability as private property which cannot be taken from him by the State without compensation. In one California case it is said: "The State cannot make, nor authorize to be made, any obstruction in navigable waters in front of any riparian proprietor, which will prevent his having free access by water to his land, unless it be done in the exercise of its power to take private property for public use, and compensation made therefor."[14]

The rule in New York seems opposed to this.[15] The supreme court of the United States also doubted whether the riparian owner should have compensation, upon principle, but holds that whether he shall or shall not is entirely a question of State law,[16] and that it will uphold the State upon whichever stand it takes.[17]

[14] Eldridge v. Cowell, 4 Cal. 80. A leading case is Yates v. Milwaukee, 10 Wall. 497, 19 L. Ed. 984, cited and approved in San Francisco Sav. Union v. R. G. R. Petroleum Co., 144 Cal. 134, 103 Am. St. Rep. 72, 77 Pac. 832, 66 L. R. A. 242, 1 Ann. Cas. 182. The California Political Code, section 4042, provides expressly for protection of riparian owners where counties improve river-beds, etc. See, also, Shepard v. Coeur d'Alene Co. (1909), 16 Idaho, 293, 101 Pac. 591; Kamm v. Normand, 50 Or. 9, 126 Am. St. Rep. 698, 91 Pac. 451, 11 L. R. A., N. S., 290; Bigham Bros. v. Port Arthur etc. Co., 100 Tex. 192, 97 S. W. 686, 13 L. R. A., N. S., 656; Mashburn v. St. Joe Imp. Co, (Or.), 113 Pac. 92; Wash. Stats. 1911, c. 11, sec. 7, subd. d. See, also, note to State ex rel. Denny v. Bridges, 19 Wash. 44, 52 Pac. 326, 40 L. R. A. 593.

[15] Scranton v. Wheeler, 179 U. S. 141, 21 Sup. Ct. 48, 45 L. Ed. 126; Gould v. Hudson R. Co., 6 N. Y. 552; Lansing v. Smith, 4 Wend. 21, 21 Am. Dec. 89; People v. Tibbetts, 19 N. Y. 523; People ex rel. Loomis v. Canal Appraisers, 33 N. Y. 461; Smith v. Rochester, 92 N. Y. 463, 44 Am. Rep. 393; Langdon v. New York, 93 N. Y. 129; Sage v. New York, 154 N. Y. 61, 61 Am. St. Rep. 592, 47 N. E. 1096, 38 L. R. A. 606. And see Cohen v. United States, 162 Fed. 364; Crawford etc. Co. v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647, 93 N. W. 781, 60 L. R. A. 889. In an early English case it was held that no compensation need be given for pollution of water (rendering in salt) in improvement of navigation, saying (as previous sections have shown no longer to be the law) that there could be no private riparian right in navigable streams. Lord Ellenborough in The King v. Directors of Bristol Dock Co., 12 East, 429, 104 Eng. Reprint, 167. *Contra*, see Bigham Bros. v. Port Arthur etc. Co., 100 Tex. 192, 97 S. W. 686, 13 L. R. A., N. S., 656.

[16] Barney v. Keokuk, 94 U. S. 324, 24 L. Ed. 224, quoted with approval in Hardin v. Jordan, 140 U. S. 382, 11 Sup. Ct. Rep. 808, 838, 35 L. Ed. 433; Shively v. Bowlby, 152 U. S. 49, 14 Sup. Ct. Rep. 548, 38 L. Ed. 349; Packer v. Bird, 137 U. S. 671, 11 Sup. Ct. Rep. 210, 34 L. Ed. 821.

[17] United States v. Mission Rock Co., 189 U. S. 391, 23 Sup. Ct. Rep. 606, 47 L. Ed. 865. *Supra*, sec. 898, note 11.

(3d ed.)

§ 905. **Wharfage, etc.**—The riparian owner's right of access gives him the right to exercise the same by wharfing out into navigable waters.[18] In the leading case of Yates v. Milwaukee [19] it is said: "But whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor, whose land is bounded by a navigable stream; and among those rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf or pier, for his own use or for the use of the public, subject to such general rules as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be." Erections may be placed in the sea or its shores and belong to the maker, *quod nullius sit, occupantis fit;* provided it does not interfere with navigation or the prior structures of individuals.[20] If the owner of land bounded by the shore upon tidewater makes improvements upon or reclaims the shore adjoining his lands, the part of the shore so improved or reclaimed belongs to him, and cannot be granted by the State.[21]

If, however, they interfere with navigation or other public rights, they become purprestures and may be prohibited. For example, the courts of some States and of the United States have held that a riparian owner has not the right to maintain a dam or other obstruction which prevents the passage of fish up the streams, and that the legislature may establish regulations to prevent obstructions to the passage of fish.[22] Likewise, if they cause damage to other riparian owners, they are actionable by them.[23]

It has been held that the right to wharf out may be severed from the land by grant.[24]

The riparian owner on an *artificial* statutory waterfront has no right to wharf out, however.[25]

[18] Coquille etc. Co. v. Johnson, 52 Or. 547, 132 Am. St. Rep. 716, 98 Pac. 132; Montgomery v. Shaver, 40 Or. 244, 66 Pac. 923; Stevens Point Boom Co. v. Reilly, 44 Wis. 295; River Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206.

[19] 10 Wall. 497, 19 L. Ed. 984.

[20] Pothier, Droit de Propriété, opp. tom. 8, p. 150.

[21] Heiney v. Noland, 75 N. J. L. 397, 67 Atl. 1008.

[22] In re Delaware River (1909), 131 App. Div. 403, 115 N. Y. Supp. 750.

[23] Kuhnis v. Lewis etc. Co., 51 Wash. 196, 98 Pac. 656.

[24] Montgomery v. Shaver, 40 Or. 250, 66 Pac. 923; Coquille etc. Co. v. Johnson, 52 Or. 547, 132 Am. St. Rep. 716, 98 Pac. 132; Decker v. Pac. etc. Co. (Alaska), 164 Fed. 977. See 40 L. R. A. 393, note.

[25] *Supra*, sec. 903.

(3d ed.)

§ 906. **Other Riparian Rights in Navigable Waters.**—In general, riparian owners have all the rights upon navigable rivers that they have on non-navigable rivers, provided they occasion no obstruction to the navigation,[1] since the right arises from ownership of the bank, not the bed. In Lyon v. Fishmongers' Co.[2] Lord Cairns said: "I cannot entertain any doubt that the riparian owner on a navigable river, in addition to the right connected with navigation to which he is entitled as one of the public, retains his rights, as an ordinary riparian owner, underlying and controlled by, but not extinguished by, the public right of navigation." In another English case Lord Blackburn said: "It was said in argument in the present case that whether the stream was navigable or not made no difference as to the rights of the riparian proprietors. . . . . I agree to this," etc.[3]

Thus, he has a right to a reasonable use of the water for irrigation,[4] or for power purposes,[5] and, in general, for other beneficial uses. "The rule is elementary that . . . . every proprietor of land on the bank of a stream of water, *whether navigable or not*, has the right to use the water, etc."[6] The riparian proprietor on a navigable stream has, among other rights, "the right to make a reasonable use of the water as it flows past or laves the land."[7]

(3d ed.)

§ 907. **Fishing.**—The general common law of fishing is borrowed from the civil law.[8] In the civil law, the fish themselves

1 *Supra*, sec. 726.

2 L. R. 1 App. Cas. 673.

3 Orr Ewing v. Colquohoun, L. R. 2 App. Cas. 861. See, also, Kent's Commentaries, lec. 52, 3 Kent, 429; 20 Harvard Law Review, 489, note; Madison v. Spokane etc. Co., 40 Wash. 414, 82 Pac. 719, 6 L. R. A., N. S., 257; Myers v. City of St. Louis, 82 Mo. 367; Walker v. Board of Pub. Works, 16 Ohio, 540; Judson v. Tide Water Co., 51 Wash. 164, 98 Pac. 377; Carli v. Stillwater Co., 28 Minn. 276, 3 N. W. 348.

4 Heilbron v. Fowler etc. Co., 75 Cal. 426, 7 Am. St. Rep. 183, 17 Pac. 535; Bigham Bros. v. Port Arthur etc. Co., 100 Tex. 192, 91 S. W. 848, 97 S. W. 686, 13 L. R. A., N. S., 656. Droit Civile Francais, par Aubrey & Rau, 4th ed., vol. III, p. 16.

5 Hamelin v. Bannerman [1895], App. Cas. 237; Trullinger v. Howe, 53 Or. 219, 97 Pac. 549, 99 Pac. 880, 22 L. R. A., N. S., 545; Dodge v. Inhabitants of Rockport, 199 Mass. 274, 85 N. E. 172.

6 Lyon, J., in Kimberly etc. Co. v. Hewitt, 79 Wis. 334, 48 N. W. 373, quoted in Green Bay Co. v. Kaukauna Co., 90 Wis. 370, 48 Am. St. Rep. 937, 61 N. W. 1121, 63 N. W. 1019, 28 L. R. A. 443.

7 Lewis on Eminent Domain, 2d ed., sec. 83; Taylor v. Commonwealth, 102 Va. 759, 102 Am. St. Rep. 865, 47 S. E. 881.

8 Shultz on Aquatic Rights, p. 1.

while swimming at large are *"ferae naturae,"* in the "negative community," and belong to no one; the right of fishing is purely a usufructuary right; the fish themselves become private property only when caught.[9] "The fish in the sea, rivers, lakes, etc., being in their natural freedom, are things belonging to no one; fishing is a species of occupation whereby the fisherman acquires the property in the fish he catches, and thus takes into his possession."[10] To illustrate this nature of property in fish, fishing in non-navigable rivers is not really *larceny*, though it may be treated as such; but regarding fish in a reservoir, these are in the possession of him who is guarding them, who may permit their capture as he sees fit; and there can be no doubt whatever that one who fishes there without his consent commits an actual larceny against the man to whom the reservoir belongs.[11]

From this negative civil-law position of "belonging to no one," the change is now well established in the common law to the positive one that fish swimming at large "belong to the State in trust for the public."[12]

In navigable waters, the public has a right of fishing, so far as it has access to the water; and the riparian owners cannot prevent them.[13] But a lawful mode of access must be obtained by the public before it can exercise the privileges appertaining to navigable waters.[14] On non-navigable waters fishing is a private riparian right belonging exclusively to the riparian owners. Lord

[9] *Supra*, secs. 2, 33; *infra*, sec. 1025.

[10] "Les poissons, qui sont dans la mer, dans les rivières, les lacs, etc., étant in laxitate naturali, sont des chose qui n'appartiennent à personne: la peche, qu'on en fait, est un genre d'occupation par lequel les pêcheurs acquièrent le domaine des poissons qu'ils pèchent, et dont ils s'emparent par la pêche qu'ils en font." Pothier, Troite de Propriètè (op. tom. 8, p. 137.)

[11] "A l'egard des poissons, qui sont dans un réservoir, ces poissons étant *sub manu* et en la possession de celui qui les y garde, qui peut les aller prendre toutes fois et quantes que bon lui semble, il n'est pas douteux que celui, qui les y pêcherait sans droit, ferait un vèritable vol à celui à qui ces poissons appartiennent." Pothier, Traitè du Droit de Proprietè (op. tom. 8, p. 138). An old English statute to protect private fish-ponds is referred to by Lord Coke. "If a man committeth a trespass in the fish-pond, etc., of another, by taking and carrying away of *water*, he is no misfeasor within this statute; but if he let out the water to the end to take fish, he is a misfeasor within this statute," etc., 2 Coke's Inst., commenting on Stat. 3, Edw. I. (Weston I.), cap. 20, 6th ed. London, 1681, p. 200.

[12] *Supra*, sec. 6.

[13] Willow R. Club v. Wade (1898), 100 Wis. 86, 76 N. W. 273, 42 L. R. A. 305. See 13 Am. St. Rep. 416, note.

[14] Bolsa etc. Club v. Burdeck, 151 Cal. 254, 90 Pac. 532, 12 L. R. A., N. S., 275.

Hale says:[15] "Fresh rivers, of what kind soever, do of common right belong to the owners of the soil adjacent; so that the owners of the one side have, of common right, the property of the soil and consequently the right of fishing *usque filum aquae;* and the owners of the other side the right of soil or ownership and fishing unto the *filum aquae* on the other side."[16]

In the Western States which have rejected the common law of riparian rights *in toto* in favor of the law of appropriation, the riparian right of fishing is subordinate to the rights of others to appropriate the stream, and lasts only until some appropriator makes a diversion.[17]

The State may regulate the use of non-navigable waters (and, in the absence of conflict with navigation, also of navigable waters) for the preservation of fish.[18]

[15] De Jure Maris, cap. I.

[16] A civil-law authority says that by the Roman law rivers were public, belonging to the people, though the use of them was allowed to everyone (tout le monde) and everybody (chacun) was permitted to fish there. It is different in our (French) law. The king owns all navigable rivers, and permits fishing therein only to "les fermiers du domaine et les engagistes," and others than "fermiers" cannot do it. "A l'égard des rivières non navigables, elles appartiennent aux différens particuliers, qui sont fondés en titres ou en possession, pour s'en dire propriétaire dans l'éntendue portér par leurs titres ou leur possession," and they alone can fish there. Pothier, Droit du Propriété, op. tom. 8, p. 137.

[17] Sternberger v. Seaton etc. Co. (1909), 45 Colo. 401, 102 Pac. 168. But see State v. Banker (Utah), 108 Pac. 352.

[18] E. g., Cal. Pen. Code, sec. 629; People v. Truckee etc. Co., 116 Cal. 397, 48 Pac. 374, 39 L. R. A. 581; Ex parte Maier, 103 Cal. 476, 42 Am. St. Rep. 129, 37 Pac. 402; Ex parte Bailey (1909), 155 Cal. 472, 132 Am. St. Rep. 95, 101 Pac. 441; Portland etc. Co. v. Benson (Or.), 108 Pac. 122; In re Delaware River, 131 App. Div. 403, 115 N. Y. Supp. 750; Hooker v. Cummings, 20 Johns. 91, 11 Am. Dec. 249; People v. Doxtater, 75 Hun, 472, 27 N. Y. Supp. 481; affirmed, 147 N. Y. 723, 42 N. E. 724; Ex parte Maier, 103 Cal. 476, 42 Am. St. Rep. 129, 37 Pac. 402; State v. Beardsley, 108 Iowa, 396, 79 N. W. 138; Stoughton v. Baker, 4 Mass. 522, 3 Am. Dec. 236; Geer v. Connecticut, 161 U. S. 519, 16 Sup. Ct. Rep. 600, 40 L. Ed. 793; Holyoke Co. v. Lyman, 15 Wall. 500, 21 L. Ed. 133; Parker v. People, 111 Ill. 581, 53 Am. Rep. 643. In Commonwealth v. Essex Co., 13 Gray (Mass.), 249, Chief Justice Shaw says: "It seems to be well settled that the obstruction of the passage of the annual migratory fish through the rivers and streams of the commonwealth is not an indictable offense at common law. But the right to have these fish pass up rivers and streams to the headwaters thereof is a public right, and subject to regulation by the legislature." In Commonwealth v. Chapin, 5 Pick. (Mass.) 199, 16 Am. Dec. 386, the court held that: "In a river not navigable the proprietor of the adjoining soil has an exclusive right of fishery in front of his land to the thread of the river, except so far as this right has been qualified by legislative regulations. But this right is limited to the taking of fish, and does not carry with it a right to prevent the passage of fish to the lakes and ponds for the multiplication of the species."

§§ *908–1006 (Blank numbers.)*

CHAPTER 40.

COMPARISON OF THE LAW OF APPROPRIATION AND OF RIPARIAN RIGHTS.

§ 1007. Purpose of this chapter.
§ 1008. First principles.
§ 1009. As dependent on ownership of land.
§ 1010. Contiguity to the stream.
§ 1011. Mode of acquisition.
§ 1012. Beneficial use.
§ 1013. Preference of domestic use.
§ 1014. Equality vs. priority.
§ 1015. In California.
§§ 1016–1024. (Blank numbers.)

(3d ed.)

§ 1007. **Purpose of This Chapter.**—It is our purpose in this short chapter to bring together in concise form, without citation of authorities, matters set forth, with regard to the systems of appropriation and riparian rights, in the foregoing two parts of this book, showing likenesses in the two systems, differences, and points where the differences are being bridged and the systems converging.

(3d ed.)

§ 1008. **First Principles.**—Under both systems the *corpus* of running water in a natural stream is not the subject of ownership; neither real property nor personal property, but in a class with the air in the atmosphere. It is in the "negative community" (or "*publici juris,*" or "belongs to the public"). A right (called "usufructuary") may exist to use it. The *corpus* of any portion taken out of the stream and reduced to possession is private property so long as reduced to possession. The common law borrowed these principles from the civil law and the law of appropriation borrowed them from the common law.

(3d ed.)

§ 1009. **As Dependent on Ownership of Land.**—To protect the landowners bordering upon the stream from trespass upon the *land,* the common law excludes nonriparian owners from the use

of the water, and to prevent excessive damage between riparian owners, limits each to a reasonable use of his own land. The common law limits the use to riparian proprietors upon the riparian lands and contemplates a settled community occupying such lands, being a system drawn from old-settled countries. But formerly in the West the bordering lands were open public domain, and the United States, their sole owner, did not object to, but encouraged, the trespass and free diversion. The ownership of riparian or any land in a private individual was not regarded as necessary to his use of the water, and the attributes of the system of appropriation are those of a "free public land" system. The law of appropriation is hence independent of ownership of any land or the place of use.

Upon this the law of appropriation is to some extent returning to the common law where statutes make the right to use water by appropriation inhere in the land irrigated.

The free access, having thus given rise to the law of appropriation, passes away as the bordering lands are settled. The right of the private land to the use of the water because of its contiguity is (so far as not diverted away while the land was public) recognized under the California doctrine but not under the Colorado doctrine. The latter has, however, returned to the principle of the common law so far as the private riparian land must not be trespassed upon to reach the water; the appropriator must enter the stream on public land or proceed by grant, prescription or condemnation.

(3d ed.)

§ 1010. **Contiguity to the Stream.**—Contiguity to the stream founds the riparian right but is disregarded by appropriation. A tendency to return to the common law is seen in decisions recognizing a right of appropriation in the riparian owner on proof of natural subirrigation; also in at least one arid State prohibiting appropriations for use beyond the watershed.

(3d ed.)

§ 1011. **Mode of Acquisition.**—No formalities are needed to require riparian rights at common law; they attach *ipso facto* to the riparian land because of its contiguity to the stream. Certain formalities are required, on the other hand, to acquire rights by appropriation, and these formalities are being steadily increased.

(3d ed.)

§ 1012. Beneficial Use.—Actual use is the foundation of a right by appropriation; but future possible use stands as high at common law as present use. Nonuse causes a loss of the appropriation, but does not affect the riparian right.

The law of appropriation is returning to the common law in this regard so far as it recognizes appropriations for "future needs" without present application of the water; also in allowing a number of years before nonuse causes forfeiture. On the other hand, pressure by appropriators upon the courts tends to reduce the common-law protection of future use, as shown chiefly in regard to taking the riparian right on eminent domain. If the common law goes far in protecting the interests of private landowners, on the other hand the law of appropriation goes far in subordinating everything to present accomplishment.

(3d ed.)

§ 1013. Preference of Domestic Use.—Statutes have introduced into the law of appropriation in some States a preference to domestic uses with or without a series of other rating of uses; whereas the common law is abandoning the distinction between classes of uses.

(3d ed.)

§ 1014. Equality vs. Priority.—All riparian owners are equal in use at common law, and none will be allowed unreasonably to impair the equal possible use of another. Equality and unreasonableness vary with the surrounding circumstances of extent of lands, seasons, volume of water, etc. On the other hand, appropriation gives an exclusive right measured by priority; it hence is a system of inequality, and aims at certainty and to prevent variation.

The law of appropriation is returning to the common law in so far as decisions are appearing, holding the rights of appropriators to be correlative; also in so far as statutes create administrative systems under which officials are given discretion to act for the general correlative good of all users on a stream; also in regard to pro-rating statutes, and also in so far as, by the practice of rotation, appropriators are voluntarily pooling their exclusive rights for the common good. It is also returning to the common-law characteristic of varying with the circumstances in

so far as beneficial use, upon which the law of appropriation rests, must, of necessity, as regards irrigation, vary with the season, the year, the change of crops, the mode of use, and the number of neighboring irrigators. Especially is priority falling in regard to pollution of streams, where the Western courts are strongly tending to disregard priority as a justification.

On the other hand, the common law is striving to be more definite and to accomplish constancy of rights; as, for example, in substituting the watershed as a limit in place of the more indefinite "reasonable use."

The law of riparian rights is one of the few instances where the common law, usually so individualistic, has accepted a communal system, and it is significant that in this it borrowed from the civil law, whose spirit is generally paternal. The law of riparian rights, being for and from older and settled communities, is restrictive upon each with a view to the correlative good of all. On new streams in the unsettled West, which require big projects before anyone can go there at all, it is an anomaly, although it contains basic principles of justice for small streams when growth has been accomplished. On the other hand, the law of appropriation is individualistic, "first come first served," which is proper enough on new and unsettled streams, but equally an anomaly after full settlement, for streams upon which a whole community has grown dependent.

(3d ed.)

§ 1015. **In California.**—The attitude of the California court toward appropriation is aptly shown by contrasting the following passages. The first dealt with streams on public land in the days of "Forty-nine." The court then said:

"When a party constructs a ditch, and diverts the waters of a stream before the rights of others have attached below, he only takes it from one unoccupied mining locality to another. In such case there can, as a general rule, be no substantial injury done to the mining interests of the State, or to the rights of individuals. The water is taken to a locality where it is used; and after being so used, it finds its way to other mining localities, where it is again used. The effect of the diversion is not to diminish the number of times the water may be used. In the majority of cases, it is used as often, and upon the whole, as profitably, as if it had

never been diverted, but had continued to flow down its natural channels. The general usefulness of the element is not impaired by the diversion. It may be very safely assumed that as much good, if not more, is accomplished by the diversion as could have been attained had such diversion never occurred. In fact, we must, in reason, presume that the water is taken to richer mining localities, where it is more needed, and, therefore, the diversion of the stream promotes this leading interest of the State. It was upon the principle, that the leading interest of the superior proprietor was attained by these diversions, that the decisions of this court sustaining them were predicated."[1]

Contrast with this Lux v. Haggin,[2] refusing to reject the common law for streams on private land:

"In our opinion, it does not require a prophetic vision to anticipate that the adoption of the rule, so called, of 'appropriation' would result in time in a monopoly of all the waters of the State by comparatively few individuals, or combinations of individuals controlling aggregated capital, who could either apply the water to purposes useful to themselves, or sell it to those from whom they had taken it away, as well as to others."

Most California water development is by large companies having old public-land appropriations and rights acquired by purchase and prescription. But as the law of exclusive rights by priority of appropriation is confined in California to waters upon public lands (the riparian system governing private lands), the common law of riparian rights is becoming the general basis of the California law, and the law of prior appropriation is diminishing in importance so far as concerns new acquisitions. The riparian system will govern the small streams, while grant, condemnation and prescription will found the larger projects of the future.

[1] Bear River etc. Co. v. New York etc. Co., 8 Cal. 327, 68 Am. Dec. 325, 4 Morr. Min. Rep. 526.
[2] 69 Cal. 255, at 309, 10 Pac. 674.

§§ *1016–1024. (Blank numbers.)*

CHAPTER 41.

SOME NOTES ON THE RIPARIAN SYSTEM UNDER THE ROMAN LAW AND THE MODERN EUROPEAN LAW OF WATERS.

§ 1025. The *corpus* of running water.
§ 1026. The law of riparian rights.
§ 1027. Grants by riparian proprietors.
§ 1028. The administrative, condemnational, and public land system.
§ 1029. Bibliography.
§§ 1030–1038. (Blank numbers.)

There are presented here cumulative quotations from the civil-law authorities. These were omitted from the foregoing chapters of the book in order to avoid encumbering it, being matters upon which the civil law has already been referred to.[1] They are here given for the sake of reference only, as they would otherwise be inaccessible to most readers, and at the same time are of practical use in regions along the Mexican border, where titles are sometimes deraigned from a Mexican source.

(3d ed.)

§ 1025. **The Corpus of Running Water.**—*Vattel* says: "There are things which in their own nature cannot be possessed. There are others of which nobody claims the property, and which remain common, as in their primitive state when a nation takes possession of a country; the Roman lawyers called these things *res communes,* things common; such were, with them the air, the *running water,* the sea, the fish and wild beasts."[2] *Puffendorff* says: " 'Tis usual to attribute an exemption from property to the light and heat of the sun, to the air, to the *running water,* and the like."[3] *Grotius* classes *aqua profluens,* running water, with things common, saying: "At idem flumen, qua *aqua profluens* vocatur; commune mansit, nimirum ut bibi hauririque possit."[4] *Pardessus* says: "Mais plusieurs choses, par leur nature, ont continué de

[1] *Supra,* c. 1, and secs. 614, 685, etc.

[2] 1 Law of Nations, c. 20; Chitty's Translation, 109, sec. 234.

[3] Stephen's Translation. The original is, "Eam ob rationem vulgo a proprietate eximunt lumen, caloremque soluis, aerem, *aquam profluentem* et similia." (Puffendorff, lib. 4, cap. 5, sec. 2. See, also, Id., lib. 3, cap. 3, secs. 3, 4.)

[4] Grotius, Bk. cap. 2, sec. 12.

n'appartenir pas plus aux uns qu'aux autres. L'usage actuel qu'on en fait est le seul titre qu'on ait à n'en être pas dépossédé; dès qu'il a cessé, une autre personne a les mêmes droits, et si ces choses ne sont pas devenues un objet de propriété exclusive par suite de cet usage, celui qui les occupe à son tour n'est pas censé s'emparer du bien d'autrui. L'eau, considérée comme substance indépendante du terrain où elle repose, est restée dans cette communauté négative, et n'appartient évidemment qu'à celui qui s'en empare le premier. Un homme qui recevroit la pluie dans un vase placé au-dessus du terrain sur lequel cette eau auroit dû tomber, ne pourroit être poursuivi comme voleur par le propriétaire de ce terrain: ce dernier ne seroit fondé à se plaindre que de ce que l'étranger auroit, sans droit, placé un vase au-dessus de son fonds. Ce principe ne s'applique pas moins à des eaux vives."[5]

So say the various other legal writers. "From the very nature of such things results the necessary consequence that they can never be completely the object of private ownership; that they can form the object of such a right only so far, and so long, as it is possible for man to retain them under his dominion or control. Except as to the portions which an individual may thus have brought under subjection, they must be regarded as common to all the world—res omnium communes."[6] "Res communes, ... things the property of no one in particular . . . . the air, *running water,* the sea and its coasts, and wild animals in a state of freedom. The air is necessary to human life, and everyone may use so much of it as is requisite, but it is not capable of appropriation; the same is the case with *running water.*"[7] "There is nothing of a fixed nature about such water, nothing of the immovable,

[5] Pardessus, Traite des Servitudes, vol. I, p. 174.

Segun las leyes del *tit.* 28, Part. 5, se dividen las cosas con respecto á su posesion ó dominio:—1°. en *comunes,* que son las que no siendo privativamente de ninguno en cuanto á la propiedad, pertenecen á todos los hombres del mundo en cuanto al uso; como el aire, el agua de la lluvia [rain water], el mar y sus playas:—2°. en *publicas,* que son las que en cuanto á la propiedad pertenecen á un pueblo ó nacion, y en cuanto al uso á todos los habitantes de su distrito; como *los rios,* riberas, puertos y caminos públicos": Eschriche, "Cosa."

Guim's supplement to Eschriche, Ordenanzas de Tierres y Aguas, Cap. 1, De la propiedad en general, says: "El aire y el agua no pueden ser sometidos al propiedad." Cap. 2, § 8, says: "Entre los comunes, la ley de Partida cuenta el aire, las aguas de las lluvias [rain water], el mar y su ribera, advirtiendo quede ellas puede usar cualquiera criatura que viva, fuese hombre, ave ó bestia."

[6] Goudsmit, on the Pandects and Roman Law, p. 113.

[7] Colquhoun, Summary of Roman Law, sec. 923.

nothing on which one may, properly speaking, rest a claim of property. At the present instant it is at one point, the next instant at another, and a new portion of water has taken its place. . . . . The bed of the stream is immovable and of a nature to become the object of exclusive property, though this is not true of the water which covers it."[8] "Things common to all are those which being given by Providence for general use cannot be reduced to the nature of property. Such are the air, *running water*, the sea, and the shores of the sea; but if a man by prescription, from time immemorial, had the use of running water, as for a mill, his case was an exception to the general rule, but he must not waste the water unnecessarily; and mills and other structures might be erected on rivers by special license."[9] "Res omnium communes. Such things, it is obvious by their very nature, could not stand in private ownership. Every person might use and enjoy them, but no one could possess them. These things are the air, *running water*, etc. When the Romans speak of the air as a res omnium communis, they do not mean to include the space above the earth, but only the atmosphere. The man who owns the soil owns the space above it, and this space is a thing in commercio [capable of barter or sale]; but the atmosphere is a res extra commercium [a thing not capable of barter or sale]. . . . . The same remarks apply to *running water*. The space in which the brook or streamlet flows, as it hastens to feed the larger streams, is in private ownership, but the water is not."[10]

The entire classification in the Institutes is as follows:

"In the preceding book we commented upon the law of persons and saw the way in which things are either the property of someone or of no one. For certain things by natural law are

[8] "Cette eau n'a rien de fixe, rien d'immuable, rien sur quoi puisse, a proprement parler, reposer un droit de propriété. Dans l'instant présent elle est sur un point; l'instant d'apres elle en occupera un autre, dans lequel une nouvelle portion d'eau lui succédera: á mesure qu'elle coule sur des fonds elle en devient l'accessoire. Le lit seul est immuable: celui qui vient y puiser aujourd'hui pourra puiser encore demain au meme point, quoique ce ne soit pas la meme eau qui s'offre a lui. Si ce terrain etoit desséché par quelque événement que ce fut, il seroit susceptible de recevoir la culture et les travaux des hommes. On voit comment les lits de cours d'eau sont de nature á devenir des objets de propriété exclusive, quoiqu'il n'en soit pas de même de l'eau qui les couvre." Pardessus, Traité de Servitudes, vol. I, pp. 175, 176. In the same writer's work, page 174, the theory of the "negative community" is set forth in words similar to those above quoted from Pothier. (*Supra*, sec. 2.)

[9] Browne's Civil Law, vol. 1, p. 170.

[10] Tomkins & Leman on the Institutes of Gaius, p. 209.

common, certain are public, certain belong to organizations, certain are nobody's; others are property of individuals, which are acquired in various ways and means according to the subject matter. 1. And by natural law all these things are common to all: Air, and *running water,* and the sea, and as a consequence the shores of the sea. Consequently no one may be prohibited from going to the shore of the sea, so long as he keeps away from houses or monuments, or other edifices [etc.]. 2. Moreover, all *rivers* and harbors are public [etc.]. 3. Things belonging to organizations are those which belong to no individual but to cities, such as theaters, stadia and the like [etc.]. 4. The things that are nobody's are the things sacred and religious and of the church; for what belongs to the divine power is the property of no one. The things sacred are [etc.]." [11]

In Digest, Book I, title 8, it is said: "Certain things by natural law are common, certain belong to organizations, certain nobody's and others the property of individuals acquired in various ways. And the things which by natural law are common are these: the air, running water and the sea, and as a consequence the shores of the sea. Likewise, stones, gems and the like which we find on the shore, by natural law immediately become ours. But rivers almost all and harbors are public. Things sacred and religious and of the church belong to nobody." [12]

(3d ed.)

§ 1026. **The Law of Riparian Rights.**—The law of riparian rights, which is the same at civil law as at common law,[13] did not

[11] Inst. Just. Liber Secundus. De Rerum Divisione. "Superiore libro de jure personarum exposuimus: modo videamus de rebus quae vel in nostro patrimonio vel extra nostrum patrimonium habentur. Quaedam enim naturali jure communia sunt omnium, quaedam publica, quaedam universitatis, quaedam nullius, pleraque singulorum quae variis ex causis cuique adquiruntur, sicut ex subiectis apparebit. 1. Et quidem naturali jure communia sunt omnium haec: aer et aqua profluens et mare et per hoc litora maris. Nemo igitur ad litus maris accedere prohibetur, dum tamen villis et monumentis et aedificiis abstineat, quia non sunt iuris gentium, sicut et mare. 2. Flumina autem omnia et portus publica sunt [etc.]. . . . . 3. Universitatis sunt, non singulorum veluti quae in civitatibus sunt, ut theatra, stadia et similia et si qua alia sunt communia civitatium. 4. Nullius autem sunt res sacrae et religiosae et sanctae; quod enim divine iuris est, id nullius in bonis est. Sacra sunt quae," [etc.].

[12] "Quaedam naturali jure communia sunt omnium, quaedam universitatis, quaedam nullius, pleraque singulorum, quae variis ex causis cuique adquiruntur. Et quidem naturali jure omnium communia sunt ella: aer, *aqua profluens,* et mare, et per hoc littora maris. Item lapilli, gemmae, ceteraque, quae in littor invenimus, jure naturali nostra statim fiunt. . . . . Sed *flumina* pere omnia, et portus *publica* sunt. . . . . Sacrae res et religiosae et sanctae in nullius bonis sunt." Digest, lib. I, title VIII, Marcianus and Florentinus.

[13] Supra, sec. 685.

become well established in the civil law until the Code Napoleon (section 644) established it in France and in the countries upon which Napoleon forced his jurisdiction. One authority says the riparian proprietors have the sole use of non-navigable streams under the Code; that before the Code it remained for some time in some state of uncertainty, but the enactment of the Code Napoleon left no room for further doubt.[14] Chancellor Kent also says that the French law did not become settled until the Code Napoleon.[15]

It thus appears that the law of riparian rights at both civil and common law is essentially modern; in the civil law by the Code Napoleon (section 644) in 1804; in the common law by Mason v. Hill in 1833. In the earlier stages of the civil law there was, indeed, much pointing to the same rules. For example, "The Praetor says: 'I forbid anyone to put any structure upon a river or on its banks, or to do anything that would deteriorate the navigation *or the water-way.*"[16] "Prohibitory interdicts forbade anything being done tending to impede the navigation of public rivers, or *changing the course of running water.*"[17] "Nor was any obstruction or diversion of a river allowed."[18] Nevertheless, the confusion we have heretofore traced in the common law, as to the distinction between the *corpus* of water and the usufruct, appears also in the earlier civil law; and even some expressions, comparatively modern, resemble the law of prior appropriation. Thus Eschriche (Rio) says all men may use streams whether owning land on the banks or not (though in other passages, elsewhere herein quoted, he denies this, and confines the use to riparian proprietors).[19]

[14] "Nous devons reconnoître que le système étoit alors de considérer les cours d'eaux non navigables comme propriétés publiques dont les riverains avoient seulement l'usage; et cette idée dominoit encore lorsqu'un projet de code civil, ébauché en 1793 et 1794, fut proposé en l'an IV. Quand il seroit vrai que ces essais, non suivis d'exécution, eussent laissé pendant quelque temps une sorte d'incertitude sur le droit de propriété des cours d'eaux non navigables, ni flottables, et sur les conditions de cette propriété, le rapprochement des articles 538 et 644 du code ne paroit plus permettre de doutes." Pardessus, Traite de Servitudes, vol. I, p. 179.

[15] 3 Com., p. 439, note c, and p. 441, note c.

[16] Justinian D., lib. 43, tit. 12, sec. 1.

[17] Mears on Ortolan's Commentaries, p. 398.

[18] Browne's Civil Law, vol. 1, p. 171, citing Digest, lib. 43.

[19] "Los rios pertenencen a todos los hombres comunalmente, de modo que aun los que son de otra tierra estraña pueden usar de ellos como los naturales y moradores del territorio que bañan." Eschriche, "Rio." In the Piedmont (Sardinian) Code, "Article 667. Among the different users, those individuals whose titles or rights of possession are most recent, shall first bear the effects of the deficiency of the

As shown in the text,[20] the basis of the modern civil law is the law of riparian rights, as at common law. Further authorities to this effect may be here added. In framing the Italian code in 1865, the following was laid down: "Article 543. Whoever has an estate bordering on a stream which flows naturally and without artificial help, excepting such as are declared public property by article 427, or over which others have a right, may make use of it for the irrigation of his lands, or for the exercise of his industries, on condition, however, that he restores the drainage and residue of it to the ordinary channel. Whoever has an estate crossed by such a stream may also use it in the interval of its transit, but with the obligation of restoring the drainage and residue of it to its natural course when it leaves his lands." Similar provisions appear in the Code of Sardinia (1837), articles 558 and 559. These are based upon the Code Napoleon, of France (section 644).

The French law is stated as follows by Pardessus (in addition to passages already quoted): "Le droit d'irrigation que la loi reconnoit à l'un et à l'autre, peut, sans doute, aller jusqu'au point que chacun d'eux fasse entrer l'eau, par des saignées, sur sa propriété, en observant de n'en pas diminuer le volume au point de priver son voisin de la même faculté; nous croyons même qu'il auroit la faculté d'appuyer momentanément pour cet usage, sur la rive opposée, des bois ou d'autres matières servant à retenir les eaux, afin qu'elles puissent s'élever à la hauteur nécessaire pour arroser son héritage; car dans un grand nombre de circonstances, le droit d'irrigation ne peut s'execer autrement. Mais s'en servir ainsi, ce n'est pas avoir droit d'en changer le lit, ou d'en arrêter l'écoulement d'une manière nuisible au voisin; *en un mot, l'usage des eaux doit être égal en faveur des deux.* Au contraire, le propriétaire de la totalité du terrain que traverse le cours d'eau, n'est point retenu par la considération de la copropriété de son voisin; la loi lui accorde un usage qui peut aller, lorsque les règlemens locaux ne s'y opposent pas, jusqu'à détourner l'eau vers

supply." The following expression may seem based upon the law of prior appropriation, but is really based only on prescription, establishing simply a very short period of limitation. "It is understood that those lower and bordering properties which shall have anticipated the utilization by a year and a day, cannot be deprived of it by another, although it may be found situated higher upon the course of the water; and that no casual employment can interrupt or attack rights previously acquired over the same waters in a lower district." (Articles 7 and 10. General Water Law of Spain of 1879.)

[20] Supra, sec. 685.

tel ou tel point: une seule obligation lui est imposée, celle *de rétablir le cours naturel au point où finit sa propriété*, sans pouvoir si ce n'est du consentement des intéressés, ou en vertu d'un règlement administratif que les tribunaux doivent respecter, faire couler l'eau sur un autre fonds, à qui la disposition naturelle des lieux ne l'attribueroit pas immédiatement, même quand ce fonds lui appartiendroit. La condition de cet usage est que l'eau, dans son cours naturel, touche la propriété de celui qui veut en profiter."[21] "Du reste, la faculté d'user des eaux ne doit pas dégénérer en une occupation tellement exclusive que les inférieurs en soient privés. L'eau est pour tous un don de la nature, que chacun de ceux à qui elle peut être utile, a droit de réclamer."[22]

The Court of Cassation (supreme court of France), in 1844, August 21st, rendered a decision on this point as follows: "Running water is regarded by the law as a common property. Riparian proprietors on a watercourse naturally have equal rights to the use of the water, although they cannot exercise this right simultaneously. If on account of the advantage of its topographical position the proprietor of higher land on a stream exercises his right before the proprietors of lower lands, he is not the less obliged by this position after having used the waters, in the interest of agriculture and industry, to return them to their usual bed, in order that the proprietors of lower lands may use them in their turn. When the proprietor of the higher land possesses at the same time both banks of the stream his right is more extended; he can then turn the watercourse from its bed within the extent of his domain, and take the waters for use where he wills on his estate, being obliged to return them to their ordinary course where it leaves his property. This proprietor will not have to return the same quantity of water which he has received, or any certain quantity of water determined, but he must economize and use water in a just measure so that the proprietors of lower lands may exercise their rights also."[23] Again, in a decision rendered in 1847, the same court decided that an upper proprietor, no matter how extended his estates on both banks of a stream, had not the right to absorb all the water on his lands, to the detriment of a lower proprietor, and that the lower proprietor had a right to a regulation

21 Pardessus, Traite de Servitudes, vol. I, p. 260.

22 *Ibid.*, p. 263.

23 Decision—August 21, 1844.

whereby he would be assured a part of the supply, in accordance with his needs and rights as adjudged by experts.[24]

The law of riparian rights is a controlling factor to-day in the development of water-power in France.[25]

The Spanish law is given by Eschriche as follows:[1] "If running water passes between the properties of different owners, each one of the latter can use it for the irrigation of his property, or for any other object; not entirely, however, but only in the part that belongs to him, because all have equal rights, and consequently, they can prevent each other from taking more than their respective shares. When the water passes within a property, the owner can use it arbitrarily, for, since the both banks are his, he has not to subject himself to the interests of an opposite riparian owner; but at the outlet of his estate, he must return it to its natural or ordinary channel, without having power to absorb it, or entirely consume it, nor give it another direction, because it does not belong to him as a property, but only to the extent of the use which he can make of it in its passage. Since, then, every riparian proprietor can use the water which passes by the edge of his property to irrigate it, it is clear that he can open drains, irrigating canals and ditches, and even construct a dam or other structure to take and carry it to his property, provided he does not make it overflow the higher lands against the will of their owners or inundate the lower lands in a way that may cause injuries, nor hold it in such a way that the neighbors are deprived of their accustomed irrigation. None of the riparian proprietors can construct works on the property of another without his consent, nor even raise on it a weir or dam to cause the waters to enter more abundantly on his property; since all have the same rights, the works ought not to be made, except in such a way that the water will be divided with equality. But this principle of equality in the division of the waters is subordinate to the interest of agriculture, which will regularly demand that the greater quantity be devoted to the estates of greatest extent, as the Roman law required. Nevertheless, as the largest estate does not always need the greatest amount of water, the maxim of the Romans ought not to be applied except under certain restrictions. As the higher

[24] Decision—July 8, 1847. See *Les Annales des Ponts et Chaussées*, Laws and Decrees, 1847.

[25] See Water Supply Paper, 238, United States Geological Survey, upon foreign laws relative to water power projects.

[1] Eschriche, "Aguas," translated.

proprietors cannot absolutely deprive the lower ones of the use of the water, but must restore it to its natural channel after having made use of it, except the inevitable loss caused by the irrigation; in the same manner, in an inverse sense, the owners of mills, water-wheels, fulling-mills, factories, and other industrial establishments, have no such right to all the water necessary for the movement of their machines that they can deprive totally of it the proprietors of the higher properties. Nevertheless, when it is a question of mills in a country where there are few, and, on account of a drought they need all the water, there ought to be suspended on their account, for the common good, the irrigation of the meadows and the other properties as long as the state of drought lasts."

(3d ed.)

§ 1027. **Grants by Riparian Owners.**—Although there are some expressions to the contrary,[2] nevertheless, as a general statement, the civil-law rule is the same as the common-law rule; grants are invalid as to noncontracting riparian owners.[3]

[2] Piedmont (Sardinian Code). "Article 560. Every proprietor or possessor of water may make such use of the same for himself as may seem to him good, or he may dispose of it in favor of other parties, provided always that no title or prescription exists to the contrary." Hall, Irr. Dev., Part I, p. 261. "En vain a-t-on voulu soutenir que l'usage des eaux dont on jouit en vertu de l'art 644 [Code Napoleon] n'est pas susceptible d'être cédé, parce qu'il constitue an advantage inhérent aux fonds riverains, et ne peut être séparé pour être applique a d'autres fonds. Cette objection (qui sous l'empire même du code Napoleon n'avait qu'une valeur très contestable, puisque le droit d'usage dont il s'git ne constitue pas une véritable servitude dans le sens de l'art 637), s'est trouvée complètement écarteé par la loi du 29 Avril, 1845." (The law of 1845, however, is based wholly upon the power of eminent domain. See *supra*, sec. 614.) "La convention par laquelle l'un des riverains renonce, au profit d'un autre, à tout ou partie des droits d'usage qui lui compètent d'après l'art 644, est opposable à tous les riverains, pour autant qu'elle ne restreint pas leur propres droits." Droit Civile Francais, by Aubrey & Rau, 4th ed., vol. III, p. 15, note 7, and p. 52.

[3] "From my water-right, so Labeo says, I may accommodate my neighbors with water. On the other hand, Proculus holds that the water may not be used for any part of the estate other than that for which the right was acquired. The opinion of Proculus is the truer one." Digest of Justinian, as translated in Ware's Rom. W. Law, sec. 257. In the French law, a riparian proprietor cannot sell to others the water he does not use on his own land. Daviel, II, 588; Demante, Cours, II, 495, lis. IV; Demolombe, XI, 155, C. pr. Req. 11 Avril, 1837, Sir, 37, 1, 493; *contra*, however, Droit Civ. Fran., by Aubrey & Rau, 4th ed., vol. III, p. 51. In the Spanish and Mexican law: "A riparian owner cannot, without the consent of the other riparian owners interested, concede to a third party, to the injury of the former, the power to take water in the same current or on his estate; nor use, himself, the water to irrigate other lands which belong to him, but which are not situated on the same bank; although this might be acquired by prescription." Hall's Mexican Law, sec. 1399, which is a translation of Eschriche "Aguas,"

In the matter of grants by riparian owners to nonriparian owners upon division of a riparian estate, it is laid down by the French authorities that such grants are binding only between the parties thereto.[4] Where a riparian estate is divided, the subdivisions not touching the stream cease to have riparian rights against riparian owners of other estates than that which had been divided. "The nonriparian portions of an estate which, before the division, had a right of use in the water, are no longer in the situation demanded by article 644.[5] One may reply, it is true, that the partition cannot take from these portions a right which they had before the partition was executed, and invoke the principle many times recalled, that it makes little difference to third persons whether the estate to which the use of the water attaches, belongs to a single owner or to many, whether it rests in an individual or has been divided up, since their own situation has not been made worse. But this principle does not seem to us applicable except to servitudes, properly speaking. The use of water, in the case now under consideration, has no place or character as a servitude; it is the result of the fact that the water, in flowing over an estate, becomes, as it does so, an incident to the estate it flows over; an incident of which the proprietor of this estate may avail himself according to the terms laid down by the law; whereas the nonriparian parts have ceased to be a part of a whole with the parts by which the water flows; they hence have not now the rights of taking the water for irrigation."[6]

Eschriche lays down the Spanish law ambiguously (but apparently referring only to rights *inter partes*): that the subdivision of a riparian tract may carry with each portion a water-right, without express agreement to that effect. The passage, however, seems clearly to have in view only the various claimants of the partitioned tract among themselves, and not as against riparian

sec. 4. "If a proprietor does not make use of his shares, the water not utilized remains with the common store for the common use of other proprietors. This idea is so rooted in the spirit of the populace that the administrators of the water assured us they had never been troubled with such a question." (Aymard, Spanish Irr., pp. 36, 37.)

[4] Daviel, II, 590; III, 770; Proudhon, IV, 1259; Demolombe, XI, 153, 154; Pardessus, I, 106; Bertin, Code des Irrigations, No. 78. These authorities are cited in Droit Civile Francais, by Aubrey & Rau, 4th ed., vol. III, p. 48, n. 11, who take issue with them, acknowledging, however, that the authorities are as stated, and that the last-named book stands alone to the contrary.

[5] Of the Code Napoleon, quoted *supra*, sec. 685.

[6] Pardessus, Traite de Servitudes, vol. I, p. 265.

owners of tracts wholly unconnected with the partitioned one. He says:[7] "A riparian proprietor can transfer the right of taking the water by renunciation, cession, sale, or other means in favor of the proprietor on the other side, or of him lower down, and if, having two properties, he gets rid of one, he can reserve the exclusive right of using the water for that which he preserves, or conceding it for that which he transfers. The riparian proprietor cannot, without the consent of the other riparian owners interested, concede to a third party, to their injury, the power of taking water from the same stream or on to his estate, nor himself use the water to irrigate another property which belongs to him, but which is not situated on the bank, although his right can be acquired by prescription. When a property on a river bank is divided amongst several joint or common owners, in a manner that the portions which are assigned or sold to any of them, and which now form other small properties not bounding on the stream, they preserve, nevertheless, one with another, their right to the water in the same proportion that they had before the division, even when nothing should have been stipulated on this subject."[8]

Regarding the extension of a riparian estate by purchase of contiguous land, Eschriche says:[9] "The proprietor who augments the extension of his riparian property by the acquisition of lands contiguous, which increases it, cannot take *more* water than formerly for his irrigation, to the detriment of the other interested parties; since, if he had that power he could in time render illusory the rights of the other riparian proprietors."[10] That is, water cannot be used thereon "in detriment of the other riparian owners"; but apparently water can be used thereon if, upon the facts, it would not be unreasonable toward other proprietors. That the use of water on the augmented land is not *per se* wrongful is recognized in this passage by the qualification of the words, "to the *detriment* of others by using *more* water." That it is not wrongful to use the *same amount* of water partly on the new land, or even more if not unreasonable to other riparian owners is infer-

7 Eschriche, "Aguas."

8 The translation is from Hall's Irrigation Development.

9 Eschriche, "Aguas."

10 "El propietario que aumenta la estension de su heredad riberiega con la adquisicion de tierras contiguas que le agrega, no puede tomar mas agua que antes para su riego en detrimento de los demas interesados; pues si tuviese tel facultad, podria con el tiempo hacer ilusorios los derechos de los demas propietarios ribereños."

entially here recognized; and is emphatically so stated by the French authorities elsewhere quoted.[11]

(3d ed.)

§ 1028.—The Administrative, Condemnational and Public Land System.—But while the law of riparian rights is the general civil law to-day, yet there is a fundamental matter in which the practical results of the civil law differ from the practical results of the common law. This lies in the great paternal power which civil-law governments possess *over the riparian proprietors themselves*, as opposed to the opposite attitude of the common law which arose in protest against the "too much government" of the continent. By virtue of the great power European governments have over individuals, wholly or nearly unfettered by constitutional limitations, public regulation and control have become the salient feature of the continental law of waters to-day. Thus, in France, while the Code Napoleon (section 644) is paramount,[12] yet the larger part of the detail of French law of irrigation to-day lies in the subordinate statutes of 1845 and 1847 of which we have treated elsewhere,[13] whereby, under a free exercise of the power of eminent domain, rights may be obtained by nonriparian owners upon due compensation to the riparian owners, and a riparian owner may himself acquire greater rights against his neighbors than under the code.[14] These statutes, however, are based on the free exercise of the power of eminent domain, requiring full compensation to the riparian owners, for aside from that the French government has no right to grant concessions in watercourses except

11 *Supra*, secs. 441, 442.

12 Droit Civile Francais, par Aubrey & Rau, 4th ed., vol. III, p. 22.

13 *Supra*, sec. 614.

14 An interesting paper of the United States Geological Survey (Water Supply Paper, 238), recently issued, deals with the development of water-power in France, containing contributions from French engineers. There, as in Western America, the engineers are leading a movement in derogation of riparian rights; and the paper, while ostensibly an exposition of French law, is in reality a polemic against the riparian system. The French contributors set forth the prevailing riparian system confirmed by the Code Napoleon, and mention the legislative attacks that have been made upon it; concluding that such attacks have been and are likely to remain unavailing, and that power legislation must proceed along the lines of condemnation under the power of eminent domain, with compensation to riparian owners. Such proposals, it is declared, have taken the lines of extending to power uses the irrigation condemnational laws of 1845 and 1847 above mentioned, declaring power creation and distribution a public use and giving power companies the right to divert, back up, or store water, upon due hearing and compensation to riparian owners. It does not appear that such laws have been actually passed as yet.

such as are dependences of the public domain. Upon the public domain it freely grants concessions; as to all other streams, however, the use is reserved to the riparian proprietors, and the government has a mere right of police.[15] The French minister of public works has declared that he had never attempted to make any such concessions as to streams or private land, and a law proposing to give him such power was rejected and never got passed.[16]

It is true that in Lux v. Haggin,[17] the court thought the Mexican government had power to grant concessions because the *corpus* of water is "common" or "public." But this is a confusion of the distinction between the *corpus* and the *usufruct*,[18] and also of the law of the public domain (which in Mexico is still of great extent) and of private land. It is the writer's impression that under the Mexican law just as under the French law (or even the California law), government concessions will lie, without compensation to riparian owners, only as to waters *on the public lands*, and that Lux v. Haggin was confused over this public land law, and the law of the *corpus* and usufruct, and also over statutes similar to those above referred to, which are really based upon the power of eminent domain and require compensation to the riparian owners. For example, in the Digest of Justinian it is provided: "For the validity of the concession for the right of taking water onto his property, it is necessary to have the consent, not only of those in whose lands the water rises, but, further, of those who have the right use of this water—that is to say, of those who have a right of servitude upon this water. . . . . And, in general, it is necessary to have the consent of all those who have a right upon the stream or upon the land where the water rises."[19] It is probably the matter of streams *on public land* which gave rise to the statements that the Mexican law is based upon governmental concession.[20] It is also the foundation of the "pueblo right,"[21] which is a part of the Mexican law for the *colonization of public land*.[22]

Besides streams on the public domain (and also, as to private lands, this free exercise of the power of eminent domain, forcing consent upon making compensation), there is a system of public supervision over the riparian owners and such other users as have

15 Droit Civile Francais, par Aubrey & Rau, 4th ed., vol. III, p. 19, n. 22.
16 *Ibid.*
17 69 Cal. 255, 10 Pac. 674.
18 *Supra*, cc. 1, 2.
19 Justinian D., lib. 39, tit. 3, sec. 8.
20 *Supra*, sec. 36.
21 *Supra*, sec. 36.
22 *Supra*, sec. 68.

acquired rights by condemnation as above or by prescription.[23] The administrative officers are restricted, however, to police powers, to facilitate the free passage of the water, and prevent damage from the water when they are retained at too great a height by dams; to regulate the height of dams, etc.; but not to interfere with private rights. Their actions, so far as they be simply devoted to the field of private rights, are void.[24]

While, consequently, the primal rights in waters are, through the influence of the Code Napoleon, generally confined to riparian proprietors in civil-law countries, yet in practical detail this is much varied by the power of public supervision, by the power over streams on public land, and by the power of modifying the rights of riparian owners on making compensation to them under a free exercise of the power of condemnation on eminent domain.

The foregoing notes are supplemental to the civil-law authorities given in other parts of this book.[25]

(3d ed.)

§ 1029. **Bibliography.**—For those readers who may wish to make a further investigation into this subject, much value will be found in the old report of Mr. Wm. Ham. Hall, as State Engineer of California, obtainable from the Secretary of State; also from the publications of the United States Department of Agriculture, and also from the works below given.[1]

[23] In Venice, irrigation disputes were settled at a public meeting once a week in the Cathedral Square. The Italian government in 1879 gave prizes for the best examples of irrigation practice. Hall's Report as State Engineer of California, vol. I, p. 348, quoting King Humbert's decree opening competition.

[24] Droit Civile Francais, by Aubrey & Rau, 4th ed., vol. III, pp. 60, 61. See, also, Smith's "Italian Irrigation," vol. II, p. 256.

[25] *Supra*, cc. 1, 2, first principles; sec. 614, public use; sec. 685, riparian right.

[1] *French Books:* De Passy, "Treatise on Hydraulic Service," 3d ed., 1876; Dumont on Watercourses, 1845; De Buffon on Waterworks, 1856; Malapert's History of French Legislation on Public Works; Dalloz on French Law, vol. 19; Debauve on Irrigation, vol. 18 of Engineering Series; Proudhon, sec. 815 et seq.; Barral on Irrigation, 1876, 1877, 1878; Magnon on Irrigation, 1869; Moncrieff on Irrigation in Europe (English book), 1868; Merlin's Jurisprudence, 17 vols.; and the works of Pothier, Pardessus, etc., cited in the foregoing sections.

Italian: De Buffon, Italian Irrigation, 1862; Smith, Italian Irrigation (in English), 2 vols., 1855.

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